

PUBLIC BID LAW – CURRENT DEVELOPMENTS

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A. THE 2007 LEGISLATIVE SESSION

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THE 2007 LEGISLATIVE SESSION

- **Act 336 (HB 726) enacted 38:2212(A)(1)(d)(iv) to increase the contract limit for public work projects to \$300,000 for political subdivisions that did not have flood insurance at the time Hurricane Katrina and Rita struck Louisiana but only for work until July 30, 2008.**
- **Act 373 (SB 121) amended and enacted 38:2212(D)(3) and 2225.2.1 to authorize certain public entities to execute design-build contracts in the construction or repair of any public building or structure in an area damaged by Hurricane Katrina, Hurricane Rita, or both and authorizes East Baton Rouge Parish to use its employees to assist in a project to enclose a canal at University Laboratory School.**

THE 2007 LEGISLATIVE SESSION

- Act 24 (HB 198) requires the East Feliciana Parish governing authority to comply with the prequalified bidding process provisions of 38:2212.5 in letting the contract for the restoration of the East Feliciana Parish courthouse.
- Act 207 (SB 154) enacted 17:1990(B)(1)(c), (d), and (e) to grant the Recovery School District the same authority and autonomy to procure or contract for materials, goods, services, and public works afforded to local school districts.
- Act 346 (HB 802) enacted 33:4712.10 provides that no political subdivision shall purchase immovable valued at greater than \$3,000.00 without an appraisal by a qualified appraiser and that any such appraisal shall not include the value of any improvements proposed to be made upon the property after purchase.

THE 2007 LEGISLATIVE SESSION

- Act 214 (SB 136) amended and reenacted 39:1494.1(A)(7) to increase the maximum proposed amount for state social service contracts for competitive bidding from \$150,000 to \$250,000 per twelve month period
- Act 37 (HB 316) amended and reenacted 34:208(A) and (B) to require the Lake Charles Harbor and Terminal District to follow 38:2212.1 in procuring materials, supplies and equipment.
- Act 386 (SB 280) amended and reenacted portions of 48:251 and 252 to increase the “contract limit” for DOTD contracts which are subject to certain advertising and bid requirements from \$250,000 to \$500,000; increases from \$25,000 to \$50,000 contracts for which advertisement is optional; and provides for electronic bidding.

CASE LAW UPDATE

Broadmoor, LLC v. Morial Exhibition Hall Authority. 867 So.2d 651
(La. 03/18/04).

- Authority awarded contract to low bidder at \$275 million. Broadmoor, second lowest bidder at \$281 million, challenged award of contract claiming low bidder failure to attend mandatory pre-bid conference, low bidder failed to attach corporate resolution, and low bidder failed to attach builders risk insurance certificate with the bid.
- Trial court found the Authority was not arbitrary or capricious and denied injunctive relief. Contract was awarded and work began. Broadmoor applied for supervisory writs, the Fourth Circuit reversed the trial court and issued an injunction ordering the Authority to reject the low bidder as being non-responsive.
- Supreme Court granted writs and in a 4 to 3 decision affirmed the court of appeals conclusion that the Authority impermissively waived the bid document requirements regarding builders risk insurance, attendance at the pre-bid conference and submission of a resolution concerning business status and thus abused its discretion when it selected the low bidder as the lowest responsive bid.

Broadmoor, LLC v. Morial Exhibition Hall Authority, 896 So.2d 251, (La. App. 4 Cir.2005).

- In light of the above Supreme Court ruling the Authority reviewed the remaining 2 bids, including Broadmoor's, and rejected both as being non-responsive. Broadmoor objected and filed suit. The trial court held that the Authority improperly rejected the Broadmoor bid, that under R.S. 38:2215, the Authority neither had the power nor the authority to do so and ordered the contract be awarded to Broadmoor.
- Court of appeals held that the Broadmoor bid was responsive and thus no need to decide the issue of whether the Authority was precluded by R.S. 38:2215 from rejection of all bids, whether responsive or not, after forty-five days. Appeals Court concluded that Broadmoor submitted the lowest responsible bid and should have been awarded the contract. Court remanded the matter back to the trial court on the issue of attorney fees due Broadmoor pursuant to R.S. 38: 2220.4 but, importantly, found no support for any award of damages.

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- Broadmoor returned to the trial court seeking award of the contract at the original bid amount plus issuance of a simultaneous change order for price escalation and other rights.
 - Office of the Attorney General filed an Intervention taking the position that under the Public Bid Law, Broadmoor could either accept the contract as bid or, because more than 45 days had passed since bid opening, Broadmoor could walk away.
 - Briefs were submitted, arguments made and the case was taken under advisement. Case dismissed in light of enactment of 38:2225.4 authorizing negotiated contract.

