

TOP TEN ISSUES IN DEALING WITH THE LOUISIANA PUBLIC BID LAW

**Police Jury Association of Louisiana
December 6, 2007**

**Presented by Richard L. McGimsey
Assistant Attorney General
Louisiana Department of Justice
Charles C. Foti, Jr., Attorney General**

1. Public Work Contracts: Can I do it myself?

- A. Public works projects valued at less than \$100,000 for the total cost of material and value of labor may be done by force account, using regular employees of the public entity or of a publicly owned utility. To determine if your job is under \$100,000, you must add together the cost of materials that will go into the job, the wages and benefits which will be paid to the employees used on the project, the cost of supervision and overhead, and the rental value of the owed equipment which will be used on the job.**
- B. Public entity may provide labor necessary for maintenance of public works once constructed without seeking bids. R.S. 38:2212(I)(1)**
- C. Design build for public contracts prohibited. R.S. 38:2225.2**
- D. Construction Manager prohibited from managing project as general contractor or acting in role of general contractor. R.S. 38:2212A(3)(g).**

2. Purchase of Materials, Supplies and Equipment

- A. For a purchase below \$10,000, no procedure is specified.**
- B. For a purchase between \$10,000 and \$20,000, at least three telephone; facsimile or written quotations must be obtained on the same specification and documented in the procurement file.**
- C. For purchases exceeding \$20,000, the procurement must be advertised and awarded to the low responsive and responsible bidder.**

3. Open Specifications

- A. Every bid spec should include the language of R.S. 38:2212.1C(2). And the specifications must be applied during bid evaluation in a manner which allows competition from products which are generally comparable in quality and functionality.**
- B. An open specification means that you are not arbitrarily excluding products which are functionally equivalent to the one described in the specifications. This would require more of a performance specification approach, where you can require what the performance result is, but not the means by which that result is reached.**
- C. No Sole Source provision in Public Bid Law.**

4. Division of Contracts

- A. Dividing purchases or public works projects so that the thresholds set forth in the law are not reached is explicitly prohibited by the law and will not be sanctioned in cases which come to our office for review.**
- B. You cannot divide purchases by departments within one public entity if the effect is to evade the bid law. You cannot divide orders within a fiscal year in order to evade the bid law. Purchases of commodities which are bought in small but recurring amounts through the year such as paper, sand, gravel, office supplies, vehicle parts, etc. should be bid on an annual basis with purchases orders issued against the resulting contract each time supplies are needed.**

5. Using RFPs for Data Processing and Telecommunications acquisitions

- A. Procurement of telecommunications or data processing equipment, systems and related services may be done by public bids, but may also be done pursuant to a Request for Proposals (RFP).**
- B. RFPs have the advantage of letting the vendor do much of the engineering or planning which may be required with complex systems. They also allow you to use evaluation factors other than price in making an award. The criteria and point value must be set forth in the**

RFP. Some political subdivisions are using RFP's effectively in cases where bids are not required, such as contracts for professional services, insurance, copying service, lease contracts and energy conservation contracts.

6. Waiving informalities

Waiver of bid requirements is prohibited. R.S. 38:2212A(1)(b) provides:

The provisions and requirements of this Section, those stated in the advertisement for bids and those required on the bid form, shall not be considered as informalities and shall not be waived by any public entity.

7. Bid Cancellation & Award

Cancellation. A bid solicitation may be cancelled for any reason before bid opening but after bids are opened only for just cause. Just cause includes, but is not limited, to unavailability of sufficient funds for the project or purchase; all bids come in over budget; substantial change in scope or design of project; or decision not to go forward with the project for at least 12 months. R.S. 38:2214C

Contract Award R.S. 38:2215 provides that within 45 days of bid opening the political subdivision must:

- award the contract to the lowest responsible bidder
- reject all bids for just cause; or
- extend deadline by mutual consent with lowest responsible bidder

Failure to do one of these can result in a mandamus by the court to grant contract to the lowest responsible bidder, even though the political subdivision has other plans or problems.

8. Responsiveness v. Responsibility

- A. An award should be made only after careful review of the apparent low bidder's responsiveness and responsibility.
- B. Responsiveness refers to whether or not the bidder has offered to you in its bid what you were asking for in your specifications. See *Hamp's*

***Construction, LLC v. City of New Orleans*; 924 So. 2d 104, 2005 WL 0489 (La. 2/22/06); *Broadmoor, LLC v. Morial Exhibiton Hall Authority*; 867 So. 2d 651 (La. 3/18/04); *Barron Contractor v City of Natchitoches*; 2004-00173 (La.App. 3 Cir. 7/7/04).**

- C. Responsibility refers to the character or quality of the bidder – whether it is an entity with which you are safe doing business. *Haughton Elevator v State of La.*, 367 So. 2d 1161 (La. 1979); *Rombach v. Parish of Jefferson*; 670 So. 2d 1305, (La. App. 5 Cir. 1996).**
- D. Rejecting a bid because of unresponsiveness requires only that the bidder be informed of why the bid was rejected.**
- E. To disqualify a bidder for the lack of responsibility requires notice to the bidder and the opportunity for a hearing. R.S. 38:2212 J.**

9. Using State Contracts and Piggy Backing on other public contracts:

- A. Political subdivisions may use contracts put in place by the Central Purchasing Office of the Division of Administration (See R.S. 39:1702) - check OSP web site: www.state.la.us/osp for list of available contracts.**
- B. Political subdivisions may make purchases from a local vendor items which are available on state contract (See R.S. 39:1710). Markup over state contract price must be based on total amount of the purchase, not unit prices.**
- C. Political subdivisions may piggy back on valid contracts of other political subdivisions. (See R.S. 33:1321 and following and 39:1702). AG takes expanded view of piggy back authorization.**
- D. R.S. 38:2212.1E provides the authorization to purchase off of GSA contracts but only in accordance with rules and regulations which have been adopted by the central purchasing agency of the division of administration. Rules converts GSA schedules to the Louisiana Multiple Award Schedules (LaMAS). See OSP cite for further information: <http://www.doa.state.la.us/osp/CONTRACTS/LaMAS.htm>**

10. Enforcement

- A. R.S. 38:2220 provides that any contract subject to the Public Bid Law and entered into without complying with the Public Bid Law is null and void. This should be enough cause for alarm to both the vendor and the public entity.**
- B. A bidder or any citizen may always seek an injunction or mandamus to force a public body to comply with the Public Bid Law. Such legal action must be initiated promptly when knowledge of the alleged violation available and after notice to the Attorney General.**
- C. The District Attorney and the Attorney General are given surveillance authority and the right to bring enforcement actions for breaches of the Public Bid Law and to seek injunctions against violations. Any citizen (usually a bidder) can file a complaint with the Attorney General who may investigate the complaint and/or file suit on behalf of the citizen. There is a "whistle blower" protection for the complainant.**
- D. When the DA or the AG seeks enforcement action and obtains a judgment of nullity, the court may award a civil penalty of up to \$50,000 against each public official who authorized the violation.**

You may contact me with questions about the Public Bid Law at (225)326-6020 or by email at mcgimseyr@ag.state.la.us . I will do my best to respond timely to your requests.