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2014 Louisiana Public Bid Law

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Two Types of Public Contracts Covered by Title 38

- **Public improvements under La. R.S. 38: 2212** and
- purchase of materials, supplies and equipment under La. R.S. 38:2212.1
 - Does not cover “service contracts”



Service Contracts

- These type contracts **are not covered** under the Louisiana Public Bid Laws La. R.S. 38:2211, et. seq.
- However, service contracts with the State are covered under the Louisiana **Procurement Code** La. R.S. 39:1731 et. seq.
- The Procurement Code does not apply to any political subdivision unless specifically adopted.



Service Contracts

A contract for the removal of debris is not subject to the Louisiana Public Bid Law.

Regency Construction, Inc. v. Lafayette City-Parish Consolidated Government, 2003-313 (La. App. 3 Cir. 6/4/03), 847 So.2d 796



Service Contracts

However, demolition of a building is an “alteration” of property under R.S. 38:2211 and therefore falls within the definition of “public work” for purposes of the Public Bid Law.

Concrete Busters of Louisiana, Inc. v. Board of Commissioners of the Port of New Orleans, 2010-1172 (La.App. 4 Cir. 2/2/11), 69 So.3d 484



Service Contracts - Design Professional Services

LSA-R.S. 38:2318.1 (Hammett Act):

- It is the policy of the state of Louisiana, its political subdivisions, and agencies to:
 - select providers of design professional services
 - on the basis of competence and qualifications
 - Neither the state nor any political subdivision may use price or price-related information as a factor in the selection.



Service Contracts - Design Professional Services

LSA-R.S. 38:2318.1 (Hammett Act):

La. Atty. Gen. Op. No. 07-0185 (Sep. 18, 2007)

- Pursuant to La. R.S. 38:2318.1, the Public Entity is prohibited from requesting price quotes on design professional services.



Service Contracts - Design Professional Services

LSA-R.S. 38:2318.1 (Hammett Act):

- No definition of *design professional services*



Service Contracts - Design Professional Services

*SEE – NEW ACT 782 Regular Session, 2014 creating
CMAR*

- "Design professional" means an engineer, architect, or landscape architect with a professional license from a Louisiana registration board and who is selected by an owner in accordance with state law



Service Contracts - Design Professional Services

NEW

ACT 782 Regular Session, 2014 creating CMAR

- Clarifies the law so that now under the “*selection law*” (La. R.S. 38:2318.1 - Hammett Act):
- Selection of a registered “engineer, architect, or landscape architect” on public works shall not use price or price-related information as a factor.



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions (La. [R.S. 38:2211](#)) *NEW 2014*

(1) "Alternate" means an item on the bid form that may either increase or decrease the quantity of work or change the type of work within the scope of the project, material, or equipment specified in the bidding documents, or both.



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions (La. [R.S. 38:2211](#)) *NEW 2014*

(1) "**Alternate**" Now defined to mean an item:

- on the bid form
- that may either increase or decrease the quantity or the type of work, material or equipment within the scope of the project specified in the bidding documents.



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions (La. [R.S. 38:2211](#)) *NEW 2014*

(2) "Bidding documents" means the

- bid notice
- plans and specifications
- ~~bidding~~ bid form
- bidding instructions
- Addenda
- special provisions, and
- other documents to be used by bidders



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions ([La. R.S. 38:2211](#)) NEW 2014

~~(2)~~ **(3)(a)** "Change order" means any contract modification that includes an alteration, deviation, addition, or omission as to a preexisting public work contract, which authorizes an adjustment in the contract price, contract time, or an addition, deletion, or revision of work.



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions (La. **R.S. 38:2211**) **NEW 2014**

"Change order"

This clarifies that **any type** of modification that alters the **contract time or money or revision to the Work** falls within the category of "change order."

- A directive, such as a Construction Change Directive (CCD) now should fall within this new definition.



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions (La. [R.S. 38:2211](#))

(3) “Change order *outside the scope* of the contract” means a change order which alters the nature of the thing to be constructed or which is not an integral part of the project objective.



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions (La. [R.S. 38:2211](#))

(4) “Change order *within the scope* of the contract” means a change order which does not alter the nature of the thing to be constructed and which is an integral part of the project objective.



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions ([La. R.S. 38:2211](#)) *NEW 2014*

(9) "Probable construction costs" means the estimate for the cost of the project as designed that is determined by the public entity or the designer.



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions (La. [R.S. 38:2211](#)) *NEW 2014*

"Probable construction costs"

All new law.

- This new definition uses the industry terminology for the pre-bid estimate clarifying the law.



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions (La. R.S. 38:2211)

(11) “Public entity” means and includes the State, or any agency, board, commission, department, or public corporation of the State, or any Political Subdivision.

- “Political subdivision” means a parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions.



SYNOPSIS OF LA. R.S. TITLE 38

Key Definitions (La. R.S. 38:2211)

- ***“Public entity”*** now includes **“Charter Schools”** established under La. R.S. 17:3972, et. seq.

Glencoe Educ. Foundation, Inc. v. Clerk of Court and Recorder of Mortgages for Parish of St. Mary, 2010–1872, p. 16 (La.App. 1 Cir. 5/6/11), 65 So.3d 225, 234, writ denied, 2011–1142 (La.10/21/11), 73 So.3d 383.



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REVISIONS TO La. R.S. 38:2212

Act 759

SENATE BILL NO. 468

Regular Session, 2014

Signed by the Governor

Effective August 1 2014

to amend the Louisiana Public Bid Law



REVISIONS TO La. R.S. 38:2212

§2212. Advertisement and letting to lowest responsible **and responsive** bidder; public work; electronic bidding; participation in mentor-protégé program; exemptions

Technical change adding the phrase “**and responsive**” to clarify the law.



RESPONSIVE BIDDER

The term “responsive bidder” is not defined under Title 38 of the Public Bid Law.

- However, 38:2212(A)(1)(a) clearly states that to be a “responsive bidder” the bidder shall bid “according to the bidding documents as advertised.”



RESPONSIBLE BIDDER La.R.S. 38:2216(C)(2)(a)

A “responsible bidder” is defined as:

- 1.a contractor or subcontractor who has ***an established business***;
- 2.who has demonstrated the ***capability to perform*** in accordance with the terms of the contract ***without excessive delays***, extensions, cost overruns, or changes ***for which the contractor or subcontractor was held to be responsible, and***



RESPONSIBLE BIDDER La.R.S. 38:2216(C)(2)(a)

3. one who does not have a documented record of past projects resulting in arbitration or litigation in which such ***contractor or subcontractor was found to be at fault.***

Enmon Enterprises, L.L.C. v. City of New Orleans ex rel. New Orleans Aviation Bd., 76 So.3d 548, 553 (La. App. 4 Cir. 9/28/11)



REVISIONS TO La. R.S. 38:2212

A.(1)(a) All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest responsible and responsive bidder who had bid according to the ~~contract, plans, and specifications~~ bidding documents as advertised, and no such public work shall be done except as provided in this Part.

- Technical changes.
- Added “responsive”
- Deletes plans and specifications replacing with “bidding documents”



REVISIONS TO La. R.S. 38:2212

(2) The term "bidding documents" is defined in R.S. 38:2211(A).

"Bidding Documents":

- the bid notice (advertisement),
- plans and specifications,
- bid form,
- bidding instructions,
- addenda,
- special provisions, and
- other written instruments prepared for use by bidders



NO WAIVER OF BIDDING DOCUMENTS

~~(b)(i)~~ **B.(1)** The provisions and requirement of this Section, and those stated in the ~~advertisement for bids, and those required on the bid form~~ **bidding documents** shall not be waived by any entity.

Maintains current law but clarifies that **nothing in the** “**bidding documents**” can be waived.

- However see R.S. 38:2216 M



BID FORM, INFORMATION AND DOCUMENTS SUBMITTED WITH BID

~~(ii)(aa)~~(2) The Any public entity advertising for public work shall use only the Louisiana Uniform Bid Form as promulgated in accordance with the Administrative Procedure Act by the division of administration, office of facility planning and control.