Hamp's Construction, LLC. v. City of New Orleans, 924 So.2d 104, 2005-0489 (La. 2/22/06).

- City issued bids for the Lincoln Beach Demolition Project. City accepted the low bid of Concrete Busters and Hamp, the second low bidder, sued seeking injunctive relief and mandamus to compel City to award the contract to it claiming low bidder failed to attach a copy of the City's "Invitation to Bid" as required in the bid specifications.
- Trial court issued temporary restraining order but at the hearing on the merits denied permanent injunction finding that the low bidder "complied with the substantive formalities set forth in the bid requirements and was the lowest responsible bidder to which the job should have been awarded."

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- Hamp filed a motion for suspensive and devolutive appeal which was at first granted but 60 days later the trial court vacated the suspensive appeal and converted the appeal to only a devolutive appeal.
 - The city then awarded the contract to Concrete Busters, the low bidder. The Appeals Court found that the low bidder was not responsive because it failed to attach the required “Invitation to Bid” and stated that the City should have awarded the contract to the second low bidder.
 - Because the contract was already awarded and work performed injunctive relief was no longer an option so the Appeals Court held that the second low bidder was entitled to damages. See State Machinery v. Livingston Parish Gravity Drainage Dist. #5, (La. App. 1 Cir. 11/14/01), 818 So.2d 133).

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- Case was remanded for a determination of damages. On Writ of Certiorari, the Supreme Court affirmed the judgment of the court of appeal and held that R.S. 38:2212A(1)(b) is express and unambiguous in that “any requirements stated in the advertisement for bid, and any requirements required on the bid form shall not be waived by the public entity.
 - The public entity does not have the discretion to determine, after bids have been submitted, whether a requirement is substantive or non-substantive, waivable or non-waivable. Once the public entity establishes a requirement, that requirement must be uniformly followed by all bidders.” Good review of legislative and judicial history of 38:2212A(1)(b).

Minsky v. Shumate, 924 So.2d 488 (La. App. 2 Cir. 3/10/06).

- Second Circuit affirmed trial court award of attorney fees in an amount less than the entirety of attorney fees plaintiff incurred in obtaining mandatory injunctive relief against sheriff. Trial court found that the sheriff violated Public Bid Law in buying prescription medicine for inmates, since the aggregate amount exceeded \$20,000.00 and the sheriff continued to buy medicine under an expired contract.
- Trial court enjoined sheriff to immediately advertise for the purchase of prescription drugs pursuant to the Public Bid Law and awarded plaintiff \$2,500.00 in attorney fees as “an amount deemed reasonable under the circumstances and commensurate with the nature of the violation.”
- Court found violation was technical and unintentional and award of attorney fees were not designed to fully reimburse the plaintiff for his attorney fees, which totaled \$10,256.77.

CB & I Constructors, Inc. v City of Thibodaux (La. App. 1 Cir. 2004), 897 So.2d 724, 2004-1133.

- City rejected bid of CB & I due to its failure to show its contractors license number on the bid envelope as required by R.S. 37:2163A(1). CB & I filed suit seeking injunction contending that the city was required by law to include in the bid specifications specific language stating that the contractor must show its contractors license number on the face of the bid envelope.
- Trial court rejected the argument stating that the bid specifications contained a statement that bidders must submit a bid in compliance with R.S. 37:2151-63. The bid specifications requiring compliance followed by the citation constituted sufficient notice to all bidders and dismissed the suit.
- Appeals Court affirmed stating that CB & I was put on notice that it had to comply with the law and the applicable statutes referenced in the bid advertisements. The bid was in violation of the statutory requirements and provided a reasonable and valid basis for “automatically” rejecting the bid.

Anding Construction, Inc. v. Monroe City School Board, (La. App. 2 Cir. 2004) 867 So.2d 1005.

- Low bidder recited numerically on the bid form “\$559.372.00” and wrote out “Five Hundred Fifty Nine Three Hundred Seventy Two Dollars”. Bid was rejected based on the use of a period rather than a comma in numerical bid amount and omission of word “Thousand” from written bid amount.
- Low bidder sued and sought injunctive relief. Trial court found in favor of the low bidder and enjoined and restrained the School Board from executing any contract with anyone other than the low bidder. Trial court concluded that the low bidder’s bid was in the proper form and was the lowest bidder.
- Appeals Court reversed stating that although the issuance of the injunction was proper (low bidder presented prima facie case that it was lowest responsive and responsible bidder) the trial court could not decide the merits (conformity and integrity of the bid) at the injunction hearing. Case remanded for hearing on the merits.

G.D. Womack Trenching, Inc. v. Maitland Water System, Inc.,

(La.App. 3 Cir. 2004), 870 So.2d 579.

