

PUBLIC BID LAW – RECENT DEVELOPMENTS

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Government Finance Officers Association of Louisiana

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THE 2008 LEGISLATIVE SESSION

1. Act 726 (HB 558) amended and reenacted R.S. 38:2212(A)(1)(b), provides that a **bid form** shall be developed and prescribed pursuant to the APA by the Division of Administration, Office of Facility Planning & Control, and shall require only the information necessary to determine the lowest bidder and **shall contain the following sections and information:** Bid Security or Bid Bond, Acknowledgment of Addenda, Base Bid, Bid Total, Signature of Bidder, Name, Title and Address of Bidder, Name of Firm or Joint Venture, Corporate Resolution and Louisiana Contractors License Number, and on public works projects where unit prices are utilized, their inclusion in the bid form. The low bidder shall furnish other documentation required at a later date, in accordance with the Bidding Documents.
2. Act 727 (HB 563) amended and reenacted R.S. 38:2212(A)(3)(a), (b), and (c), relative to designer’s estimates and to the procedures for bidding including required forms used for such purposes. Specifically, the act provides that if, at the end of the contract document phase, it is determined that the designers **estimate is more than the funds budgeted by the public entity for the project then the project shall not be advertised.** If the project is advertised then the **designer’s estimate shall be read aloud at the bid opening.** The Act further provides that a **bid form shall be developed and prescribed pursuant to the APA by the Division of Administration,** Office of Facility Planning & Control, **and shall contain** Bid Security or Bid Bond, Acknowledgment of Addenda, Base Bid, Bid Total, Signature of Bidder, Name, Title and Address of Bidder, Name of Firm or Joint Venture, Corporate Resolution and Louisiana Contractors License Number, and on public works projects where unit prices are utilized, their inclusion in the bid form. The low bidder shall furnish other documentation required at a later date, in accordance with the Bidding Documents.

3. Act 230 (SB 14) amended and reenacted R.S. 38:2212(A)(1)(d)(v), provides that the contract limit for any project for the **restoration and rehabilitation of levees** not maintained with federal funds or to perform mitigation on public lands owned by the state or a political subdivision, shall be **one million dollars**, provided the project is undertaken by the public entity with its own resources and employees or another public entity through a cooperative endeavor or other agreement. The contract must be awarded or agreement **must be entered into before December 31, 2010**.
4. Act 391 (SB 72) amended and reenacted R.S. 38:2318.1(B) and enacted R.S. 38:2225.2.2, and **authorizes the City of Slidell to utilize-build contracts** for the construction or repair of any public building or structure which has been destroyed or damaged by Hurricane Katrina or Rita following certain prescribed procedures and for projects contracted prior to **July 1, 2010**.
5. Act 111 (HB 544) amended and reenacted R.S. 48:250.2, and expands the authority of the **Department of Transportation and Development** for design-build contracts and authorizes the secretary to select projects or combine a program of utilizing the design-build method.
6. Act 317 (HB 1120) amended and reenacted Section 2 of Act No. 38 of the First Extraordinary Session of 2006, and authorizes the adjutant general and the **Military Department to utilize the design build** method for certain construction projects for contracts awarded prior to June 30, 2010.
7. Act 598 (HB 918) enacted R.S. 38:2212.7 and R.S. 39:1496.2 and 1594.3, **prohibits bids or proposals** for public contracts by any person who contracts with an agency for the purpose of developing bid documents, requests for proposals, or any other type of solicitation. The person is also prohibited from participating as a subcontractor on the awarded contract.
8. Act 590 (HB 610) amended and reenacted R.S. 38:2212(A)(1)(f) and 2212.1(B)(4), provides that public entities must provide contractors the option of **submitting bids electronically** through a uniform and secure electronic interactive system that conforms with the standards adopted by the State as provided for in LAC 4:XV.701. Public entities that do not have high-speed Internet access available are exempt until such access becomes available. Parishes with a population less than 50,000 and municipalities with a population less than 25,000 are also exempt.

