

# UNDERSTANDING THE PUBLIC BID LAW

March 9, 2010

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The Louisiana Public Bid Law (La. R.S. 38:2211-2296) is applicable to all political subdivisions and all locally elected public officials. It is also applicable to the state Legislature and the Judiciary. It also applies to all state agencies for Public Works only.

## 1. Application:

### A. Public Works

- ☐ the law applies to contracts for **public works, by public entities, using public funds**.
- ☐ this **includes** construction, remodeling, drainage structures, utilities, improvements, etc.
- ☐ for public works the law becomes applicable when the total cost of a project (including labor and materials) exceeds **\$150,000**. No procedures are prescribed by state law for jobs under \$150,000. R.S. 38:2212A(1)(d)
- ☐ **Design Build** for public works contracts generally prohibited. R.S. 38:2225.2

### B. Use of Force Account: Can I do it myself?

- ☐ jobs valued at **less than \$150,000** may be done by force account, using regular employees. La. R.S. 38:2212B
- ☐ to determine if your job is under \$150,000, you add together the cost of all materials that will go into the job, the **wages and benefits** which will be paid to the employees used in the project, the **cost of supervision and overhead**, and the rental value of the owned equipment which will be used on the job.
- ☐ Public entity may provide labor necessary for **maintenance of public works** once constructed without seeking bids. R.S. 38:2212(I)(1).
- ☐ **Construction manager** prohibited from managing project as a general contractor or acting in role as general contractor. R.S. 38:2212A(3)(g)
- ☐ Public works projects over \$50,000 require the use of **state licensed** contractors and subcontractors. R.S. 37:2150.1.

### C. Materials & Supplies

- ☐ The law applies to **purchases of materials and supplies**
- ☐ this **includes** equipment, vehicles, supplies, and all other movable property
- ☐ it **does not apply to services**, professional or otherwise.
- ☐ The law **does not apply to pure leases**, but does apply to any lease where there is an opportunity to obtain title at any time such as the typical lease purchase.

- R.S. 38:2212.1A sets forth the monetary threshold for bidding:
  - for a purchase **below \$10,000**, no procedure is specified
  - for a purchase **between \$10,000 and \$30,000**, at least three telephone, facsimile or written quotations must be obtained on the same specification and documented in the procurement file.
  - for purchases **exceeding \$30,000**, the procurement must be advertised and awarded to the low responsive and responsible bidder based on timely received sealed bids.
- threshold for bidding purchase of a used or new motor vehicle for conversion into law enforcement vehicle is \$30,000.
- road maintenance or improvement equipment up to \$25,000 may be purchased without being advertised and let out for bids.

## 2. Specifications

### A. Division of Contracts: R.S. 38:2212H

- Under no circumstances shall there be a division or separation of any procurement or public works project into smaller procurements or projects which division or separation would have the effect of avoiding the public bid process. This is explicitly **prohibited** by the law and will not be sanctioned in cases which come to our office for review.

### B. Requirements Contracts

- contracts for materials, supplies, or equipment that will be needed in partial deliveries through the fiscal year must be purchased through a **requirements** contract based on the estimated value of that commodity to be purchased during the fiscal year.
- this will apply to acquisitions such as **office supplies, sand, gravel, gasoline tires, auto parts** and all commodities needed in small but recurring quantities during the fiscal year.
- certain commodities with volatile prices such as a gasoline may require the use of an index price (such as OPUS) to establish a price that adjusts with market conditions. Competition between bidders is based solely on the **margin over index price** which the bidder offers.
- **cost plus** contract arrangements cannot generally be used in public procurement.
- R.S. 38:2212A(3)(f) permits limited allowances in proposals for hardware, face brick, landscaping, electric light fixtures and carpeting.

### C. Open Specifications

- The Public Bid Law has always been very clear on the requirement of **open specifications**. See R.S. 38:2212.1C. Our courts have also been vigilant in holding public bodies to the law. See *State Machinery v. Livingston Parish Drainage* (742 So.2d 26). Our office is also becoming more active in enforcing the open specifications requirement of the law.
- Every bid spec should **include** the open specification language of R.S. 38:2212.1C(2).
- An **open specification** means that you are not arbitrarily excluding products which are functionally equivalent to the one described in the specifications. This requires 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. Specification may refer to a brand name and model number to indicate general quality and character of product sought, but must also clearly state that products of similar quality and character will be acceptable. This is referred to as an “or equal” specification. If equipment is “functionally equivalent” to the brand item specified, it must be acceptable.
- **Alternates**. Specifications may include **no more than three alternates**, which may “add” or “delete” alternates. **An alternate by any other name is still an alternate**. Alternates, if accepted, **shall be accepted in the order that they are listed** on the bid form, unless accepting them out of order does not change the determination of the low bidder. R.S. 38:2212A(3)(e)
- **Change Orders**. All public works contracts must authorize change orders **within the scope of the contract**. There is no dollar or percentage limitation on the size of a change order, but it must be within the scope of the contract. **A delete change order may be used under some circumstances to bring a low bid that is over-budget within the available funding**. R.S. 38:2212A(4)-(7).

### 3. Data Processing and Telecommunications Procurement

- 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).
- An RFP has the advantage of letting the vendor do much of the engineering or planning that may be required with complex systems and allow you to use evaluation factors **other than price** in making the award. The criteria must be set forth and point valued in the RFP.
- Some political subdivisions are using RFP’s effectively in some cases where bids are not required, such as contracts for **professional services, insurance, copying service, lease contracts and energy conservation contracts**.

