No. S133464

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MICHAELIS, MONTANARI, & JOHNSON
Petitioner,
v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES
Respondent.

CITY OF LOS ANGELES, DEPARTMENT OF AIRPORTS;
BOARD OF AIRPORT COMMISSIONERS; LOS ANGELES
WORLD AIRPORTS; AND DOES 1 through 20,
Real Parties in Interest

APPLICATION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT CITY OF LOS ANGELES, DEPARTMENT OF AIRPORTS, ET AL.

DENNIS J. HERRERA, State Bar #139669
City Attorney
BUCK DELVENTHAL, State Bar #45007
PAUL ZAREFSKY, State Bar #201100
Deputy City Attorneys
1 Dr. Carlton B Goodlett Place, Suite 234
City Hall, Room 234
San Francisco, CA 94102-4604
Telephone: (415) 554-4652
Facsimile: (415) 554-4747

Attorneys for Amici Curiae
City and County of San Francisco, League of California Cities, and California State Association of Counties

DAVID L. ALEXANDER, State Bar #059069
Port Attorney
CHRISTOPHER H. ALONZI, State Bar #161303
Deputy Port Attorney
530 Water Street, 4th Floor
Oakland, CA 94607
Telephone: (510) 627-1572
Facsimile: (510) 444-2093

Attorneys for Amicus Curiae
City of Oakland, acting by and through its Board of Port Commissioners

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Deputy Port Attorney
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Oakland, CA 94607
Telephone: (510) 627-1572
Facsimile: (510) 444-2093

Attorneys for Amicus Curiae
City of Oakland, acting by and through its Board of Port Commissioners

APPLICATION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

TO: THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE:

This Application is submitted jointly by the City of Oakland, acting by and through its Board of Port Commissioniers, ("Port"), the City and County of San Francisco ("CCSF"), the League of California Cities ("League"), and the California State Association of Counties ("CSAC") (collectively "Amici"). Pursuant to Rule 29.1(f) of the California Rules of Court, Amici respectfully request leave to file the attached brief in support of the City of Los Angeles, Department of Airports.

The Port is a semi-autonomous department of the City of Oakland, authorized under the Oakland City Charter to exercise exclusive control and management of Oakland's seaport and the Oakland International Airport.[1] CCSF is a chartered city comprised of many departments, including the San Francisco International Airport.

The League is an association of 476 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the state. The committee monitors

[1] See, *City of Oakland v. Williams* (1929) 206 Cal. 315.

appellate litigation affecting municipalities and identifies those that are of statewide significance.

CSAC is a non-profit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The Port, CCSF, and the members of the League and CSAC frequently use the competitive request for proposals ("RFP") process to determine the firm or entity that will be awarded a contract or lease. Taken together, the League and CSAC represent over 500 public agencies that collectively conduct countless RFP's and contract negotiations similar to the one at issue in this case.

Amici have a substantial interest in the resolution of the issues raised by this case. The Court of Appeal's decision, if allowed to stand, would be harmful to public entities throughout the state. Disclosure of RFP proposals during negotiation of a contract would considerably reduce the bargaining power of public agencies, resulting in more expensive and less desirable contracts. Further, the decision threatens to weaken the ability of public agencies to obtain the services of responsible businesses by degrading the integrity of the contracting

process. The disclosure of proposals prior to or during negotiations undermines the integrity of the selection process and creates a disincentive either to submit a proposal containing innovative or creative solutions, or to set forth a highly competitive price.

Counsel for Amici have reviewed the briefs on file in this case to date. As friends of the Court, Amici do not seek to duplicate arguments set forth in the briefs. Rather, Amici seek to assist the Court in understanding the public interest in preserving the confidentiality of proposals prior to and during negotiations. Further, Amici seek to ensure that any interpretation of the catch-all balancing test in Section 6255 of the Public Records Act not be unduly restrictive. Finally, Amici have an interest in ensuring that the scope of the Court's decision be limited to the narrow but important question presented by this case.

Amici respectfully submit that there is a need for additional briefing on these matters and that, based on their experience, they may assist this Court in making a sound decision.

Accordingly, we respectfully request leave to file the attached brief of Amici Curiae.