9. Act 881 (SB 809) amended and reenacted R.S. 44:4.1(B)(18) and enacted R.S. 33:4547.1(E) and (F), all relative to **performance-based energy efficiency contracts** and provides for contract provisions, contract evaluation requirements, cost of evaluation, and an exception to laws relative to public records. Specifically, the act provides for new evaluation requirements for political subdivisions that enter into performance-based energy efficiency contracts.
10. Act 592 (HB 638) enacted Subpart K of Part III of Chapter 17 of Title 39 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 39:1646, relative to procurement of certain motor vehicles by the State of Louisiana. The act **requires fuel efficiency standards** for certain motor vehicles purchased or leased by the state (18 mpg city, 28 mpg highway or 24 mpg combined) and provides for exceptions for vehicles used by law enforcement, first responders and emergency personnel.
11. Act 542 (SB 351) amended and reenacted R.S. 39:364, relative to state purchase of alternate fuel or hybrid vehicles and provides that the commissioner of administration shall purchase or lease for state use only **alternate fuel and hybrid vehicles**, and provides exceptions.
12. Act 117 (SB 133) amended and reenacted R.S. 3:266(14) and R.S. 38:2212(B), relative to the Louisiana Agricultural Finance Authority and **requires the Louisiana Agricultural Finance Authority to comply with public bid laws.**

CASE LAW UPDATE

RESPONSIVENESS

Beverly Construction Company, L.L.C. v. Parish of Jefferson, 979 So.2d 551, 2007-847 (La. App. 5 Cir. 2/6/08).

Unsuccessful low bidder on parish public works project (Beverly) sued parish, seeking injunction, nullification of contract, or damages, claiming it was the lowest responsible bidder and that its bid should not have been rejected and the project awarded to Kass Brothers, the next lowest monetary bidder. The bid of Beverly was rejected on the basis that it did not comply with the bid requirements stated in the advertisement for bids. Beverly argued that its bid was responsive and that the parish acted arbitrarily in interpreting its advertised bid requirements or, in the alternative, that the parish could waive a requirement stated in the bid advertisement.

The bid advertisement stated “THIS BID PACKAGE MUST BE RETURNED IN ITS ENTIRETY” and “BID PACKAGE, INCLUDING INSTRUCTIONS AND SPECIFICATIONS, MUST BE RETURNED IN ITS ENTIRETY FOR THE BID TO BE VALID”. **Beverly failed to return and include in its bid the corporate resolution form that was part of the bid package.** Instead, Beverly removed the bid form and submitted its own corporate resolution form. The 24th Judicial District Court, Parish of Jefferson, affirmed the rejection of the Beverly bid and affirmed that the contract was properly awarded to Kass Brothers, the next lowest monetary bidder. Beverly appealed.

The Appeals Court, in following the *Hamp*’s case, found that the case is governed by La.R.S. 38:2212(A)(1)(b), which clearly does not allow the Parish, a public entity, to waive its mandatory bid requirements. The court held that the advertised bid required that the corporate resolution form that was included as part of the bid documents be returned by all bidders with the bid package and that this requirement could not be waived by the parish. Beverly failed to return the form and therefore its bid was properly rejected as non-responsive.

MISCELLANEOUS

Electric Supply Company, Inc. v. Great American Insurance Company, Inc. 973 So.2d 827, 42, 727 (La. App. 2 Cir. 12/12/07).

Supplier of subcontractor on a school construction project (Electric Supply Company) recorded a "Claimant's Statement of Amount Due From Contractor Pursuant to the Public Works Act" in mortgage records (\$79,424.00) and mailed a copy of the statement of claim to project owner (Webster Parish School Board), general contractor (Barron Contractor, Inc.), and the subcontractor (EDCO) the next day. When the claim was not paid the supplier sued the general contractor, subcontractor, and payment bond surety who in response file a Motion to Dismiss for **failure to send proper notice** of nonpayment to Barron and the School Board **prior to filing the lien** as required by R.S. 38:2242(F). The Twenty-Sixth Judicial District Court, Parish of Webster, granted the motion to cancel lien stating that 38:2242(F) provides that "if the materialman has not been paid by the subcontractor and has not sent notice of nonpayment to the general contractor and the owner, then the materialman shall lose his right to file a privilege or lien on the immovable property." Supplier appealed.