Clarifies that all public entities **SHALL** use **only** the standard bid form **published by the State.**



BID FORM, INFORMATION AND DOCUMENTS SUBMITTED WITH BID

The ~~bid form developed~~ **bidding documents** shall require only the **following** information ~~necessary to determine the lowest bidder and the following sections and information~~ and documentation to be submitted by a bidder at the time designated in the advertisement for bid opening:

- Clarifies that there shall be **no requirement** that any bidder submit anything **at bid time other than those specified in the new statute.**
- *Some exceptions allowed*



BID FORM, INFORMATION AND DOCUMENTS SUBMITTED WITH BID

Bid Security or Bid Bond,
Acknowledgment of Addenda,
Base Bid, Alternates, Signature
of Bidder, Name, Title, and
Address of Bidder, Name of
Firm or Joint Venture,
Corporate Resolution or
written evidence of the
authority of the person
signing the bid, and Louisiana
Contractors License Number,

- **Only** these items may be required at bid time.
- *Some exceptions allowed*



INFORMATION AND DOCUMENTS SUBMITTED WITH BID

1. Bid Security or Bid Bond,
2. Acknowledgment of Addenda,
3. Base Bid,
4. Alternates,
5. Signature of Bidder,
6. Name, Title, and Address of Bidder,
7. Name of Firm or Joint Venture,
8. Corporate Resolution **or written evidence of the authority of the person signing the bid**, and
9. Louisiana Contractors License Number.



BID FORM, INFORMATION AND DOCUMENTS SUBMITTED WITH BID

and on public works projects where unit prices are utilized, a section on the bid form where the unit price utilized in the bid shall be set forth **including a description for each unit**; however, unit prices shall not be utilized for the construction of building projects, unless the unit ~~price is~~ **prices and their extensions are** incorporated into the base bid **or alternates**.

- Where unit prices are used, the **description for each unit shall be stated on the bid form**.
- No change:
 - Unit prices shall not be used for building projects, unless the unit **prices and their extensions are incorporated into the base bid or alternates**.



“OTHER DOCUMENTS” POST BID

(3)(a) (bb) The bidding documents shall not require any bidder, other than the apparent low bidder, to furnish any other information or documentation, including the Attestation Affidavit and the E-Verification Form, any sooner than ten days after the date bids are opened;

- **Only** the apparent low bidder may be required to furnish “other information” within 10 days after the bid opening.
- *Some exceptions allowed*



“OTHER DOCUMENTS” POST BID

... however, the apparent low bidder may submit such information or documentation at any time prior to the expiration of the ten-day period.

- Clarifies the law
- Bidders **may**, but cannot be required to submit the “other documents” sooner than 10 days after bid opening.



“OTHER DOCUMENTS” POST BID

... If the apparent low bidder does not submit the proper information or documentation as required by the bidding documents within the ten-day period, such bidder shall be declared non-responsive,

- Mandatory disqualification for failure to submit “other documents” within 10 days.



“OTHER DOCUMENTS” POST BID

... and the public entity may award the bid to the next lowest bidder, and afford the next lowest bidder not less than ten days from the date the apparent low bidder is declared non-responsive,

The next apparent low bidder **SHALL** have at least 10 days after the first low bidder was disqualified to submit its “other information.”



“OTHER DOCUMENTS” POST BID

... and may continue such process until the public entity either determines the low bidder or rejects all bids.

- The process may continue to the third apparent low bidder and so on until the contract is awarded or all bids rejected.



“OTHER DOCUMENTS” POST BID

The ten-day period shall not be altered or waived by any public entity except the governing authority of any publicly owned commercial aviation airport, the Sewerage and Water Board of New Orleans, the Regional Transit Authority, and all agencies of the City of New Orleans, including but not limited to the ~~Regional Transit Authority~~ and the ~~New Orleans Aviation Board~~

- No waiver of this 10-day rule allowed except for:
 - publicly owned airports,
 - N.O. Sewerage & Water Bd.,
 - Regional Transit Authority, and
 - all agencies of the City of New Orleans



“OTHER DOCUMENTS” POST BID

... who shall require that the other documentation and information referred to in this ~~Subitem~~ Subparagraph be furnished by the two ~~lowest~~ apparent low bidders **no sooner than** three days after the bid opening. The two apparent low bidders may submit such information or documentation at any time prior to the expiration of the three day period.

These entities **SHALL** require that the “other information” be furnished by the 2 apparent low bidders no sooner than 3 days after the bid opening.



“OTHER DOCUMENTS” POST BID

~~(cc)~~ **(b)** Notwithstanding any other provision of law to the contrary the provisions of this Paragraph, all bidders bidding on public works for East Baton Rouge Parish shall submit all bid forms required by statute or by the Louisiana Administrative Code to the governing authority of East Baton Rouge Parish prior to the opening of all bids relative to a contract for public works.

Special rule Baton Rouge:

- all bidders **SHALL** submit all forms required by law **prior to** the opening of bids.
- E-Verify form
- Non-collusion Affidavit
- Criminal attestation



EXEMPTIONS: BID FORM, DOCUMENTS SUBMITTED WITH BID AND 'OTHER' DOCUMENTS

(iii) The provisions of this Subparagraph shall not apply to bid forms of the Department of Transportation and Development pursuant to Title 48 of the Louisiana Revised Statutes of 1950.

- No change.
- LaDOTD is exempt from this sub-paragraph



LaDOTD is only exempt from Title 38 Public Bid Law if:

- There is a statutory exemption, or
- Conflicts with Title 48
 - *Barber Bros. Contracting Co., LLC v. State ex rel. Dept. of Transp. and Development*, 2011–2305 (La.App. 1st Cir.11/8/12), 110 So.3d 1085, 1088–89, writ denied, 2012–2680 (La.2/8/13), 108 So.3d 87
 - *JB James Construction, L.L.C. v. Louisiana Department of Transportation and Development*, 11–1086, 2011 WL 6776999 (La.App. 1 Cir. 12/21/11), writ denied 12–0237 (La.3/30/12), 85 So.3d 122.



EXEMPTIONS: BID FORM, DOCUMENTS SUBMITTED WITH BID AND 'OTHER' DOCUMENTS

(4) Notwithstanding any other provision of law ..., the Acknowledgment of Addenda to the bid form provided for in this Section for the public bid of public works conducted by the New Orleans Sewerage and Water Board shall also include attachment of the addenda if pricing information is contained therein and the addenda requires attachment.

Special rule for New Orleans Sewerage and Water Board

- Acknowledgment of Addenda **SHALL** also include attachment of the addenda if pricing information is contained therein and the addenda requires attachment.



WRITTEN AUTHORITY TO SIGN BID

~~(c)(i) (5) Evidence Written evidence of agency, corporate, or partnership the authority of the person signing the bid for public works shall be required for submission of a bid to the division of administration or the state of Louisiana submitted at the time of bidding.~~

- These revisions clarify existing law.
- Written documentation of authority to sign bid **SHALL be submitted at the time of bidding** to document the authority of the person signing the bid.



WRITTEN AUTHORITY TO SIGN BID

The authority of the signature of the person submitting the bid shall be deemed sufficient and acceptable if any of the following conditions are met:

~~(aa)~~ **(a)** The signature on the bid is that of any corporate officer listed on the most current annual report on file with the secretary of state, or the signature on the bid is that of any member of a partnership or ~~partnership in commendam~~, **limited liability company, limited liability partnership, or other legal entity** listed in the most current ~~partnership~~ **business** records on file with the secretary of state.

The documentation **shall** be sufficient if the signature on the bid is that of :

- a corporate officer or member of a legal entity on file with the secretary of state, or



WRITTEN AUTHORITY TO SIGN BID

~~(bb)~~ **(b)** The signature on the bid is that of an authorized representative as documented by the legal entity certifying the authority of the person.

~~(cc)~~ **(c)** The legal entity has filed in the appropriate records of the secretary of state of this state, an affidavit, resolution, or other acknowledged or authentic document indicating the names of all parties authorized to submit bids for public contracts.