- Public bid for relocation of water lines contained alternate for 3,650 cubic yards of backfill to be removed, disposed of and replaced with select backfill. The bid form asked for a unit price per cubic yard. Womack was low bidder on the base plus the alternate but post bid opening Maitland determined that only 140 cubic yards of backfill would be required rather than 3,650.
- Maitland recalculated the bids and as a result Jabar was the lowest bidder and awarded the contract. Womack filed suit to enjoin performance of the contract and declare the contract illegal and void. Womack claimed that it was the lowest bidder and that Maitland engaged in post-bid manipulation that made Jabar the lowest bidder.

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- The trial court, by stipulation, conducted a consolidated hearing on both the injunction and merits and held that the reduction of quantities post bid opening was a violation of the bid law. Although the bid reserved the right of Maitland to decrease quantities it did not allow a post bid recalculation.
 - The trial court ordered that the contract be awarded to Womack rather than rebid. The appeals court affirmed the trial court holding that Maitland violated R.S. 38:2212(A)(3)(e) by recalculating the bid prior to awarding the contract to Jabar.
 - Another issue on appeal was whether Womacks complaint was timely since suit was filed almost 6 months after the contract was awarded to Jabar. Because a stop order was issued by DOTD and work had not begun the suit was timely.

Roy Sattler Construction, Inc. v. City of Bossier City, (La. App. 2 Cir. 2005), 903 So.2d 503.

- Sattler submitted low bid of \$27,000 to clear a 22-acre tract of land where the Bossier City Bass Pro Shop was to be constructed. Next low bidder was \$70,000.00. Sattler stated that he bid low in hopes of receiving future work from the city. Sattler also believed that he could burn the trees he took down, sell off stuff found in buildings to be demolished, crush bricks for road material and sell dirt from the site.
- After being awarded the contract Sattler found that the tree roots were entangled in concrete, I-beams and rebar and therefore the trees and the debris would have to be hauled off instead of being burned and buried. Sattler wanted to be paid extra to remove and haul off the trees and the debris.
- The city agreed to an additional cost of \$13.20 per yard for hauling off the trees and the related subsurface materials. Sattler sent two invoices for the additional work which totaled approximately \$63,500. The City issued a change order and paid the invoices. A third invoice of \$288,367.20 was rejected by the City who offered a change order of only \$32,000.00. Sattler refused and sued.

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- The three change orders agreed to by the City increased the cost of the job from \$27,000 to \$112,000. The trial court concluded that the change orders violated the public bid law, were null and void and no further payment was due Sattler.
 - On appeal the Second Circuit affirmed finding that the removal of subsurface debris related to the removal of trees was outside the scope of the original bid and was not authorized. However, the removal of trees and stumps was within specifications of the original bid and therefore under the principle of quantum meruit Sattler would be entitled only to the amount of his expenses in hauling off the debris but not to any profit.
 - Thus Sattler was entitled to the original bid of \$27,000.00 plus the actual costs Sattler paid subcontractors to haul off the extra debris of \$43,935.00 for a total of \$70,935. He was paid \$82,330.80 so no further payment was due.

State Machinery & Equipment Sales, Inc. v Iberville Parish Council,
2006 WL 3804686 (La. App. 1 Cir. 2006).

- Parish council had just cause to reject bid that did not meet bid specification requirement that the excavator and wheel loader be provided by the same manufacturer.
- Just cause existed per La. R.S. 38:2214 due to warranty considerations. Ease of repairs and ability to service both at one place under a single warranty was justification to reject low bidder who did not comply.

Scott v. Red River Waterway Commission, 2006 WL 932060,
(La.App. 2 Cir.).

- Bonding company who takes over public works project and does not perform beyond its role as surety or assumes any additional performance duties on the project is not legally responsible for alleged defective premises that cause plaintiffs damages.

Boes Iron Works, Inc. v. Travelers Casualty and Surety Company of America. 2006 WL 782738 (La. App. 5 Cir. 2006)

- Forum selection clause contained in the subcontract between the general contractor (MAPP) and the subcontractor (Boes) conflicted with venue provisions contained in R.S. 38:2181.
- When MAPP failed to pay Boes on an invoice Boes filed suit against the payment bond surety (Travelers) in the 24th JDC, that being the place where the work was performed. Travelers filed an exception of improper venue based on the forum selection clause which designated the 19th JDC as the proper venue. Boes responded by claiming that the rules of venue governing public contracts contained in La. R.S. 38:2181 apply and which provide proper venue in either the parish where the public entity is located or any other parish where, by law, such action may be instituted.
- Other law would include La. R.S. 38:2243 which authorizes the public entity or a claimant to file a claim against the surety in the parish where the work was performed. As such, Boes argued that the claim could be properly filed in the 24th JDC notwithstanding the forum selection clause.
- The trial court granted Travelers exception of improper venue. On appeal the Fifth Circuit vacated the judgment and remanded due to the failure to include a copy of the subcontract in the record

Magnolia Construction Company, L.L.C. v. Parish of St. Charles,
947 So. 2d 747, (La. App. 5 Cir. 2006)

- Execution of change orders by contractor was full accord and satisfaction of claims for delay damages.