Second Circuit affirmed trial court and held that supplier was required to give notice of subcontractor's nonpayment to the general contractor and owner before filing lien or privilege. "The reason for the notice is obvious. A contractor or owner is not always going to be aware of the materialman from whom a subcontractor has obtained materials that the subcontractor has used on a public works project, so forcing the claimant materialman first to give notice to the general contractor and owner places those parties in the position of being able to withhold payment to the subcontractor so as to avoid ultimately having to make a double payment."

Quality Design and Construction, Inc. v. City of Gonzales Through Its Duly Elected Mayor, Johnny Berthelot, 977 So.2d 87, 2006-2211 (La. App. 1 Cir. 11/28/07).

After city withheld payment on a portion of public works contract as retainage, contractor filed petition for mandatory injunction against the city, claiming that unforeseen obstacles or items not contained in the contract had increased costs and lengthened construction time. City put forth a reconventional demand to recover funds it allegedly expended in order to complete the project. The District Court entered judgment awarding contractor the amount retained, subject to a deduction for 14 days of liquidated damages for delays in completion. Contractor appealed.

The Court of Appeal reversed and remanded in part and affirmed as amended in part. The First Circuit held that (1) the contractor was entitled to attorney fees under Public Works Law for city's failure to make timely payment following acceptance of work, (2) city was entitled to liquidated damages for contractor's failure to meet substantial compliance deadline set forth in contract for the project; and (3) contractor was entitled to legal interest on the retainage sum awarded to it for city's failure to make timely payment.

ATTORNEY GENERAL OPINIONS

07-0033 – Article VI, Sec. 23 of the Constitution prohibits Town from purchasing gasoline for resale and from acquiring, operating, and maintaining a retail gasoline station.

07-0076- School Board must comply with the provisions of La. R.S. 17:87.6 and the Public Lease Law (La. R.S. 41:1211 et seq.), including the advertising requirements, when leasing school board owned property.

07-0096- As a political subdivision, Cypress Black Bayou Recreation and Water Conservation District should follow the procedures outlined in LSA-R.S. 33:4712(F) or LSA-R.S. 49:125 to dispose of surplus movable property. Alternatively, it may sell its surplus movable property to another public entity through an intergovernmental governmental agreement as provided by R.S. 33:1321 et seq., the “Local Service Law”.

07-0278- Louisiana’s Public Bid Law applies to the proposed food services contract. The predominant component of the proposed food services contract was the purchase of food materials needed to prepare the meals. Such a component constitutes the purchase of materials and supplies under the Public Bid Law.

08-0001- The appraisal obtained by the seller of the four acre unimproved tract of land in West Feliciana Parish cannot be used to determine the fair market value of the land because it includes the value of improvements proposed to be made to the property after purchased by the police jury, in violation of La. R.S. 33:4712.10.

08-0056 – Police Jury may contribute public funds or personnel in the unloading and distribution of food items to qualified senior citizens. Not a prohibited donation and satisfies the requirements of Article VII, Sec. 14(B)(1).

08-0067 – Public Bid Law prohibition against division or separation of public work projects (38:2212H) does not apply to repairs and renovations to two separate buildings using separate concepts, plans and specifications and subject to annual budget constraints.

08-0150- The Greater Lafourche Port Commission must use the value expressed in **words** under the PAY ITEM UNIT PRICE column in calculating the bids. The specification clearly states that bids were to be compared on the basis of the unit bid prices. In the event there was a conflict or discrepancy between the unit bid prices stated in numerals and the unit bid price stated in words, the words prevailed. As such, the Port is obligated to follow the provisions contained in the specification and use the unit bid prices stated in words calculating and comparing the submitted bids.

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