The documentation **shall** be sufficient if the signature on the bid is that of :

- an authorized person as certified by the legal entity, or
- a person listed in an affidavit or other documentation on file with the secretary of state.



DELIVERY OF BIDS

~~(ii) (6)(a) Except as provided in Subparagraph (f) of this Paragraph, each Each bid shall be either hand delivered by the bidder or his agent in which instance the deliverer shall be handed a written receipt, or such bid shall be sent by registered or certified mail with a return receipt requested, or shall be submitted electronically as provided in Subsection E of this Section.~~

Changes the law to allow for bids to be submitted electronically as provided in Subsection E.

Bids may now be submitted by:

1. hand delivery
2. registered or certified mail, or
3. electronic means as provided in Subsection 'E'



DELIVERY OF BIDS

No public entity shall accept or take any bids, including receiving any hand delivered bids, on days which are recognized as holidays by the United States Postal Service. ~~The Department of Transportation and Development and facility planning and control section under the division of administration shall keep on file a list of all states which have passed a bid preference law.~~

- No change
- No bidding on holidays recognized by the US Postal Service



WRITTEN WORDS GOVERN

(b) Only for the purpose of interpretation of the base bid total and alternate bids, when applicable, written words shall govern if a conflict exists between words and numerals.

- New law makes clear that written words **SHALL govern** if a conflict exists between words and numerals of the base bid total or alternate bids.



UNIT PRICES GOVERN BID TABULATION

(c) If the public works requires unit price bids and there is a discrepancy between the base bid total and the sum of the extended unit prices, the unit price bid shall govern.

- New law clarifies, where unit prices are stated on the bid form, the unit prices govern if the base bid does not accurately total the summation of the unit prices.



CONTRACT LIMIT

~~(d)~~ C.(1) The-Except as provided in Paragraphs (2) and (3) of this Subsection, the term "contract limit" as used herein shall be equal to the sum of one hundred fifty thousand dollars per project, including labor, materials, and equipment as per the rates in the latest edition of the Associated Equipment Dealers Rental Rate Book and administrative overhead not to exceed fifteen percent;

- As before, the threshold amount ("contract limit") for public works is **\$150,000 inclusive of labor, material and equipment.**



CONTRACT LIMIT

however, provided that beginning February 1, 2015, and annually on February first of each subsequent year, the office of facility planning and control within the division of administration shall adjust the "contract limit" by an amount not to exceed the annual percentage increase in the Consumer Price Index in the preceding year. The office of facility planning and control within the division of administration shall publish the new contract limit for public works contracts in the Louisiana Register in January of each year.

- However, the new law provides for an **automatic adjustment starting Feb. 1, 2015** per increase in the Consumer Price Index.
- FP&C shall publish the new contract limit in the Louisiana Register in January of each year.



DISTRIBUTION OF BIDDING DOCUMENTS

~~(e)(i)~~-D. Each public entity advertising and letting for bid a public works contract under the provisions of this Section shall furnish all prime bidders who request ~~bid~~ **bidding** documents and who are properly licensed by the Louisiana State Licensing Board for Contractors with at least one set of complete ~~bid~~ **bidding** documents.

- Technical revision
- At least one set of “bidding documents” shall be furnished upon request to any properly licensed contractor.



DISTRIBUTION OF BIDDING DOCUMENTS

The public entity may require a deposit on the ~~bid~~ bidding documents; however, the total cost of the deposit, including handling fees and other costs shall not exceed twice the actual cost of reproduction.

- Only technical change.
- A public entity may require a deposit in an amount not more than twice the actual cost or reproduction.



DISTRIBUTION OF BIDDING DOCUMENTS

Deposits on the first set of documents furnished bona fide prime bidders ~~will~~ shall be fully refunded upon return of the documents no later than ten days after receipt of bids. On other sets of documents furnished to bidders, the deposit less the actual cost of reproduction, ~~will~~ shall be refunded upon return of the documents no later than ten days after receipt of bids.

- Only technical change.
- 100% refund of deposit on 1st set within 10 days after return.
- Refund on other sets minus the actual cost of reproduction within 10 days after return.



DISTRIBUTION OF BIDDING DOCUMENTS

Where the public entity, itself, prepares and distributes the ~~contract~~ **bidding** documents, the public entity may, in lieu of a deposit, charge a fee for the documents, which **fee** shall not exceed the actual cost of reproduction.

- Only technical change.
- Instead of a “deposit” the Public Entity may charge a “fee” not more than the actual cost of reproduction.



DISTRIBUTION OF BIDDING DOCUMENTS

Prime bidders shall obtain an original set of electronic or paper bidding documents either from the public entity or the design professional who prepared such documents.

- ***New law***
 - Each “PRIME BIDDER” is **required to obtain** an original set of bidding documents (paper or electronic), **from the public entity or the Designer.**



DISTRIBUTION OF BIDDING DOCUMENTS

Either the public entity or the design professional may choose the method and service of plan distribution. When the public entity utilizes an electronic bid submittal system, bidding documents shall be distributed in the manner chosen by the public entity. At its sole discretion, the public entity may authorize its design professional of record to choose an electronic bid submittal system.

- *New law*
 - Allows plan distribution by either electronic and/or paper distribution



DISTRIBUTION OF BIDDING DOCUMENTS

The public entity or its design professional of record shall maintain a list of all prime bidders for the purpose of addenda distribution.

- *New law*
 - the public entity or Designer shall maintain a list of all prime bidders for the purpose of addenda distribution.



ELECTRONIC BIDDING - Subsection 'E'

~~(f)(i) E. (1) Contractors shall be provided the option to submit bids for public contracts through~~ Public entities shall provide, as an additional bidding option, a uniform and secure electronic interactive system for the submittal of bids for public works requiring competitive bidding. ~~Political subdivisions~~

- Clarification of existing law
- Public entities **SHALL** provide, as an **additional bidding option, a uniform and secure electronic interactive system for the submittal of bids.**



ELECTRONIC BIDDING - Subsection 'E'

Any public entity providing such system shall follow the standards for the receipt of electronic bids adopted by the office of the governor, division of administration, and the office of information technology as provided for in LAC 4:XV.701, ~~and shall make the appropriate provisions necessary for the acceptance of electronic bids for all purchases requiring competitive bidding as required by this Section.~~

- Technical change
- All public entities using electronic bidding **SHALL** follow the FP&C standards as provided for in LAC 4:XV.701



ELECTRONIC BIDDING - Subsection 'E'

Any special condition or requirement for the submission shall be specified in the advertisement for bids required by this Section.

- No change.
- Any special requirement (*for submitting electronic bids*) shall be specified in the advertisement for bids.



ELECTRONIC BIDDING - Subsection 'E'

~~(ii)~~**(2)** Public entities that are currently without available ~~high speed~~ high-speed Internet access ~~will~~ shall be exempt from this requirement until such time that ~~high speed~~ high-speed Internet access becomes available.

~~(iii)~~**(3)** Any parish with a police jury form of government and a population of less than twenty thousand shall be exempt from the provisions of this ~~Subparagraph~~ Subsection.

- Clarifies the law:
- *EXEMPTIONS from electronic bidding*
 - any public entity that does not have high-speed internet access
 - any police jury parish with a population less than 20,000



ELECTRONIC BIDDING - Subsection 'E'

~~(iv)~~ **(4)** Any city or municipality with a population of less than ten thousand shall be exempt from the provisions of this ~~Subparagraph~~ Subsection.

~~(v)~~ **(5)** Any ~~special service district created by a police jury form of government and~~ other public entity which is unable to comply with R.S. 38:2212(A)(1)(f)(i) the electronic bidding provisions of this Subsection without securing and expending additional funding shall be exempt from its requirements.

- EXEMPTIONS from electronic bidding
- any city or town less than 10,000
- any other public entity unable to comply without expending additional funding.



ELECTRONIC BIDDING - Subsection 'E'

~~(vi)~~ **(6)** Public entities shall have the option to require that all bids be submitted electronically for any competitive bid let out for public bid.