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Dated: October 19, 2005

DENNIS J. HERRERA, City Attorney
BUCK DELVENTHAL
PAUL ZAREFSKY
Deputy City Attorneys

Buck Delventhal (PZ)
BUCK DELVENTHAL
Deputy City Attorney

Attorneys for Amici Curiae
City and County of San Francisco, League of California Cities, and California State Association of Counties

DAVID L. ALEXANDER, Port Attorney
CHRISTOPHER H. ALONZI, Deputy Port Attorney

CHRISTOPHER H. ALONZI
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Facsimile: (510) 444-2093

Attorneys for Amicus Curiae
City of Oakland, acting by and through its Board of Port Commissioners

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INTRODUCTION

This brief is submitted jointly by the City and County of San Francisco ("CCSF"), the City of Oakland, acting by and through its Board of Port Commissioners ("Port"), the League of California Cities ("League"), and the California State Association of Counties ("CSAC") (collectively "Amici"). CCSF is a chartered city comprised of many departments, including the San Francisco International Airport. The Port is a semi-autonomous department of the City of Oakland, authorized under the Oakland City Charter to exercise exclusive control and management of Oakland's seaport and the Oakland International Airport.[1] The League is an association of 476 California cities united in promoting the general welfare of cities and their citizens. CSAC is a non-profit corporation whose membership consists of the 58 California counties. CCSF, the Port, and the members of the League and CSAC, frequently use the competitive request for proposals ("RFP") process to determine the firm or entity that will be awarded a contract.

ISSUE PRESENTED

The Court of Appeal's decision presents a narrow, yet important, question of public policy: Under the California Public Records Act (Gov. Code §6250 et seq.)[2] ("Act"), does the public interest served by not disclosing the contents of

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[1] See, *City of Oakland v. Williams* (1929) 206 Cal. 315.

[2] All further statutory references are to the Government Code, unless otherwise indicated.

competitive proposals submitted to a public agency, prior to or during negotiations for the subject contract, clearly outweigh the public interest served by disclosure of the competitive proposals while negotiations are pending?

SUMMARY OF ARGUMENT

Yes. Disclosure of competitive proposals while negotiations are pending is disadvantageous to the public agency and ultimately to the public. As Amici explain below, premature disclosure of proposals is detrimental to the public contracting process on two levels. First, on a transaction-by-transaction basis, the bargaining position of public agencies will be weakened, leading to less desirable outcomes for the public. Second, on a more systemic level, the integrity of the contracting process will be undermined, which will discourage competition and submission of innovative proposals by responsible qualified private firms. Withholding proposals prior to, and during negotiations, is consistent with state and federal practices, with model procurement codes, and with cognate provisions in California law. In addition, nondisclosure prior to and during negotiations is consistent with the experience of Western industrialized democracies.

ARGUMENT

In its opinion, the Court of Appeal asserts that its interpretation of the Act as requiring that competitive proposals be disclosed following submission to the public agency is consistent with the underlying principles and purposes of public procurement statutes. (*Michaelis, Montanari & Johnson v. Superior Court* (2005)

127 Cal.App.4th 1298, at 1305.) The Court of Appeal's assertion strikes an ironic chord because such disclosure places public agencies in a weak bargaining position and discourages responsible companies from proposing innovative and creative solutions to problems confronted by local agencies. The Act does not compel such a result. Withholding proposals prior to, and during, negotiations for the subject contract, is consistent with generally accepted public procurement practices, as illustrated by the laws and policies applicable to government contacting in other Western industrialized democracies.

I. THE PUBLIC INTEREST IN NOT DISCLOSING PROPOSALS PRIOR TO OR DURING THE NEGOTIATION PROCESS CLEARLY OUTWEIGHS THE PUBLIC INTEREST IN DISCLOSURE .

This Court should not view this case in isolation or narrowly analyze its facts when applying the balancing test in Section 6255 to determine whether the records at issue must be disclosed at this time. The ruling below is not limited to disclosure of responses to one city's RFP for airport lease space, but would apply whenever any public entity receives proposals in response to an RFP. If the ruling below is affirmed, public agencies will be required to disclose all proposals submitted in response to an RFP prior to or during the negotiation process. That precedent would adversely affect the contracting processes of hundreds of public entities across the state. Over time, the public interest in the ability of public agencies to award sound, financially advantageous contracts would be seriously compromised.

The RFP process is significantly different than the Invitation for Bids ("IFB") process, which requires that the contract be awarded to the lowest responsible bidder. Responses to IFB's must follow a fixed format and meet very precise criteria, and are judged on price alone. (See, e.g., *City of Inglewood-Los Angeles County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 86.) By contrast, the RFP process assumes that responses may propose widely different methods of achieving the public objective that the RFP seeks to achieve. Price is only one of many factors that the public entity may take into account in selecting a proposal. The RFP process is designed to allow public entities to engage the creativity of the private sector. Negotiation is at the heart of the process. Cities and counties and other public entities use the RFP process precisely because of the flexibility it provides to negotiate and award a contract to the party who is willing to actually enter an agreement that embodies the overall best choice, considering both price and terms, for the public entity. Should the ruling below stand, public entities may expect that proposers, acting in their commercial self-interest, will routinely submit Public Records Act requests for competing RFP proposals immediately following the submittal deadline. Public entities would generally have to disclose the proposals upon request. Courts must endeavor to interpret the Act in a fashion that does not thwart the ability of public entities to effectively bargain in the RFP process, and does not undermine the efficacy and integrity of the process. The public interest in allowing public entities to withhold responses to an RFP while the negotiation process is ongoing strongly outweighs the interest

in public access to the responses while the entity is negotiating with one or more of the proposers.

