

PUBLIC BID LAW – CURRENT DEVELOPMENTS

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PUBLIC BID LAW – CURRENT DEVELOPMENTS

- THE 2014 LEGISLATIVE SESSION
- CASES
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THE 2014 LEGISLATIVE SESSION

- **Act 759** (SB 468) amended and reenacted R.S. 38:2211, 2212, 2212.5, 2212.10, 2215, 2225 and 2241.1 to provide for several revisions to the public bid law.
- The definition of an “alternate” was changed to allow public entities to alter the type of work within the scope of the project, material, or equipment specified in the bid documents.

THE 2014 LEGISLATIVE SESSION

- Clarifies that only the presumptive low bidder is to supply additional information and no sooner than 10 days after the bid opening. If the presumptive low bidder fails to supply the information, the next low bidder is given 10 days to supply the information.
- Specifically provides that written words shall govern numerals if a conflict exists and if a discrepancy exists between the base bid total and the sum of extended unit prices, the unit price bid governs.

THE 2014 LEGISLATIVE SESSION

- Allows FP&C to adjust the \$150k contract limit each year beginning February 2, 2015 based on the Consumer Price Index and requires FP&C to publish any change in the Louisiana Register in January of each year.
- Requires that bidders obtain bidding documents from the public entity or the design professional who prepared the documents and requires the public entity to maintain a list of all bidders for the purpose of addenda distribution.

THE 2014 LEGISLATIVE SESSION

- Provides that all bids shall be subject to review, either no sooner than 14 days following the bid opening or after the recommendation of award, whichever occurs first.

THE 2014 LEGISLATIVE SESSION

- Provides that if a public entity proposes to reject a bidder for not being responsible, the public entity must give written notice of proposed action and must give the bidder an informal hearing and opportunity to refute the proposed action. The informal hearing shall be held prior to the award of the contract, and shall be conducted prior to any adverse action against the bidder.
- The informal hearing shall be conducted no later than 5 days after the notice of disqualification and the public entity shall issue a ruling in writing and deliver to the affected bidder no later than 5 business days after the hearing.
- No award may be made prior to the expiration of the 5 business day period.

THE 2014 LEGISLATIVE SESSION

- Provides that both the state and political subdivisions have 45 calendar days in which to make an award (state previously had 30).
- Provides that if the low bidder has provided all documents and no injunction or TRO is in effect, the bidder and the public entity shall execute the contract within 60 calendar days from award. The public entity has 30 calendar days from the execution of the contract to issue a notice to proceed.

THE 2014 LEGISLATIVE SESSION

- **Act 782** (SB 680) enacted R.S. 38:2225.2.4 authorizing public entities to employ the construction manager at risk method for public works projects valued over twenty-five million dollars. Public entity selects a design professional, and then utilizes a RFQ to select a CMAR contractor.
- The RFQ must be advertised at least two (2) times within 30 days from the date the proposals are to be received and must contain certain required information, i.e. grading criteria, preconstruction scope of services, total fees payable to contractor for preconstruction services, etc.

THE 2014 LEGISLATIVE SESSION

- Within 90 days from receipt of proposals the “selection review committee” chosen by the owner shall make a written recommendation to the owner. Thereafter, the design professional shall continue with design services (in consultation with CMAR contractor), the design professional and CMAR contractor shall present separate opinions on probable project costs, and the CMAR contractor shall guarantee a maximum price for construction of the project.
- If the owner and CMAR contractor are able to agree on a guaranteed maximum price, then the owner may contract with the CMAR contractor for construction of the project. If they are unable to agree, the project must be competitively bid as a design-bid-build project.

THE 2014 LEGISLATIVE SESSION

- **Act 487** (SB 316) amended and reenacted R.S. 38:2191(B) and (D) to provide that a public entity shall be liable for reasonable attorney fees for failing to make any progressive stage payment within forty-five days following receipt of a certified request for payment without reasonable cause, or failing to make any final payments after formal final acceptance and within forty-five days following receipt of a clear lien certificate.

THE 2014 LEGISLATIVE SESSION

- **Act 241** (HB 419) enacted R.S. 38:215.1 concerning maintenance of public drainage, to provide that no landowner shall refuse to grant reasonable surface access to any existing natural or artificial public drainage by a local governing authority, drainage district, or other public entity charged with maintaining the public drainage when such access is within the normal course of the entity's duties and written notice has been given to the landowner at least thirty days prior to the commencement of any maintenance activities on the property. The landowner shall also be given an opportunity for a public hearing.