~~(vii)~~ **(7)** Public entities ~~must~~ **shall** include all ~~bid~~ **bidding** documents as defined in R.S. ~~38:2211(A)(1)~~ **38:2211(A)(2)**, on the electronic website accepting the electronic bids.

~~(g)~~ Repealed by Acts 1999, No. 768, §2.

Only technical changes.

- **Option** to require that all bids be submitted electronically.
- If electronic bidding is selected, **all of the bidding documents shall be available on the bidding website.**



ESCALATION CLAUSES

(2) F. The bid specification may contemplate a fixed escalation or de-escalation in accordance with the United States Bureau of Labor Statistic's Consumer Price Index and/or Wholesale or the Producer Price Index. Bids based on specifications which are subject to a recognized escalation index shall be legal and valid for any item of a public work, at the discretion of the public entity.

The Act changes the law

- allows escalation/de-escalation provisions in public works contracts using the Consumer Price Index or the Producer Price Index
- for any item of a public work.



ADVERTISEMENT FOR BIDS

~~(3)(a)~~ **G. (1)** The advertisement required by this Section for any contract for public works shall be published once a week for three different weeks in a newspaper in the locality, and the first advertisement shall appear at least twenty-five days before the opening of bids. In addition to the newspaper advertisement, a public entity may also publish an advertisement by electronic media available to the general public.

~~(b)~~ **(2)** The first publication of the advertisement shall not occur on a Saturday, Sunday, or legal holiday. ~~Plans and specifications~~

No change in the law.

- published once a week for 3 weeks
- in a newspaper in the locality / optional electronic publication
- first advertisement shall not be on a legal holiday and shall appear at least 25 days before bid opening



ADVERTISEMENT FOR BIDS

All bidding documents shall be available to bidders on the day of the first advertisement and shall be available until twenty-four hours before the bid opening date.

- Technical change to clarify the law.
- all “bidding documents” shall be available when the project is first advertised and remain available until 24-hours before bidding.



ESTIMATE OF PROBABLE COST

Technical Changes

H. Every public entity intending to advertise a public work for bids shall estimate the probable construction costs of such public work or obtain such estimate from the project designer prior to advertising such public work for bids.

- Mandates that all public entities **SHALL** have an estimate of the probable construction costs **prior to advertising.**



ESTIMATE OF PROBABLE COST

Technical Changes

No public entity shall advertise a public work for bids unless funds that meet or exceed the estimate of the probable construction costs have been budgeted by the public entity for the project.

- Prohibits advertisement unless funds have been budgeted that meet or exceed the estimate of the **probable construction costs for the project.**



ESTIMATE OF PROBABLE COST

NEW PROVISION

The estimate of probable construction costs for the project shall be made available at the time of bid opening, either by posting such estimate electronically or announcing aloud such estimate at the bid opening.

- The estimate of probable construction costs **SHALL**
- be **posted** **electronically** or **announced publicly** at the time of bid opening,



BID OPENING

Deleted from La. R.S. 38:2212

- Governed under La. R.S. 38:2214
 - Public entity shall, in the advertisement, designate the time and place that the bids will be received and shall at that time and place publicly open the bids and read them aloud



JUST CAUSE TO REJECT BIDS

- Governed under La. R.S. 38:2214
 - Public entity may reject any and all bids for just cause.
 - Just cause is defined, but not limited to:
 - (1) unavailability of funds for construction
 - (2) all bids are higher than the pre-bid estimate
 - (3) substantial change in design prior to the award
 - (4) decision not to build within 12 months after bids
 - (5) disqualification of all bidders



WITHDRAWAL OF BIDS - ERROR

- Governed under La. R.S. 38:2214

Bids containing

- patently obvious unintentional, and substantial clerical or mathematical errors made in the compilation of the bid,

May be withdrawn by the contractor if:

- sworn written evidence is furnished within 48 hours of the bid
- the errors are clearly shown from the bid prep documents
- the error is not merely a judgment error, and
- the bid was submitted in good faith



WITHDRAWAL OF BIDS - ERROR

- Governed under La. R.S. 38:2214

A contractor who attempts to withdraw a bid

- shall not be allowed to resubmit a bid on the project
- shall not supply any material or labor to, or perform any subcontract work on the project



AVAILABILITY OF DOCUMENTS SUBMITTED

All new law

Any and all bidders' information shall be available upon request, either no sooner than fourteen days following the bid opening or after the recommendation of award by the public entity or the design professional, whichever occurs first, and the requester shall pay reasonable reproduction costs. The provisions of this Subsection shall not apply to the Department of Transportation and Development.

- Information (and documents) submitted by the bidders shall not be publicly available until 14 days after bid opening or recommendation of award whichever occurs first.
- The provisions of this Subsection shall not apply to the LaDOTD.



Pre-Bid Conference

(d)(i) I. When a design professional or public entity mandates attendance by prospective bidders at pre-bid conferences as a prerequisite to bid on a public works project, the date, place, and time of the pre-bid conference shall be stated in the first each advertisement notice.

(ii) All prospective bidders ~~in the orphan well plug and abandonment program within the Louisiana Department of Natural Resources~~ shall be present at the beginning of the pre-bid conference and shall remain in attendance for the duration of the conference. Any prospective bidder who fails to attend the conference or remain for the duration shall be prohibited from submitting a bid for the project.

Changes the law:

- All bidders SHALL attend the entire pre-bid conference, from start to finish.
- Failure to attend entire pre-bid conference SHALL disqualify contractor.



Alternates

(e) J. Any proposal **Bidding documents** shall include no more than three alternates. An alternate bid by any name is still an alternate. Alternates, if accepted, shall be accepted in the order in which they are listed on the bid form. Determination of the low bidder shall be on the basis of the sum of the base bid and any alternates accepted. However, the public entity shall reserve the right to accept alternates in any order which does not affect determination of the low bidder.

Only technical change.

- Maximum of 3 alternates.
- ***See new definition of “alternate” in 38:2211.***
- Alternates may only be accepted in order listed.
- Public entity shall have the right to accept alternates in any order which does not affect determination of the low bidder.



Allowances

(f) K. Use of allowances in ~~proposals~~ bidding documents shall be restricted to minor items and shall be limited to hardware, face brick, landscaping, electric light fixtures, miscellaneous steel, tile, wallpaper and other exterior finishes, fixtures and furnishings, and carpeting. Allowances may not be utilized by the design professional or public entity to control the selection of a subcontractor or supplier.

Allowances now include:

- hardware,
- face brick,
- landscaping,
- electric light fixtures,
- miscellaneous steel,
- tile,
- wallpaper and
- other exterior finishes,
- fixtures and furnishings,
- and
- carpeting



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

www.bswllp.com/publicbid4

10 minute break





Construction Manager

(g)(i) **L.(1)** No construction manager or any other third-party consultant employed by a public entity may manage a construction project as a general contractor or act in the role of the general contractor to oversee, direct, or coordinate individual trade contractors on behalf of the public entity, or accept bids or itself bid on the public work or components of the public work with respect to which the manager or consultant is employed or contracted to manage or consult.

Maintains general prohibition.

- A person hired to manage a construction project **may not act in the role of contractor** to oversee, direct, or coordinate individual trade contractors on behalf of the public entity, **or accept bids or itself bid on any part of the project.**



Construction Manager At Risk - **NEW LAW**

Act 782 Regular Session, 2014

Signed by the Governor - *Effective August 1, 2014*

R.S. 38:2225.2.4 is hereby enacted

- Regardless of any other law that might prohibit the use of CM at risk, this new law **allows but does not mandate** the use of this method.
- **\$25 million is the minimum size for a qualifying project.**



Construction Manager At Risk - **NEW LAW**

- OWNER contracts with Design Professional
- OWNER contracts separately with CMAR contractor
 - preconstruction phase AND/OR
 - construction services to build the project

THIS IS NOT DESIGN-BUILD WHERE CONTRACTOR HIRES DESIGNER.