The Opening and Reply Briefs on the Merits filed by City of Los Angeles, Department of Airports ("City") discuss the compelling public interest served by withholding responses to an RFP from public disclosure prior to or during the negotiation process. We crystallize and further explain the practical reasons why nondisclosure so vitally serves the public interest.

A. Disclosing Proposals Prior To Or During Negotiations Is Harmful To The Public Interest Because It Weakens The Public Agency's Bargaining Position And Undermines The Efficacy And Integrity Of The RFP Process.

As the City has argued, maintaining the confidentiality of pending proposals is a standard feature of government procurement procedures in state, federal, and international public procurement. This practice benefits the public in two ways. First, it preserves the strength of the public agency's bargaining position during the crucial period of negotiations, and thereby maximizes the ability of public agencies to award sound, financially advantageous contracts. Second, it preserves the integrity of the RFP process and thereby encourages competition and innovative proposals by responsible qualified private firms, to the ultimate benefit of the public.

These benefits will be lost if RFP proposals may be disclosed prior to or during the negotiation process. The failure to preserve these benefits will harm the public interest on two levels. At the level of individual transactions, the

weakening of bargaining position will potentially be prejudicial to public agencies in each particular transaction that is the subject of negotiations following submission of proposals in response to an RFP. On a more systemic level, not necessarily discernible transaction-by-transaction but nonetheless real, the public interest will suffer when the integrity of the RFP process is undermined.

The typical RFP process, whether for a professional services contract, concession, or lease, begins with proposers submitting written proposals in which they outline their experience, qualifications, proposed solutions, and business terms. While the written proposals outline the key issues, in any complex transaction, a binding contract must address countless details far too complex and varied to be included in the response to the RFP. Thus, the written proposal is typically the starting point for a dynamic process, rather than a final embodiment of fixed concepts. The public agency reviews the written proposals and selects one proposer or a short list of proposers, which then make a presentation to a selection committee or panel. The presentation often includes a Power Point™ display which elaborates upon, and enhances, the initial proposal materials. The agency then selects a firm with whom to negotiate a contract.[3] However, if agreement cannot be reached with the initially selected firm, the public agency has the option of terminating the negotiations and then turning to the second ranked proposer to commence negotiations. Details of the RFP process will vary among

[3] This process is typical for California public agencies, but is not the only possible process. Some public agencies, in some cases, may pursue multiple parallel negotiations with proposers in order obtain the best value for the public.

agencies but these features are common for any transaction that is not subject to lowest sealed-bid procedures. Under this common scenario, the public interest in not disclosing the proposals prior to, or during, negotiations clearly outweighs the public interest in disclosure.

1. The Bargaining Power Of Public Agencies Would Be Weakened By Allowing Public Disclosure Of Proposals Prior To Or During Negotiations.

When a public agency selects the first-ranked proposer to commence negotiations for a contract, the agency will be at a disadvantage if that proposer has been able to review the proposals of its competitors. The Court of Appeal asserted that the "disclosure of all proposals prior to the final negotiations can only benefit the public." (*Montanari & Johnson*, *supra*, at 1305.) Amici respectfully disagree.

Disclosure of all proposals during negotiations would generally be disadvantageous to the public. In any negotiation, whether to lease a house, purchase an automobile, or settle a lawsuit, the willingness of the parties to agree at all, and their willingness to agree on particular terms, depends to a significant degree on their assessment of the other party's alternatives. Knowledge of the other party's available alternatives is invaluable in deciding whether to stand firm or offer concessions.