THE 2014 LEGISLATIVE SESSION

- **Act 742** (SB 183) enacted R.S. 33:4690.13 to provide that in addition to any notice required by law relative to a pending public works project, and at least ten days prior to the public hearing, a good faith attempt to notify the owner or owners of record of the property directly affected by the public works project may be made by sending an official notice by United States mail of the time and place of the public hearing and the general subject matter of the proposed public works project.

THE 2014 LEGISLATIVE SESSION

- **Act 575** (SB 112) amended and reenacted R.S. 38:2251(C)(3) and R.S. 39:1595(C)(3) relative to preferences for certain meat and meat products processed in Louisiana.
- **Act 416** (HB 547) enacted R.S. 39:1647 to provide that any purchase of seats for public seating areas following the renovation or construction of a state building, no fewer than five percent of the total seats purchased shall have arms.

THE 2014 LEGISLATIVE SESSION

- **Act 823** (HB 690) enacted R.S. 38:2212.1(N) which authorizes schools to participate in a school district purchasing cooperative for the purchase of materials, equipment, and supplies.
- A school district purchasing cooperative means an organization of which two or more public school districts are members and which solicits proposals or bids from vendors of services, materials, equipment, or supplies of the type and nature as may be purchased by a public school district or public school.

THE 2014 LEGISLATIVE SESSION

- **Act 700** (SB 315) enacted R.S. 39:196(C) and 1554(J), to allow any public postsecondary education institution to establish and utilize its own group purchasing and cooperative purchasing procurement provisions subject to approval by its management board and the Board of Regents.

THE 2014 LEGISLATIVE SESSION

- **Act 724** (SB 614) enacted R.S. 49:125.1 which authorizes political subdivisions to transfer surplus electronic devices to a nonprofit entity that is certified by R2 Solutions or the e-Stewards Initiative.
- The nonprofit entity shall perform services that are proportionate to at least the value of the electronic device, and at a minimum, shall include the pick-up and erasure of the hard drives and responsible recycling of all electronic devices.

CASE LAW UPDATE

Command Construction Industries, LLC v. City of New Orleans, 126 So.3d 716 (La.App. 4 Cir.)

- Case involves a public works construction project let by the City of New Orleans. Durr Construction was awarded the project. Command Construction was an unsuccessful bidder and challenged the award of the project.
- There were three (3) bidders on the project. The presumptive low bid was not considered because of irregularities. Command was the next lowest bid. A day after the bids were submitted, Durr sought to amend its bid because of a “clerical error,” and it substituted a revised base bid.

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- The City reportedly advised Command that it intended to award the contract to Durr, leading Command to file suit. The Trial Court rendered judgment denying Command's request for a preliminary and permanent injunction.
 - On Appeal, the 4th Circuit recognized that “[t]here is no dispute that Durr's original total base bid was mistakenly comprised of the base bid (an addition of all the unit prices) *plus* all three alternates.”
 - Durr erroneously added the three alternates to the base bid unit prices to arrive at its initial bid. This sum was higher than Command's base bid. However, when the three alternates were subtracted from the total base bid, Durr's base bid was lower than Command's bid.

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- The Court cited the *Hamp's* case, and several others, to hold that the requirements of the Public Bid Law, the advertisement for bids and the bid form *shall not be waived by any public entity and* Durr's mistaken inclusion of the alternates in its total base cannot alter its unequivocal total base bid. As a result, the 4th Circuit held that the record reflected that Command was the lowest responsible bidder, and the City improperly awarded the contract to Durr.
 - The Trial Court had denied the preliminary and permanent injunction and a mandamus, so the project went forward. The 4th Circuit made no determination as to whether Command is entitled to damages, as that issue was not before them. The 4th Circuit remanded the matter to allow Command to pursue its claim for damages.

City of New Orleans v. Advanced Environmental Consulting Inc., 2013 WL 6327480 (La.App. 4 Cir.)

- Case involves two (2) bids let by City of New Orleans (City) for the removal of material from a demolished apartment complex.
- The Louisiana Department of Environmental Quality (“LDEQ”) and contractor for Bid 1 began to disagree upon the proper method for the removal of the demolition debris and the percentage of the demolition debris that was Regulated Asbestos Contaminated Material. The parties engaged in numerous discussions and after some back and forth, the City informed the contractor that it was in default on the contract for Bid 1.