Construction Manager At Risk - **NEW LAW**

CMAR selected: Request for Qualifications (RFQ)

- Selection Committee SHALL have no more than 5 people:
 - One design professional in the discipline of the project.
 - One licensed contractor in the discipline of the project.
 - One representative of the owner.
 - Two members at large (?).



Construction Manager At Risk - **NEW LAW**

The results of the selection review committee, inclusive of its findings, grading, score sheets, and recommendations, shall be available for review by all proposers and **shall be deemed public records**.



Construction Manager At Risk - **NEW LAW**

The RFQ to solicit for the CMAR **SHALL**:

- be advertised in the official journal of the owner
- if one exists, on the Owner's Internet website,
and
- be advertised at least two times within the 30
day period prior to the deadline for responses.



Construction Manager At Risk - **NEW LAW**

The RFQ to solicit for the CMAR **SHALL** include:

- The preconstruction scope of services
- Submittal criteria for the project
- Procurement grading criteria
- Scoring methodology
- Fees to be paid the CMAR preconstruction



Construction Manager At Risk - **NEW LAW**

NO LEGAL CHALLENGE to the choice of the CMAR
except for:

- fraud,
- bias for pecuniary or personal reasons not related to the taxpayers' interest, or
- arbitrary and capricious selection by the owner.



Construction Manager At Risk - **NEW LAW**

Selection of the design professional is not governed by this new statute.

Public entities are still required to select providers of design professional services on the basis of competence and qualifications.

Price or price-related information shall not be used as a factor in the selection. La. R.S. 38:2318.1 (Hammett Act)



Construction Manager At Risk - **NEW LAW**

(5) If the benefits of using the CMAR method reduce as the design process progresses, the owner shall select the CMAR contractor either before, but not later than, when the design professional's design is not more than thirty percent complete.

Public Entity may determine **when to engage** the CMAR.

- **If** the advantage of having the CMAR in the project during design lessen as the design progresses, **then** the CMAR shall be selected no later than **when the design is 30% complete.**



Construction Manager At Risk - **NEW LAW**

The CMAR SHALL

- provide to the owner a guaranteed maximum price for construction of the project, before or upon completion of the final design.



Construction Manager At Risk - **NEW LAW**

If the Owner and CMAR negotiate and agree to:

- guaranteed maximum price (GMP)
- constructability
- construction phasing
- sequencing, and
- time to complete the project

Then Owner/CMAR enter into construction contract.

If not, Owner uses Public Bid to award construction contract.



Change Orders

R.S. 38:2212

~~(4)~~M. **(1)** All public work contracts shall contain provisions authorizing the issuance of change orders within the scope of the contract.

~~(5)~~ **(2)** All change orders shall be in writing or in electronic format if the public entity has the capability to receive change orders electronically. All change orders shall be signed by the contractor and the public entity or its design representative.

The new Act changes the law:

- Electronic format is now permitted for change orders.
- To be a “change order” it **SHALL be signed by:**
 - **the contractor**
and
 - the public entity or its design representative



Change Orders

R.S. 38:2212

The new Act changes the law:

- *Thus, a document. such as a construction change directive (CCD) signed only by the Owner and Architect but never signed by the Contractor, cannot as a matter of law, serve as an authorization to change the “contract price, contract time, or an addition, deletion, or revision of work.”*



Change Orders

R.S. 38:2212

(3) The public entity shall pay the contractor for work performed by change order not later than sixty days after the date the public entity approves the application for payment for completion of the work performed in the change order.

The new Act changes the law:

- If the document is a “change order” then
- the public Owner **SHALL pay the change order not later than 60 days after the date the public entity approves the application for payment that includes the “CHANGE ORDER.”**



La.R.S. 38:2191 *PROMPT PAY*

- A. All public entities shall promptly pay:
1. all progressive stage payments and final payments when they respectively become due and payable under the contract.



La.R.S. 38:2191 *PROMPT PAY*

Amended by ACT 487 – 2014

B. Any public entity failing to make any progressive stage payment within **forty-five days** following receipt of a certified request for payment by the public entity without reasonable cause shall be liable for reasonable attorney fees.



La.R.S. 38:2191 *PROMPT PAY*

Amended by **ACT 487 – 2014**

D. Any public entity failing to make any **progressive stage payments** arbitrarily or without reasonable cause, **or any final payment** when due as provided in this Section, shall be subject to **mandamus to compel the payment** of the sums due under the contract up to the amount of the appropriation made for the award and execution of the contract, **including any authorized change orders.**



La.R.S. 38:2191 *PROMPT PAY*

C. The provisions of this Section shall not be subject to waiver by contract.



NEWEST CASE - La.R.S. 38:2191 *PROMPT PAY*

Wallace C. Drennan, Inc. v. St. Charles Parish, 14-89 (La.App. 5 Cir. 8/28/14),
--- So.3d ----, 2014 WL 4243154 (La.App. 5 Cir.)

- Parish refused to pay approved pay application asserting it had overpaid on the previous applications for payments.
- Parish challenged right of Contractor to *mandamus action*.
- **Issue: *Whether a Contractor is entitled to use mandamus.***
- Court held that R.S. 38:2191 is an exception to the general rule that limits the right to a mandamus to “cases where the law provides no relief by ordinary means.”



ACT No. 748

La. R.S. R.S. 39:126

The prior approval of the Joint Legislative Committee on the Budget is required for one or more change orders that cause an excess in the aggregate of one hundred thousand dollars per month for a project undertaken pursuant to an appropriation in the Capital Outlay Act. In addition, a change order for a project undertaken pursuant to this Part shall also be subject to the approval of the commissioner of administration. Any change order in excess of fifty thousand dollars but less than one hundred thousand dollars shall be submitted to the Joint Legislative Committee on the Budget for review but shall not require committee approval.

La. R.S. 39:126 **AMENDED (2014)**

Now **prior approval** by Joint Legislative Committee is required for:

- **one or more change orders** that cause an excess **in the aggregate** of \$100,000 per month for a project undertaken pursuant to an appropriation in the ***Capital Outlay Act.***



R.S. 38 § 2222 Change orders; recordation

Added by Acts 2011, No. 343, § 2

Recordation in the mortgage records **required**, if:

- change order adds 10% or more and at least \$10,000
or
- all change orders aggregate to an amount of 20% or
more

The provisions of this Section shall not apply to the FP&C or to State Purchasing office.



Change Order Outside Scope

~~(6)~~ (4) Any change order outside the scope of the contract in excess of the contract limit as defined herein shall be let out for public bid as provided by this Part.

No change to existing law.

- If the change order exceeds “contract limit” then:
- Determination must be made ***whether the change is “within” or “outside” the “scope” of the contract.***



Change Order Outside Scope

No change to existing law.

- If the change order is ***less than \$150,000***, then the public entity may negotiate with the original contractor regardless of whether the change is within or outside the original scope.
- If the change order is ***within the scope*** of the original contract as advertised, the public entity may negotiate with the original contractor regardless of the price of the change.
- If the change order is ***outside the scope*** of the contract and is ***\$150,000 or more***, then the change must be publicly bid.



Change Order Outside Scope

Roy Sattler Const., Inc. v. City of Bossier City, 903 So.2d 503, 39,545 (La.App. 2 Cir. 4/29/05).

- Payment to public works contractor was **limited to reasonable cost only** (*quantum meruit*) as the additional work was **outside scope** of the original contract and in excess of the “contract limit.”
- The recovery was limited notwithstanding that the “change order” was, **in fact**, signed by the City, because the change order was in violation of prohibitory law and thus **null and void**.



Change Order Outside Scope

La. Atty. Gen. Op. No. 03-0263 (8-6-2003)

- The determination whether the changes are within the scope of the contract starts with the **project description** that was used **in the advertisement and in the specifications**.
- *The original contract identified only one road.*
- The change *to include additional roads in excess of \$150,000* must be separately bid because the additional work is outside the scope of the contract.



Change Orders

(7) (5) Any change order pertaining to public work, not required by this Part to be ~~put~~ let out for public bid, shall either be negotiated in the best interest of the public entity or let out for public bid as provided by this Part. Where the change order is negotiated, the public entity shall require that ~~said~~ such change order be fully documented and itemized as to costs, including material quantities, material costs, taxes, insurance, employee benefits, other related costs, profit, and overhead. Where certain unit prices are contained in the initial contract, no deviations shall be allowed in computing negotiated change order costs.