This fundamental principle of successful negotiation applies with equal force to the public sector. If the Court of Appeal's decision becomes law, the party

which ranks first, and therefore, may enter into negotiations with the public agency, will be able to precisely assess the agency's available alternatives. That knowledge will strengthen the party's hand in negotiating with the public agency. That party will be able to identify the issues upon which it can stand firm, and assess the extent to which it must make concessions – if any – without rendering its proposal inferior to the next most desirable proposal. In such cases, the public agency's negotiating leverage will be compromised. The agency will often be left to enter into a transaction that is less desirable, from the standpoint of the public generally (including the taxpaying public) than it might otherwise have been. Such a result is obviously not in the public interest. The ability of a public agency to get the best deal with each proposer depends on the ability of the agency to maintain the confidentiality of all of the proposals until the negotiation process is completed.[4]

Moreover, it cannot be assumed that the public agency will ultimately execute a contract with the initially-selected proposer. The RFP process enables a public agency to undertake negotiations with the second-ranked proposer, the third-ranked proposer, and so on, if negotiations with the higher ranked proposer or proposers fail to produce an agreement that meets the public agency's needs. In

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[4] For the sake of clarity, it must be noted that successful negotiation is not the same as deceptive negotiation. As explained in a classic treatise on the art of negotiation: "Less than full disclosure is not the same as deception . . . Deliberate deception as to facts or one's intentions is quite different from not fully disclosing one's present thinking . . . Good faith negotiation does not require total disclosure." (Fisher and Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, p.134, (Penquin Books 1991)

those circumstances where negotiations with the first-ranked proposer must be terminated, and negotiations then commence with the second-ranked proposer, the public agency will be at a further disadvantage as it approaches the second-ranked proposer, who will be in possession of the details of the first-ranked proposal. Reviewing the first-ranked proposal will yield valuable insights that will operate to the benefit of the second-ranked proposer, and to the detriment of the public agency.

The Act promotes the public purpose of enabling citizens to monitor government. While disclosure of nearly every public record may conceivably promote some public benefit, mandating disclosure of proposals prior to completion of negotiations will primarily promote private interests – the commercial interests of some individual contractors. The Court of Appeal's decision effectively inverts the balance in the Act, by giving greater weight to the purely private interest in disclosure than to the public interest in nondisclosure. In adopting the Act, the Legislature did not intend to deprive public agencies that enter the marketplace of the bargaining advantage that attends knowing the positions of all those seeking a contract while keeping that information from those private parties. In striking the balance that Section 6255 calls for, public agencies and courts must consider competing public interests. Here, the Court of Appeal's decision effectively takes into account the narrow private interests of some individual contractors.

2. Allowing Public Disclosure Of Proposals Prior To Or During Negotiations Would Undermine The Efficacy And Integrity Of The Public Contracting Process, Impairing The Ability Of Public Agencies To Attract Innovative Proposals And To Fairly Evaluate Proposals.

The problem described in section I.A(1), above- that disclosure of proposals before or during negotiations will substantially weaken the bargaining position of public agencies - has the potential to concretely harm the public with respect to any particular transaction that originates with an RFP. The second problem with disclosing proposals prior to or during negotiations will manifest itself in a subtler, more systemic way. The problem may be difficult to quantify but is nonetheless real.

As has been described, the typical negotiation process is dynamic. As a result, if competitors can obtain all of the proposals immediately following submission, they can then appropriate unique, innovative, or creative elements from the better proposals and incorporate them into their later oral presentations. The prospect that the advantages flowing from hard work, energy, and creativity might be lost because a less qualified competitor could review all proposals prior to any oral presentation creates several related problems.

First, some private firms would conclude that the risk of misappropriation outweighs the potential rewards to be reaped from winning the contract. As a result, these firms would simply refrain from participating in the RFP process. The higher quality firms, which likely have greater alternatives in the private

sector, would be the most likely to refrain from participating in the public sector. Second, firms that continue to participate in the RFP process might reduce their risk of misappropriation by submitting vague, general proposals, while withholding the innovative details for an oral presentation.

The prospect of discouraging private firms from submitting proposals at all, or creating an incentive for them to submit vague and general proposals, is not mere conjecture. One commentator clearly articulated these concerns in the context of unsolicited proposals to public agencies. While these concerns were stated in the context of unsolicited proposals, the same concerns are posed by any type of competitive proposal process. The authors explain that in the absence of protection for innovative and unique solutions, "proposers will either refuse to submit proposals, or develop unique (and potentially wasteful) methods of safeguarding their proprietary information." (Bederman and Trebilcock, *Unsolicited Bids for Government Functions* (1997) 35 Alberta L. Rev. 903, 924.)[5] Similarly, the Australian Department of Finance and Administration articulated the disadvantage to the public of disclosing proposal documents. "Physical security of documents is an important aspect to ensure no information is leaked to the public . . . [A] lack of confidence in security could deter bidders, or reduce the detail or volume of information they include in their bids, both of which are poor outcomes for the government." (Department of Finance and Administration,

[5] As used by the authors, the term "proprietary" is not narrowly limited to the concept of trade secrets, but includes the broader concept of unique business approaches such as innovative financing or organizational models.

Financial Management Guidance No. 14, p.13 (Commonwealth of Australia 2005.)