Board of Directors of the Industrial Development Board of the City of Gonzales, La. Inc. v. All Taxpayers et al., 938 So.2d 11 (La. 2006), 2006 WL 2548480

- Case arises out of a bond validation proceeding related to the construction of Cabela's Retail Center.
- Supreme Court reinterprets Art. VII, Sec. 14 of the state constitution to now mean that this provision is violated when a public funds or property are gratuitously alienated.
- Public entity must have legal authority to alienate funds or property with a reasonable expectation receiving equivalent value.

Holly & Smith Architects, Inc. v St. Helena Congregate Facility, Inc. and St. Helena Parish Hospital; 943 So.2d 1037 (La. 2006).

- Supreme Court holds that a judgment against a public entity may be recorded but the recordation does not create a judicial mortgage and has no effect.
- Judgment against public entity can only be satisfied through an appropriation made by the public entity.

LAGC, Inc. v. La. Department of Agriculture and Forestry, 924 So.2d 90, 2005-0131 (La. 2/22/06).

- Supreme Court affirmed 1st Circuit Court of Appeal Decision that LDAF and La. Agriculture Finance Authority (LAFA) are exempt from the Public Bid Law pursuant to R.S. 3:266(14).
- LAFA was created and empowered to alleviate the severe shortage of capital and credit available at affordable interest rates for investment in agriculture, including buildings and related facilities used by the Dept. of Agriculture and Forestry.
- Statute specifically exempts such activities from public bidding. LAFA has authority to act as its own contractor and may construct public works without compliance with the Contractors Licensing Law.

ATTORNEY GENERAL OPINIONS

- **06-0051**-Public entity must comply with self-imposed competitive public bidding requirements in awarding contract for billing and collection services, including the award of the contract to the lowest responsible bidder who bids in accordance with the contract, plans, and specifications as advertised.
- **06-0067**-Due to health and safety concerns at its post-Katrina temporary courthouse facilities, parish may invoke the emergency provisions of the Public Bid Law (La. R.S. 38:2212D) for construction of new temporary courthouse.
- **06-109**- Discusses legal issues regarding sale of surplus immovable property by a political subdivision including method of disposition, offer back provisions of 41:1338, and sale with right of first refusal.
- **06-0124**- Fire Chief and Assistant Fire Chiefs, all of whom are on call 24-hour call, may use vehicles purchased with public funds and assigned to them for occasional personal use without violating Art. VII, Sec. 14 of the Louisiana Constitution.

ATTORNEY GENERAL OPINIONS

- **06-0134A**- District Attorney may receive compensation for services rendered on behalf of Gravity Drainage District.
- **06-0171**- Volunteer Fire Department governed by Police Jury and primarily funded with public funds is a quasi-public entity subject to Public Records and Audit Law but not subject to Public Bid Law.
- **06-0183**- Legal services constitute a contract for professional services which are not subject to the Public Bid Law.
- **06-0225**- Public employees who must be accessible twenty-four hours a day may be issued cell phones by public entity and not be required to reimburse public entity for personal calls under block-minute billing plan provided personal calls do not incur any cost in excess of the monthly charges due.

ATTORNEY GENERAL OPINIONS

- **06-0337**- Harbor District may reduce rent in exchange for a number of concessions by the lessee such as release of claims from legal dispute and repair to roof.
- **07-0018**- Mayor of Lawrason Act municipality is the sole authority to sign and execute contracts and agreements approved by the Board of Alderman.
- **07-0057**- City may pay for contracted services provided agreement details services to be performed, services will benefit the City and there is a reasonable expectation of receiving equivalent value.
- **07-0067**- Municipalities may contract with private third parties for debt collection services.

ATTORNEY GENERAL OPINIONS

- **07-0096**- Political subdivision should follow procedures outlined in R.S. 33:4712(F) or R.S. 49:125 to dispose of surplus movable property.
- **07-0109**- Discusses various legal issues regarding disposal of surplus immovable property by a special district/political subdivision including offer back provision to original donor.
- **07-0134**- Discusses prohibited donation criteria in light of Cabela's decision. Transfer of public funds/property would constitute a prohibited donation unless public entity has legal authority to make the transfer, the transfer is for a public purpose, the transfer does not appear to be purely gratuitous on its face and the public entity has a reasonable expectation of receiving equivalent value in exchange for the transfer.
- **07-0188**- School Board may accept grand prize from fundraising drawing and sell prize in accordance with public bid law with proceeds inuring to the benefit of the school board.