Only technical changes.

Change orders not bid shall:

- be negotiated in the best interest of the public entity
- be fully documented and itemized as to costs, taxes, insurance, benefits, profit and overhead
- If unit prices are in the contract, *no deviations allowed to price the change order*



Addenda

€. O. (1) Except as provided by Paragraph (2) of this Subsection, the public entity may, through the issuance of an addendum, extend the bid period for up to thirty days, without the requirement of readvertising as provided by Subsection A of this Section.

Technical changes only.

- The bid date may be extended by addenda for up to 30 days, without the requirement of re-advertising.



Addenda

(2)(a) If a public entity issues or causes to be issued on a public work exceeding the contract limit any addendum modifying ~~plans and specifications~~ the bidding documents within a period of seven days prior to the advertised time, or the time extended as provided for in this Section, for the opening of bids, excluding Saturdays, Sundays, and any other legal holidays, then the public entity shall transmit a copy of the addendum to all prime bidders who have requested ~~bid~~ bidding documents pursuant to ~~Subparagraph (A)(1)(e)~~ Subsection D of this Section.

Technical changes only.

- If an addendum is issued within 7 days prior to advertise bid opening, excluding legal holidays
- then the addendum shall be sent to all to all prime bidders who have requested bidding documents



Addenda

This shall be completed within twenty-four hours of the issuance of the addendum and may be delivered by either facsimile transmission, e-mail, other electronic means, **or by hand, or by overnight delivery using a nationally recognized carrier** provided the prime bidder has supplied the facsimile transmission number or e-mail address to the public entity. ~~In addition to the transmission required in this Paragraph, a copy of the addendum shall be sent by regular mail to all prime bidders who have requested bid documents pursuant to Subparagraph (A)(1)(e) of this Section.~~ If the addendum cannot be transmitted by facsimile transmission, e-mail, or other electronic means, **overnight delivery using a nationally recognized carrier**, or otherwise effected by hand delivery, the public entity shall postpone the bid opening by at least seven days.

New provision regarding delivery:

- facsimile transmission
- e-mail
- other electronic means,
- by hand,
- **or overnight delivery using a nationally recognized carrier.**
- The new law **deletes** rule that the addendum be sent by regular mail.



Addenda

b) No public entity shall issue or cause to be issued any addenda modifying plans and ~~specifications~~ the bidding documents within a period of seventy-two hours prior to the advertised time for the opening of bids, excluding Saturdays, Sundays, and any other legal holidays; however, if the necessity arises to issue an addendum modifying plans and ~~specifications~~ the bidding documents within the seventy-two-hour period prior to the advertised time for the opening of bids, then the opening of bids shall be extended for at least seven but not more than twenty-one working days, without the requirement of readvertising as provided by Subsection A of this Section. The addendum shall state the revised time and date for the opening of bids.

Technical changes only.

- If an addenda is issued within the 72-hours before bid time, then bid opening shall be extended for *at least 7 but not more than 21 working days*.
- The addendum shall state the revised bidding time and date



Closed Specifications

~~F. T.~~ (1) Whenever a public entity desires to purchase technical equipment, apparatus, machinery, materials, or supplies of a certain type and such purchases are clearly in the public interest, the public entity may specify a particular brand, make, or manufacturer in the ~~specifications~~ **bidding documents** let out for public bid as provided by this Part. If a particular brand, make, or manufacturer is specified, the model or catalog number also shall be specified.

No change in the law.

A specific named product may be identified in the specifications, but the specification SHALL state:

- the model or catalog number
- that the named product is used only as a quality standard



Closed Specifications

(2) Wherever in specifications **a public entity specifies** the name of a certain brand, make, manufacturer, or uses a definite specification is utilized, the specifications **bidding documents** shall state clearly that they are used only to denote the quality standard of product desired and that they do not restrict bidders to the specific brand, make, manufacturer, or specification named; that they are used only to set forth and convey to prospective bidders the general style, type, character, and quality of product desired; and that equivalent products **will may** be acceptable. It shall be the responsibility of the professionally employed architect or engineer to determine what is considered an equivalent product on any and all projects in which he has been legally employed to perform his professional services.

- that Bidders are NOT restricted to the specific named product
- the named product is used only to convey the general style, character, and quality

It shall be the Designer's responsibility to determine what is an equivalent product subject to judicial review.



Closed Specifications – *Prior Approval*

“Prior approval” *allowed* under La. R.S. 38:2291-2292

- if the Designer has made a declaration that the specifications are “closed” and
- the Designer has obtained the approval of the public entity identifying specific reasons necessitating the declaration.



Closed Specifications – *Prior Approval*

By contrast, La. R.S. 38:2295(c) states:

“If a potential supplier wishes to submit for prior approval..., he shall do so no later than 7 working days prior to the bid opening.”

- Thus if the Contractor or supplier wants assurance that a different product is approved before bidding, then the product must be submitted pre-bid.

Absent a declared “closed specification, the Designer should evaluate post-bid submittal for equal utility.



Closed Specifications – *Prior Approval*

NEWEST CASE

Akers v. Bernhard Mechanical Contractors, Inc., 48,871 (La.App. 2 Cir. 4/16/14),
137 So.3d 818

Subcontractor sued for unpaid amounts arising from refusal of the Public Entity to accept an equivalent product which was **NOT submitted for prior approval as required by the specifications.**

The Court held that:

- * The Public Bid Law prohibits “closed specifications.”
- * The proposed equipment was equivalent to the specified brand, and thus City had no basis to require prior approval.



Maintenance Contracts

~~U.G. Notwithstanding the provisions of Subsection M of this Section relative to the financing of public works contracts by a contractor, public **Public** entities are hereby authorized to **may** enter into professional maintenance contracts for the repair and maintenance of water storage tanks **public facilities** owned, controlled, or operated by a public entity for a fixed annual fee.~~

The new Act broadens the use of maintenance contracts.

- Deleted restriction to “professional” maintenance/repair contracts
- Restriction to “water storage facilities” deleted



Maintenance Contracts

Such contracts shall extend for a duration of not less than two years. Any such contract entered into by a public entity shall include a nonappropriation clause and shall not be considered a debt of the public entity. Such a ~~professional~~ maintenance contract shall not be considered a public works contract.

- May now be used on any public facility.
- May be for a fixed annual fee of not less than 2 years.
- These are not “public works” contracts and are not subject to the Public Bid Laws.



Disqualification of Bidder as Non-responsible

~~J-X.~~ **(1)** If the public entity letting the contract proposes to disqualify any bidder, **either as a potential bidder or as the low bidder**, on grounds that such bidder is not a "responsible bidder" such public entity shall **do all of the following:**

~~(1)~~ **(a)** Give written notice of the proposed ~~disqualification~~ **action** to such bidder and include in the written notice all reasons for the proposed disqualification action; and

~~(2)~~ **(b)** Give ~~such bidder,~~ **the bidder** who is proposed to be disqualified the opportunity to be heard at an informal hearing at which such bidder is afforded the opportunity to refute the reasons for the ~~disqualification~~ **proposed action.**

The law has been changed.

Now requires the following to disqualify a "potential bidder" or the low bidder:

- written notice including all reasons;
- opportunity to be heard at an informal hearing;



Disqualification of Bidder as Non-responsible

(2) The informal hearing shall be conducted prior to award of the public work.

(3) The informal hearing shall be a condition precedent to any action by the bidder adverse to the public entity, its representatives, employees, and designers.

- conduct informal hearing prior to award of the contract;
- the informal hearing shall be a condition precedent to any legal action by the bidder proposed to be disqualified;



Disqualification of Bidder as Non-responsive

(4)The informal hearing shall be conducted by the public entity not later than five business days after the date of the notice of disqualification of such bidder. The public entity shall issue a ruling in writing and deliver it to the affected bidder not later than five business days after the date of the informal hearing.