The prospect of misappropriation of creative and innovative solutions holds the potential of undermining the reliability of the contracting process in two ways. If private firms respond to the prospect of disclosure by omitting details of innovative solutions, then the public agency may inadvertently overlook a worthy contracting party due to confusion. That proposer might be excluded from the oral presentation phase of the selection process because its written proposal appeared to be generic boilerplate. Alternatively, if private firms continue to include innovative solutions in their proposals, that other contenders then misappropriate, the public agency may mistakenly select the party that "cheated" and overlook the superior firm. When detached from the props of stolen ideas, the contractor may not be able to perform as well as the submission made the contractor appear. Either way, the capacity of the contracting process to reliably identify the proposer which offers the best value to the public will be diminished. The public entity could well end up expending taxpayer funds for lower quality services.

Obviously, developing and submitting a formal proposal for a contract requires costly resources. Before committing the necessary resources to such an effort, private firms must have some assurance of a reasonable likelihood of obtaining the contract based on a fair assessment of their genuine capabilities. Opening the door to misappropriation of innovative ideas can only discourage the

submission of proposals by responsible qualified firms that are willing to devote the resources necessary to develop superior, innovative proposals. Those firms at the "bottom of the barrel," that are less capable of competing in the private sector, will remain to offer their lower quality services to the public.

In sum, if the Court of Appeal's ruling becomes the law, the result will be prejudicial to the bargaining position of each public agency with respect to particular transactions and, on a systemic level, it will generally undermine California's public contracting process. This Court should reject an interpretation of the Act that hobbles the ability of public agencies to negotiate contracts with responsible firms while advancing no sound public policy that might serve as a counterweight to the great harm it would cause.

B. Maintaining The Confidentiality Of Proposals Is A Standard Feature Of Government Procurement Systems In Western Industrialized Democracies, Which Reinforces The Conclusion That The Public Interest In Withholding Proposals Prior To, And During, Negotiations Clearly Outweighs The Public Interest In Disclosure.

The City has amply demonstrated an overwhelming consensus among jurisdictions and experts that proposals submitted in response to an RFP should not be disclosed prior to or during negotiations. (AOB, p.19-29.) Federal law, as manifest in several procurement statutes and in the Freedom of Information Act, takes that view. The vast majority of states take the same view in their respective laws. In accord are model procurement laws adopted by the American Bar Association, the National Conference of Commissioners on Uniform State Laws,

and the United Nations Commission on International Trade Law. The City has also noted that cognate provisions in California law, including, for example, the provision in the Act that exempts from disclosure real estate appraisals prior to the acquisition of the property, support the conclusion that proposals submitted in response to an RFP should not be disclosed prior to or during negotiations. (AOB, 13-17.)

To this mix of impressive authorities, we add that Western industrialized democracies also recognize the legitimate interest in protecting the confidentiality of pending proposals and negotiations for public contracts.[6] Like California public agencies, government procurement authorities in other Western democracies participating in market economies face common concerns with respect to fiscal constraints, the value of transparency and fairness, and avoiding corruption. It is therefore appropriate in this public interest inquiry that this Court give weight to reasoned conclusions that other Western democracies have reached on this issue.[7]

In 2004, a three-judge panel of Canada's Federal Court of Appeal issued a decision interpreting the Canadian Access to Information Act as it applied to

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[6] See, Amici's Motion for Taking of Judicial Notice, filed and served concurrently with this brief.

[7] Historically, this Court has looked for guidance to judicial decisions rendered in other English-speaking countries. (*Jehl v. Southern Pacific Co.* (1967) 66 Cal.2d 821, 829-830; *People v. One 1941 Chevrolet* Coupe (1951) 37 Cal.2d 283; *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, 23-24.)

information from a proposal for a lease of a government office building.[8] *(High-Rise Group, Inc. v. Canada (Minister of Public Works)* (2004) 30 C.P.R.(4th) 417; 2004 C.P.R. LEXIS 21.) Following the award of the lease, the government received a request for information on the proposal process for the building, including the total Net Present Value of the lease, as revealed in the lease proposal. The lower court held that the information should be exempt from disclosure to "guarantee the integrity of the bidding process," despite the fact that the lease had already been awarded. The Court of Appeal reversed, and ordered the information be disclosed, observing "[A]s was pointed out in *Societe Gamma*, there are *good reasons for maintaining confidentiality during the bidding process*, but different considerations arise once the contract is awarded and public funds are committed to it." (*High-Rise Group, Inc.,* at LEXIS p.24, [emphasis added] citing to *Societe Gamma v. Canada (Department of Secretary of State)* (1994) 56 C.P.R. (3rd) 58 (T.D.).)