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- The City then filed a Petition for Damages and Declaratory Judgment against the contractor and its surety seeking damages, attorney's fees, and costs.
 - While the lawsuit was pending, the City issued a second solicitation for bids (“Bid 2”) to clear the debris. Bid 2 was largely the same as Bid 1. However, Addendum No. 1 to Bid 2 included specific instructions on asbestos removal.
 - The same contractor on Bid 1 was the low bidder on Bid 2.

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- The City rejected the bid deeming the bidder a non-responsible bidder, and also found its bid to be non-responsive.
 - The City contended that the contractor demonstrated a “lack of operational competence,” an “inability to perform according to contract,” an “unwillingness to comply with state environmental regulations,” a “lack of oversight, carelessness, poor judgment,” a “lack of concern for the City's contracting needs and systemic management deficiencies.”

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- The Trial Court held that the City's decision deeming the contractor a non-responsible bidder was not reasonable. It was of the opinion that the bid documents were not clear as to how the asbestos was to be removed, which resulted in a significant increase to the bid proposal and involuntary work stoppage.
 - Further, the Trial Court was of the opinion that the contractor made extensive attempts to fulfill the contract for Bid 1. The 4th Circuit agreed and held that the Trial Court did not abuse its discretion in granting the declaratory judgment, as the record reflected that the contractor was the lowest responsible and responsive bidder.

A.P.E., Inc. v. City of New Orleans, 2014 WL 530192
(La.App. 4 Cir.)

- City solicited public bids for police department uniforms. A.P.E. and Signal 26 submitted the only two bids. At the time the bids were submitted, a shareholder of Signal 26 was married to a NOPD officer. The shareholder later sold her shares and the City notified Signal 26 that it was the successful bidder.
- A.P.E. argued that Signal 26 had a disqualifying conflict of interest under New Orleans Municipal Code 2-777 (no city officer or employee shall have a financial interest in any contract with the city...). City argued that the sale of the shares before the bid was awarded eliminated any conflict of interest under 2-777.

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- Fourth Circuit disagreed and found that the word “contract,” as used in the ordinance, was intended to encompass both completed contractual agreements and the submission of bids.
 - The relevant time to examine a bidder’s qualifications is at the time the bid is submitted. Signal 26 was disqualified from bidding.

Akers v. Bernhard Mechanical Contractors, 137 So.3d 818 (La.App. 2 Cir. 4/16/14)

- A & R General Contractors was the general contractor on the project. Bernhard Mechanical Contractors was the mechanical subcontract. Bernhard solicited from Akers, d/b/a Air Products Co., a proposal for a ventilation system, including a vehicle exhaust system.
- Akers proposed a system made by Ventaire. The bid specifications stated that all products must be “equal to” those made by another company, Nederman. Akers’ submittal identified his proposal to use Ventaire, not Nederman, but he felt it was equal to the latter in every way.
- Bernhard's manager agreed and forwarded Akers’ submittal to the general contractor, A & R. A & R then forwarded it “without comment” to the city's architect and engineer for approval.

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- The Trial Court found that Akers' proposal was accepted all the way up the chain and that the Ventaire system it proposed was "substantially the same" as the Nederman system described in the specs.
 - On appeal, the City argued that Addendum Number Two (2) created the need for prior approval of Akers' bid, which listed a Ventaire system instead of the Nederman system named in the specs and that since Akers did not request prior approval, the City had every right to reject the equipment, even if it was equal to Nederman. The 2nd Circuit rejected that argument.
 - The Ventaire product was substantially the same as the Nederman product, and thus the City had no basis to require prior approval.

J. Reed Constructors, Inc. v. Roofing Supply Group, LLC, 135 So.3d 752 (La.App. 1 Cir. 11/1/13).

- J. Reed Constructors, Inc. was the general contractor on a public works project for the Ascension Parish School Board. J. Reed entered into several subcontracts, one of which involved a roofing subcontractor, A & L Systems, Inc. A & L purchased roofing supplies and materials on open account from defendant, Roofing Supply Group, L.L.C. (RSG).
- RSG sent written notice to J. Reed and the School Board, informing the general contractor and the project owner of A & L's nonpayment of invoices in connection with the deliveries of roofing supplies and materials for the public works project.