- conduct informal hearing within 5 business days after the disqualification notice;
- A written ruling shall be issued within 5 business days after the informal hearing;



Disqualification of Bidder as Non-responsible

(5) No award of the contract for the public work shall be made by the public entity prior to the expiration of at least five working days following the date of issuance of the decision by the hearing official.

(6)The provisions of this Subsection shall not apply to such actions of the Department of Transportation and Development.

- No award of the contract prior the expiration of 5 working days after the written decision;

This Subsection shall not apply to the LaDOTD.



Disqualification of Bidder

- ❖ No procedure is provided anywhere in the law for:
 - Disqualification based on failure to be “Responsive”
or
 - To protest award to another bidder.



Disqualification of Bidder – **NEWEST CASE**

Gibson & Associates, Inc. v. La. DOTD, 2013-2069 (La.App. 1 Cir. 9/24/14), --- So.3d ----, 2014 WL 4776149

- 2nd low bidder sued for award of contract
- Trial Court entered an order declaring a violation of the Public Bid law, and awarded contract to Gibson
- First Circuit held that the prevailing bidder is entitled to reasonable attorney fees under R.S. 38: 2220.4 despite non-compliance with procedure under R.S. 38: 2220.2

Refused to follow *Tectrans, Inc. v. New Orleans Aviation Board*, 695 F.Supp.2d 313 (E.D.La. 2010), affd, 10–30247 (5th Cir.2010)



Exception for Contractor as Purchasing Agent for Owner

§. Z. The provisions of this Section shall not apply to purchases of materials and supplies by contractors awarded public works contracts by a public entity; or to subcontractors of ~~said~~ such contractors, who have been appointed or designated agents for the purchase of materials and supplies to be incorporated into a public work pursuant to a contract properly bid in accordance with this Chapter when acting pursuant to said appointment or designation.

No change in the law.

- Contractors/subcontractors may serve as the “**purchasing agent**” for the Owner without public bid purchasing.
- Allows for the tax free procurement by the contractor using the Owner’s tax free status.



REVISIONS TO La. R.S. 38 § 2212.5 Prequalified Bidders

Except for construction or repair of roads and bridges and those contractors providing materials and supplies for construction or repair of roads and bridges, the division of administration may prequalify bidders for historic restoration projects funded by the state. The division of administration shall promulgate rules and regulations setting forth procedures for such prequalification. Historic restoration projects as used herein means repairs, renovations, or reconstruction of state-owned structures which are listed on the National Register of Historic Places or state-owned structures which are eligible for inclusion on the National Register and shall also include the renovation of the Louisiana State University Student Union on the Baton Rouge campus, which has been acknowledged as a Nationally Recognized Architectural Building that is recognized by the American Institute of Architects as having received an Honor Award from the Gulf States Region. After the division of administration has prequalified such bidders, only prequalified bidders may submit bids on those designated projects, and the contracts on those designated projects shall be awarded to the prequalified bidder submitting the lowest responsible **and responsive** bid, which bid for the renovation project of the Louisiana State University Student Union on the Baton Rouge campus only may be for overhead and profit or lump sum. Prior to the execution of the contract for the renovation project of the Louisiana State University Student Union on the Baton Rouge campus, it shall be submitted to the Joint Legislative Committee on the Budget for review and approval.

No substantive change.

- **New Act only removes references to specific projects.**
- **Pre-qualification allowed only for historic restoration projects funded by the state.**



Pre-Qualification Not Allowed

Louisiana Supreme Court.

“There is no legal authority allowing a responsibility determination to be a precondition to bidding on public contracts.”

“Absent statutory law authorizing the prequalification of bidders, we refuse to allow a public entity to engage in a process which eliminates certain bidders from competing before the bidding process even begins.”

***Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Bd.*, 586 So.2d 1354 (La. 1991)**



Revisions To La. R.S. 38 § 2212.10 E-Verify

C. A private employer shall not bid on or otherwise contract with a public entity for the physical performance of services within the state of Louisiana unless the private employer verifies in a sworn affidavit attesting to both of the following:

1) The private employer is registered and participates in a status verification system to verify that all new employees in the state of Louisiana are legal citizens of the United States or are legal aliens.

G. In the event the status verification system expires and extensions are not approved by the federal government, the provisions of this Section shall no longer apply. The executive director of the Louisiana Workforce Commission shall provide written notification to the Louisiana State Law Institute if the status verification system expires and extensions are not approved by the federal government.

- Clarifies that the E-Verify requirement to bid on public works applies only to “new” employees, not all employees engaged prior to the award of the contract.



REVISIONS TO La. R.S. 38 § 2215 Time period for holding bids; issuance of work orders to commence work; exceptions

A. ~~The state or any state agency upon receipt of bids for the undertaking of any public works contract~~ A public entity shall act ~~within thirty~~ not later than forty-five calendar days of ~~such receipt~~ after the date of opening bids to award said such public works contract to the lowest responsible and responsive bidder or to reject all bids. ~~A political subdivision upon receipt of bids for the undertaking of any public works contract shall act within forty-five calendar days of such receipt to award said contract to the lowest responsible bidder or reject all bids.~~ However, the public entity and the lowest responsible and responsive bidder, by mutually written consent, may agree to extend the deadline for award by one or more extensions of thirty calendar days.

The Act changes the law:

- Now ALL public entities shall have 45 calendar days after bid opening to award the contract or reject all bids.
- The deadline may still be extended by agreement.



REVISIONS TO La. R.S. 38 § 2215 Time period for holding bids; issuance of work orders to commence work; exceptions

B. If the lowest responsible and responsive bidder has timely provided all documents required by R.S. 38:2212, and no injunction or temporary restraining order is in effect, the lowest responsible and responsive bidder and the public entity shall execute the contract not later than sixty calendar days after the date of the public entity's award of the contract to the lowest responsible and responsive bidder.

The Act changes the law:

- Absent an injunction, the public entity **shall** execute the contract with the low bidder within **60 calendar days after *award* of the contract**



La. R.S. 42:17 Exceptions to Open Meetings Law
ACT NO. 188 Approved June 24, 2011

The 2011 amendment changed the law, which now provides:

Regardless of whether the character, competence, or the health of a person is to be discussed, an ***“executive session”*** for discussing the award of a public contract is not permitted.

EXCEPTIONS:

- as allowed under the Procurement Code
- strategy sessions or negotiations with respect to prospective litigation ***after*** formal written demand, or actual litigation

See La. Atty. Gen. Op. No. 13-0218 (07/10/2014)



REVISIONS TO La. R.S. 38 § 2215 Time period for holding bids; issuance of work orders to commence work; exceptions

C. The public entity shall issue to the contractor a notice to proceed with the project or work order not later than thirty calendar days following the date of execution of the contract by both parties, whichever execution date is later. However, the public entity and the contractor, upon mutual written consent of both parties, may agree to extend the deadline to issue the notice to proceed.

The Act changes the law:

- The notice to proceed **shall** be given to the contractor within 30 days after the contract is signed unless the parties agree to extend the time.



REVISIONS TO La. R.S. 38 § 2215 Time period for holding bids; issuance of work orders to commence work; exceptions

D. The provisions of this Section shall not be applicable when the contract is to be financed by bonds which are required to be sold after ~~receipt~~ **opening** of bids on the contract, or when the contract is to be financed in whole or in part by federal or other funds which will not be readily available at the time bids are ~~received~~ **opened**, or on contracts which require a poll of the ~~legislature~~ **Legislature** of Louisiana before funds are available to fund the contract.

The Act changes the law:

- The deadlines do not apply if:
 - the project is financed by bonds, federal or other funds **not available prior to bidding.**



REVISIONS TO La. R.S. 38 § 2215 Time period for holding bids; issuance of work orders to commence work; exceptions

~~In the event the~~ **If any** time limit stipulated ~~herein in~~ **this Section** is not applicable because of one of the exceptions outlined ~~above~~ **in this Subsection**, this fact shall be mentioned in the ~~specifications~~ **bidding documents** for the project and in the official advertisement for bids required in accordance with R.S. 38:2212.