Australia's Department of Finance and Administration has promulgated extensive rules regarding confidentiality in the contracting process contained in a publication entitled *Guidance on Confidentiality of Contractor's Commercial*

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[8] With respect to government contracts, Section 20 of Canada's *Access to Information Act* exempts from disclosure the following: (b) financial, commercial, scientific, or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party; (d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party. (*Access to Information Act,* Consolidated Statutes of Canada, *R.S.C. 1985, c. A-1, s. 20.*)

Information.[9] The *Guidance* focuses on post-award confidentiality clauses in Commonwealth contracts. However, with respect to contractor selection, it states:

> Within the initial tender documentation – or if no tender process is undertaken, at the beginning of negotiations—prospective contractors should be notified . . . that the Commonwealth will treat as *confidential any information provided by the tenderers/prospective suppliers prior to the award of a contract* and in respect of unsuccessful tenderers after contract award. (p.4, §4 [emphasis added].)

Government contracting in the 25 member states of the European Union ("EU") is regulated by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (Directive 2004/18/EC.)[10] Directive 2004/18/EC provides, in relevant part: "Communication and the exchange and storage of information shall be carried out in such a way as to ensure that the integrity of tenders and the confidentiality of tenders and requests to participate are preserved . . . " (Directive 2004/18/EC, Art. 42, ¶3.) With regard to confidentiality during negotiations, Article 29 of Directive 2004/18/EC provides: "Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by

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[9] Available from www.finance.gov.au (under the Government Finances menu).

[10] The primary objective of such Directives is to increase the transparency of the public contracting procedure so that contracting parties are granted a fair chance of winning a contract regardless of their national origin. (Fernandez Martin, *The EC Public Procurement Rules: A Critical Analysis*, p. 13 (Clarendon Press, Oxford) 1996.)

a candidate participating in the dialogue without his/her consent." (Directive 2004/18/EC, Art. 29, ¶3.)

In sum, Canada, Australia and the EU have all concluded that, at a minimum, protecting the confidentiality of proposals prior to and during negotiations serves the public interest. These authorities reinforce those cited by the City that overwhelmingly takes the same view. Considered as a whole, the judgments of expert bodies that have studied the issue and of jurisdictions that have addressed it demonstrate the compelling force of the practical policy arguments that clearly favor nondisclosure of proposals prior to or during negotiations.

II. MMJ'S CONSTRICTED INTERPRETATION OF SECTION 6255 OF THE PUBLIC RECORDS ACT MUST BE REJECTED.

To buttress its view that proposals submitted in response to an RFP must be disclosed once the submission deadline has passed, the requester here, Michaelis, Montanari & Johnson ("MMJ"), makes two arguments that, if accepted, would seriously constrict the reach of Section 6255's catch-all balancing test. The arguments have ramifications well beyond the field of public contracting. The Court should reject these attempts to limit the right of public entities to use the balancing test to determine whether a public record may be withheld from disclosure.

A. Section 6255's Balancing Test May Be Invoked To Withhold A Record For A Period Of Time Before Making It Available To The Public.

MMJ argues that a public entity may not invoke Section 6255's balancing test to withhold from disclosure a record that at a later date will be made available to the public. This argument fails for several reasons. Perhaps most importantly, there is no support in the text of the Act for the argument. Section 6255 contains no provisos or restrictions that circumscribe application of its balancing test. MMJ is, in effect, asking the Court to write into Section 6255 a limitation that is not there.

In addition, as a matter of process, the argument defies common sense. A public entity must apply Section 6255's balancing test in the short time frame the Act prescribes for responding to requests. If at that time nondisclosure is warranted under the balancing test, the record need not be disclosed then. But disclosure may be warranted at a later time, when facts and circumstances have changed and altered the relative weight to be given to the public interest in disclosure and nondisclosure.

Further, the argument is at odds with public records law generally, which recognizes that a record may be exempt when requested even though subject to disclosure at a later time. For example, the principle of delayed disclosure expressly applies under certain circumstances to litigation records (§6254(b)); real estate appraisals (§6254(h)); engineering/feasibility estimates and evaluations

(id.); contracts for inpatient services and records pertaining to those and similar contracts (§§ 6254(q); 6254(t)); and contracts for health coverage and health services (§§ 6254(v)(2)-(4); 6254(w)(2)-(3); 6254(y)(2)-(3); 6254(bb)(2)-(3); 6254.14(a)). (*Cf. Federal Open Market Committee v. Merrill* (1979) 443 U.S. 340 (approving delayed disclosure of sensitive economic data if earlier disclosure would harm the government's monetary functions or commercial interests).)