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- When RSG did not receive payment after notifying J. Reed and the School Board, RSG filed and recorded its materialman's claim.
 - J. Reed and the School sought to have the lien canceled pursuant to La. R.S. 38:2242(F) which requires a subcontractor send notice of nonpayment to the general contractor and the owner on or before seventy-five days from the last day of the month in which the material was delivered.

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- The 1st Circuit held that La. R.S. 38:2242(F) is clear and unambiguous. To preserve his right to file a privilege or lien, a subcontractor must send monthly or multiple notices in order to preserve the right to file a lien against a public works project for unpaid supplies and materials.
 - Regardless of the month of delivery or the number of deliveries, the seventy-five-day period commences on the last day of that month.
 - Dissent concluded that a single notice within 75 days of last delivery was timely.

Gulf Coast Refrigeration, LLC v. Houma Terrebonne Housing Authority, 2014 WL 1175898 (La.App. 1 Cir.)

- The Houma Terrebonne Housing Authority (HTHA) entered into a construction agreement with Olympic Commercial and Residential Repair, LLC (Olympic) to modernize and renovate ten duplex housing units in Houma. Companion was the surety on the project. Gulf Coast was a subcontractor on the project and made several charges on the contract for work and materials.
- Olympic paid Gulf Coast for those charges, until it went into default and was terminated as contractor. HTHA then secured a new contractor and resumed construction on the project, but Gulf Coast was not renewed as a subcontractor.

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- Gulf Coast filed a lien for the outstanding balance Gulf Coast claimed was owed and recorded the same in the public records of Terrebonne Parish.
 - Gulf Coast also filed a petition for sums due against HTHA, Olympic, and Companion. Companion and HTHA filed exceptions of no cause of action and no right of action.

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- Louisiana Revised Statutes, 38:2242(B), provides that any claimant may after the maturity of his claim and within forty-five days after the recordation of acceptance of the work by the governing authority or of notice of default of the contractor or subcontractor, file a sworn statement of the amount due him with the governing authority having the work done and record it in the office of the recorder of mortgages for the parish in which the work is done.

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- It was obvious from the record that Gulf Coast filed and recorded its lien well beyond the forty-five days after which Olympic went into default.
 - In order to proceed on the bond, the claimant must comply with the notice and recordation requirements of La. R.S. 38:2242(B). The 1st Circuit also affirmed the Trial Court's award of costs and reasonable attorney fees pursuant to La. R.S. 38:2246

ATTORNEY GENERAL OPINIONS

- **13-0050** - The Louisiana Public Bid Law provides that all statutory requirements, advertisement requirements, and bid form requirements must be observed. Here, because the presumptive low bidder failed to comply with a bid requirement, the City of Kenner must reject the non-responsive bid.

ATTORNEY GENERAL OPINIONS

- **13-0135** - The Baton Rouge Metro Airport Commission must follow the policy governing the procurement of professional services established by the Authority for the Greater Baton Rouge Airport District.
- **13-0167** - The Louisiana Public Bid Law is not applicable to the Lower Mississippi River Port Wide Strategic Security Council in procuring a contract for legal, accounting, management, or other professional services.

ATTORNEY GENERAL OPINIONS

- **13-0182** - The Houma-Terrebonne Airport Commission may not employ the design-build construction method for a potential capital improvements project.

ATTORNEY GENERAL OPINIONS

- **13-0184** - Pursuant to La. R.S. 33:4169.1(A)(3), the City may only extend to a total twenty-five year term the portion of the contract which governs services for disposal of garbage or trash. Services relating to collecting and transportation of garbage or trash are limited to a ten year maximum contract term. The term of the current contract must be included with the contract extension term when calculating the total contract term.

ATTORNEY GENERAL OPINIONS

- **13-0224** - When procuring data processing and telecommunications equipment, the Orleans Parish Criminal District Court may use either the invitation to bid process authorized by La.Rev.Stat. 38:2212.1, the request for proposal process authorized by La.Rev.Stat. 38:2234 et seq., or the Court may purchase the equipment directly from the state contract vendor as authorized by La.Rev.Stat. 39:1702.
- **14-0033** - The Orleans Judicial District Court Building Commission may not employ the design-build construction method for the construction of a new courthouse.

■ **You may contact my office with questions and concerns regarding public contract issues:**

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