~~C. If the contractor has provided all necessary documents to the public entity within ten days of the opening of bids and no bid challenge has been submitted to the public entity, the contractor and public entity shall execute the contract not later than forty five days from the public entity's acceptance of the lowest responsible bid.~~

~~D. Upon the execution of the contract, the public entity, within thirty days thereafter, shall issue to the contractor a notice to proceed with the project. However, upon mutual consent by both parties, the notice to proceed may be extended.~~

E. These provisions shall not be subject to waiver.

The Act changes the law:

- If the time limit in this Section are not applicable because of one of the exceptions, **this fact shall be stated in the bidding documents.**

These provisions shall not be subject to waiver.



SYNOPSIS OF LA. R.S. TITLE 38

Rule of Strict Enforcement - Non-Waiver

Louisiana Supreme Court : *Hamp's Construction, L.L.C., v. The City of New Orleans*, 05-0489 (La. 2/22/06), 924 So.2d 104

- *Public entities are prohibited from waiving any requirements (even informalities) in the Public Bid Law, or in the bidding documents*
- *Public Bid Law is prohibitory law founded on public policy*



SYNOPSIS OF LA. R.S. TITLE 38

Rule of Strict Enforcement - Non-Waiver (*Hamp's*)

- Once the public entity establishes a requirement, that requirement must be uniformly followed by all bidders.
- Accordingly, the public entity should not include any requirements in its bidding documents it considers insignificant or waivable, because once included, these requirements are non-waivable as a matter of law.



SYNOPSIS OF LA. R.S. TITLE 38

Rule of Strict Enforcement - Non-Waiver (*Gilchrist Const.*)

Gilchrist Const. Co. LLC v. East Feliciana Parish Police Jury, 122 So.3d 35, 2012-1307 (La.App. 1 Cir. 7/11/13)

- **The Court rejected Bidder's complaint, that it should receive the award, because the Bidder did not submit its bid in triplicate as required in the advertisement.**
- **Thus, Bidder was "non-responsive" and it can have no right to contest the award to another bidder.**



SYNOPSIS OF LA. R.S. TITLE 38

However, La. R.S. 38:2216 (M)

- Any term, provision, or condition
- of any contract for public works
- which is contrary to or in violation of the Public Bid Law
- is against public policy and shall be unenforceable.
- Any such provision shall be severed from the contract and shall not affect the other provisions.



Project Classification – CONTRACTOR LICENSING LAW

La. R.S. 37:2163:

It shall be the obligation of the architect, engineer, or awarding authority to classify public projects.

Any interested person may object by sending a certified letter to both the Louisiana Licensing Board for Contractors and to the Designer or awarding authority.

An objection must be received by the Board and the Designer or awarding authority at least 10 working days before the bid opening date.



Project Classification – CONTRACTOR LICENSING LAW

La. R.S. 37:2163:

- The objection shall be submitted to the Licensing Board who shall have the power to approve the project classification or add an additional classification.
- The matter shall be resolved no less than 5 days prior to the time when bids are to be opened, unless all parties agree to a delay.



Project Classification – CONTRACTOR LICENSING LAW

La. R.S. 37:2159

- The license of every contractor shall state the contractor's classification
- The licensee **shall not be permitted to bid** or perform any type or types of work not included in the classification under which his license was issued.



Project Classification – CONTRACTOR LICENSING LAW

- (1) Building construction.
- (2) Highway, street, and bridge construction.
- (3) Heavy construction.
- (4) Municipal and public works construction.
- (5) Electrical work.
- (6) Mechanical work.
- (7) Plumbing work.
- (8) Hazardous materials.
- (9) Specialty classifications.
- (10) Residential construction.



TIME LIMITATIONS TO FILE SUIT

§ 2189. Prescription Claims against Contractors

- Any action against the contractor or surety
- in connection with any public works
- shall prescribe **5 years**
- **from the substantial completion**, as defined in R.S. 38:2241.1, **or acceptance of such work, whichever occurs first, or of notice of default of the contractor**



TIME LIMITATIONS TO FILE SUIT

§ 2189. Prescription Claims against Contractors

This **5 year** statute of limitations for bringing action against public works contractor or its surety on contract or bond is **peremptive**.

Bossier Parish School Bd. v. LeBlanc, 48 So.3d 355, 45,632 (La.App. 2 Cir. 9/22/10), writ denied 51 So.3d 13, 2010-2396 (La. 12/17/10).



TIME LIMITATIONS TO FILE SUIT

- “Prescription” under Louisiana law is equivalent to a “statute of limitations” in common law.
- This time, prescribed by law, commences when the claimant knew or should have known that damages occurred.
- The prescriptive time may be interrupted or suspended by activities beyond the claimant’s control.



TIME LIMITATIONS TO FILE SUIT

- “**Peremption**” under Louisiana law is equivalent to a “statute of repose” in common law.
- This time, established by statute, **commences on a date specified** by the statute and **ends on the first business day after the time expires**. Knowledge of the claimant is irrelevant.
- The preemptive time may **NOT** be interrupted or suspended for any reason except the filing of a lawsuit.



TIME LIMITATIONS TO FILE SUIT

§ 2189.1. Prescription; claims by contractors; surety

- Any action by the contractor surety
- against the Public Entity
- in connection with any public works
- shall prescribe **5 years** from the completion, the substantial completion, as defined in R.S. 38:2241.1, or acceptance of such work
- whichever occurs first, or of notice of default of the contractor or other termination of the contract



TIME LIMITATIONS TO FILE SUIT

Contours Unlimited, Inc. v. Board of Com'rs of Port of New Orleans, 630 So.2d 916, writ denied 634 So.2d 863, 1994-0267 (La. 3/18/94)

- The provision in the Port's contract limiting the time within which the contractor could sue the Port to only 30 days was ruled null and void.
- **The Public Entity may not shorten the 5-year period as proscribed by law.**



CONTRACTOR'S DELAY DAMAGES

La. R.S. 38: 2216 (H):

Any provision in a public contract which:

- purports to waive, release, or extinguish the rights of a contractor to recover damages for delays,
- if such delay is caused in whole, or in part, by acts or omissions of the public entity or persons acting on its behalf
- is against public policy and is void.

The void provision shall be severed from the contract and shall not affect the other provisions of the contract.



CONTRACTOR'S DELAY DAMAGES

La. R.S. 38: 2216 (J):

The provisions of this Section shall not be subject to waiver by contract.



SYNOPSIS OF LA. R.S. TITLE 38

La. R.S 38: 2216:

L. (1) There shall be no provision contained in a contract for public works which requires

- a contractor to reimburse a design professional for additional costs for inspections which occur outside of normal working hours.
- The above provision does not apply to Jefferson Parish or the city of New Orleans.



SYNOPSIS OF LA. R.S. TITLE 38

§ 2241.1. Acceptance of governing authority

- An “acceptance” of the work shall be recorded in the mortgage records where the work has been done
- This acceptance shall not be executed **except upon the recommendation of the architect or engineer**



SYNOPSIS OF LA. R.S. TITLE 38

§ 2241.1. Acceptance of governing authority

■ **“Substantial completion” is defined as:**

the finishing of construction, in accordance with the contract documents, to the extent that the public entity can use or occupy the public works or specified area for the use for which it was intended.

■ Recordation of certificate of substantial completion on public works project was effective as an acceptance.

Quality Design & Const. v. City of Gonzales, 977 So.2d 87 (La.App. 1 Cir 2007)



SYNOPSIS OF LA. R.S. TITLE 38

§ 2248. Provisions for withholding payment; punch list

- Punch List
 - Shall include the cost estimates **for each item** of work
 - The estimates are to be based on the costs of correcting each punch list item
 - The **design professional shall retain his working papers**



SYNOPSIS OF LA. R.S. TITLE 38

§ 2248. Provisions for withholding payment; punch list

- Owner shall **not withhold more than the punch list value**
- Punch list **items completed shall be paid** upon expiration of the 45 day lien period
- These provisions **shall not be subject to waiver**
- These provisions do not apply to the La. DOTD



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