MMJ cites a lone sentence in an Attorney General's Opinion in support of its view that Section 6255's balancing test may not be used to delay disclosure of a record: "Section 6255, the so-called 'catch-all' provision, is applicable to the disclosure of the *content* of a record, not the *timing* of the disclosure." (76 Ops.Cal.Atty.Gen. 235, 240 (1993) [emphasis in original].) But in context this sentence appears to be saying that Section 6255 is not a timing provision that dictates the manner of responding to a public records request. The Attorney General was addressing the logistics of permitting public inspection of absentee ballot applications that had been received but not yet processed by the county clerk. His discussion of this issue focuses on timing inspections so as not to disrupt processing of the applications. (*Id.*, 239-42.) Had he been considering whether, apart from logistical considerations, disclosure of unprocessed ballot applications would somehow undermine the integrity of the electoral process, we suspect the quoted sentence would have been worded with greater nuance. Given Section 6255's balancing test, it taxes credulity to suggest that the Attorney

General would ever conclude that, absent a specific statutory mandate requiring disclosure, a public entity must disclose a record when the public interest would be much better served by nondisclosure.

However, in the unlikely event that MMJ's broad reading of the quoted sentence from the Opinion correctly states the Attorney General's view, the Court should reject that view. The sentence is unaccompanied by any reasoning or supporting case law. Further, it does not engage any of the arguments that would justify the conclusion that the public interest in nondisclosure of a record at a given moment outweighs the public interest in disclosure even though at a later time there may be no basis to withhold the record.

MMJ also cites the anti-delay provision of the Act, Section 6253(d), to support its view that Section 6255's balancing test may not be invoked to withhold a record that at a later date will be made available to the public. Reliance on this provision is misplaced. Section 6253(d) states a principle governing the process of responding to a public records request. The Legislature did not intend for this provision to limit Section 6255's balancing test or any of the other exemptions in the Act.

B. The Expressio Unius Principle Of Statutory Construction Does Not Limit The Scope Of Records That May Be Withheld Under Section 6255's Balancing Test.

Relying on the *expressio unius* principle of statutory construction, MMJ argues that because the Act contains express exemptions covering certain records,

other records not expressly exempt – especially records similar in nature to those covered by an express exemption – must be disclosed. That reliance is misplaced. As this Court has noted. "[u]nder the maxim *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions *unless there is a clear legislative intent to the contrary.*" (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230 [emphasis added].) There is, of course, "clear legislative intent to the contrary" in the Act – the plain language of Section 6255: "The agency shall justify withholding any record by demonstrating that [it] is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by [nondisclosure] clearly outweighs the public interest served by disclosure . . ." (§6255(a) [emphasis added].)

While the plain language of Section 6255 disposes of MMJ's *expressio unius* argument, it is worth noting the pernicious implications of the argument. The Act expressly enumerates many types of records that are exempt. But given the breadth of modern government, the range of public records extant when the Legislature adopted and most recently amended the Act was so broad as to defy any attempt to specifically list in the Act or any other statute all the categories of exempt records. Section 6255 reflects the Legislature's recognition of the impossibility of that task.

If MMJ's argument were to prevail, many types of records bearing a similarity to records covered by express exemptions would be beyond the ambit of

Section 6255's balancing test. The function served by the balancing test – to be a catch-all option for public entities legitimately concerned about the harm to the public interest in disclosing a record that does not fall under an express exemption – would be largely eviscerated.

III. THE COURT SHOULD LIMIT ITS DECISION TO WHETHER A PUBLIC AGENCY MAY DECLINE TO DISCLOSE PROPOSALS SUBMITTED IN RESPONSE TO AN RFP PRIOR TO OR DURING CONTRACT NEGOTIATIONS.

As has been noted, the Court's decision in this case will set a significant precedent defining the interrelationship between the Act and the RFP process. Nevertheless, the decision need not address all aspects of the interrelationship. Rather, it should be confined to the sole question presented here: Whether a public entity may decline to disclose a proposal submitted in response to an RFP prior to or during contract negotiations. The Court does not need to decide a quite distinct question not now before it: At what point after contract negotiations have concluded must a public entity disclose proposals submitted in response to an RFP?

Principles of sound judicial decisionmaking caution against answering or suggesting an answer to this second question. Given the posture of this case, any answer or hint of an answer to the second question would be dictum. The parties have not briefed or addressed that issue. Authorities cited in the briefs endorsing the view that disclosure of proposals is required only after contract award merely

emphasize that a regime of earlier disclosure – after contract negotiations have been completed – surely passes muster under Section 6255's balancing test.

Post-negotiation/preaward disclosure of responses to an RFP presents a different balance of competing factors than is present in this case. Therefore, Amici urge this Court to decide only the narrow question presented by the record in this case, and not venture into other issues.[11]

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[11] Another issue the Court should avoid, because it is not presented by this case and has not been briefed or addressed by the parties, is whether or when particular types of records that relate to proposals submitted in response to an RFP, such as raters' evaluation forms and score sheets, must be disclosed.

CONCLUSION

For the reasons set forth above, Amici urge this Court to reverse the judgment of the Court of Appeal and hold that the public interest in not disclosing the proposals prior to, or during negotiations, clearly outweighs the public interest in disclosure.

Dated: October 19, 2005

DENNIS J. HERRERA, City Attorney
BUCK DELVENTHAL
PAUL ZAREFSKY
Deputy City Attorneys

Buck Delventhal (PZ)
BUCK DELVENTHAL
Deputy City Attorney

Attorneys for Amici Curiae
City and County of San Francisco, League of California Cities, and California State Association of Counties

DAVID L. ALEXANDER, Port Attorney
CHRISTOPHER H. ALONZI, Deputy Port Attorney

CHRISTOPHER H. ALONZI
Deputy Port Attorney
Attorneys for Amicus Curiae
City of Oakland, acting by and through its Board of Port Commissioners

WORD CERTIFICATION

I, Christopher H. Alonzi, Attorney for Amici Curiae, In Support of Appellant City of Los Angeles, Department of Airports' Board of Airport Commissioners; Los Angeles World Airport, hereby certify that according to Microsoft Word, the computer program used to prepare this Application of Amici Curiae to File Brief: Brief of Amici Curiae, the number of words in the document, including footnotes, is 5,309, exclusive of caption, tables, signature block and this certification.

Dated: October 19, 2005

DENNIS J. HERRERA, City Attorney
BUCK DELVENTHAL
PAUL ZAREFSKY
Deputy City Attorneys

BUCK DELVENTHAL
Deputy City Attorney

Attorneys for Amici Curiae
City and County of San Francisco, League of California Cities, and California State Association of Counties

DAVID L. ALEXANDER, Port Attorney
CHRISTOPHER H. ALONZI, Deputy Port Attorney

CHRISTOPHER H. ALONZI
Deputy Port Attorney

Attorneys for Amicus Curiae
City of Oakland, acting by and through its Board of Port Commissioners

CERTIFICATE OF SERVICE BY MAIL – Secs. 1013a, 2015.5 CCP

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the above-entitled cause. My business address is 530 Water Street, Oakland, CA 94607.

I served the foregoing **APPLICATION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF ANDBRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT CITY OF LOS ANGELES, DEPARTMENT OF AIRPORTS, ET AL.** by placing a true copy thereof for collection and mailing by First Class Mail, in the course of ordinary business practice. I have enclosed in a sealed envelope/package addressed as follows:

Garry L. Montanari
Nathan B. Rand
MICHAELIS, MONTANARI & JOHNSON
4333 Park Terrace Drive, Suite 100
Westlake Village, CA 92361

(Attorney for Petitioner)

Clerk of the Court
Superior Court of Los Angeles County
(Forn: Hon. Dzintra Janavs)
111 N. Hill Street, Department 85
Los Angeles, CA 90012

(Respondent)

Clerk of the Court
Court of Appeals, Second Appellate District
300 S. Spring Street, Room 2717
Los Angeles, CA 90013

Amici Curiae Support

DENNIS J. HERRERA, City Attorney
BUCK DELVENTHAL, Deputy City Attorney
PAUL ZAREFSKY, Deputy City Attorney
1 Dr. Carlton B Goodlett Place, Suite 234
City Hall, Room 234
San Francisco, CA 94102-4604

DAVID L. ALEXANDER, Port Attorney
CHRISTOPHER H. ALONZI, Deputy Port Attorney
530 Water Street, 4th Floor
Oakland, CA 94607

Jennifer B. Henning
Counsel Amici Curiae
California State Association of Counties and League of California Cities
1100 K Street, Suite 101
Sacramento, CA 95814

Andrew J. Kahn
Davis, Cowell & Bowe, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105

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

Executed at Oakland, California

October 19, 2005

Lilibeth S. Trinidad
LILIBETH S. TRINIDAD

Michaelis, Montanari, & Johnson v. Superior Court; City of Los Angeles, Department of Airport
No. S133464

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Rockard J. Delgadillo
Eduardo A. Angeles
M. Lynn Mayo
1 World Way
P.O. Box 92216
Los Angeles, CA 90009-2216

Mara E. Rosales, Esq.
Joseph M. Quinn, Esq.
Julia L. Bond, Esq.
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607

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

Executed at Oakland, California.

October 19, 2005

Lilibeth S. Trinidad
LILIBETH S. TRINIDAD