#### 4. Advertising

- **Advertising** of a bid solicitation is required once procurement meets the bid thresholds.
- The advertisement must appear in a newspaper in the locality of the public entity.
- In addition to a newspaper advertisement, a public entity **may** also publish an advertisement by electronic media available to the general public. R.S.38:2212A(1)(f) mandates, with some exceptions, that public entities provide for electronic bidding.
- **complete** plans and specifications must be available on the date of the first advertisement.
- the advertisement must indicate where detailed specifications can be obtained and when and **where bids will be received and opened.**
- **advertising for purchases** of materials and supplies must be published at least twice, beginning at least 15 days before bids are to be received.
- **advertising for public works** must be published once a week, for three different weeks, with the first ad appearing at least 25 days before the bid opening date
- advertising is the only requirement of the law, but to encourage competition, **specs and bid forms should be mailed** to all known area vendors of the commodities sought or all contractors in the area.
- No addendum shall be issued **within 72 hours** of the bid opening, excluding weekends and legal holidays, without the extension of the bid opening. Extension of at least 7 but no more than 21 working days required but re-advertising not required. R.S. 38:2212C(2)(b)
- if an addendum on a public work contract is issued within 7 days of the bid opening or any extension thereof then the public entity shall **transmit** a copy of the addendum within 24 hours to all prime bidders who have requested bid documents and may be transmitted by fax, e-mail or hand-delivery provided the prime bidders provided necessary information. If the addendum cannot be transmitted the bid opening shall be postponed at least 7 days. Addendum shall also be sent to all prime bidders by regular mail. R.S. 38:2212C(2)(a)

#### 5. Emergencies

- R.S. 38:2212D(1)(a) provides that contracts can be awarded in **emergency** situations without the advertising for bids; notice of the emergency must be advertised in the official journal within 10 days after declaration. See the strict definition of emergency in R.S. 38:1122A(6).
- R.S. 38:2212D(1)(b) added “**Extreme Public Emergency**” which is defined as a catastrophic event that causes the loss of a quorum to certify a an emergency prior to making expenditures to acquire material, supplies, or make repairs necessary to protect life, property or continued function of the public entity. The declaration of an extreme public emergency must be published within 10 days of the declaration or as soon thereafter as practicable.

## 6. Opening of Bids: R.S. 38:2214A

- must be done at the **time and place** indicated in the advertisement
- need not to be done **before the governing body** unless required by your local ordinance
- bids that do not arrive at the designated place by the appointed time cannot be considered and should not even be opened. They should be marked with the time received and **returned to the bidder unopened.**
- sealed bids must be publicly opened and **read aloud**, if feasible
- **bids are public records** and are subject to inspection and copying, but take precautions to avoid tampering
- **no comment** should be made at bid opening about the low bid or about award

## 7. Bid Evaluation

### A. Responsibility and Responsiveness

- an award should be made and the purchase order to contract document should be entered only after careful review of the apparent low bidder's **responsiveness and responsibility:**
  - responsiveness** refers to whether or not the bidder has offered to you in its bid what you were asking for in your specifications.
  - responsibility** refers to the character or quality of the bidder – whether it is an entity with which you are safe doing business.
- **rejecting** a bid because of **unresponsiveness** requires only that the bidder be informed of why the bid was rejected.
- to **disqualify** a bidder for the **lack of responsibility** requires notice to the bidder and the opportunity for a hearing. R.S. 38:2212J

### B. Bid Withdrawal, Cancellation & Award

- **Withdrawing a Bid.** A bid may be withdrawn by the bidder if done **by affidavit within 48 hours** of bid opening, but only for **patently obvious, unintentional and substantial mechanical, clerical or mathematical errors.** R.S. 38:2214C
- **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.

### C. Waiver

- waiver of informalities is virtually impossible. 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.**

## 8. Preferences

- **Preferences.** Louisiana does not have an outright preference provision in our law for **public works contracts**. R.S. 38:2225 requires that if an out of state bidder is low, a Louisiana bidder may be given the job if the home state of the out-of-state bidder gives him a preference in his own state, and the Louisiana bidder is within the margin of that states preference for its own state bidders. This is referred to as a **reciprocal preference**.
- **Product Preferences.** R.S. 38:2251 relates to preferences for Louisiana products.
  - Agricultural and forestry products grown, manufactured or processed **in** Louisiana are entitled to a **mandatory 10% price preference** over products produced elsewhere.
  - Some specific meat, seafood and produce products **grown outside** of Louisiana and **processed within** Louisiana are only entitled to a **mandatory 7% preference**
- For all other products purchased, municipality may **choose** to allow a bidder offering a **Louisiana product** and whose price is within 10% of the low bid to receive the award if bidder is willing to sell at the low bid price.
- There is **no preference for Louisiana vendors**, only for Louisiana products.

## 9. **Bonds and Recordation**

- There are three different places in the Public Bid Law where bonds are required: R.S. 38:2216 calls for a **performance bond** (not less than 50% of contract); 2218 deals with **bid bonds** and other forms of bid security (5% for public works); 2219 tells you who can write bonds; and 2241 deals with **payment bonds** (not less than 50% for contracts of \$25,000 or more). It is important to look at all of these provisions in preparing your bid documents for public works projects.
- Public works contracts of **\$5,000 or more** must be reduced to writing.
- Public works contracts of **\$25,000 or more must be recorded** in the official mortgage records of the Clerk of Court.

## 10. **Illegal Procurement Practices**

- 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.
- 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 is available and after notice to the Attorney General.
- 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.
- 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.

## 11. Other Procurement Methods

- **State Contracts.** R.S. 38:2212.1(F) provides that purchases may be made from available **state procurement contracts** without the necessity of bidding. (La. R. S. 39:1702). **Purchases cannot be made directly from federal GSA contracts.** But see limitations in OSP Memo 08-02 and 10-02. Office of State Purchasing may convert GSA schedules to the Louisiana Multiple Award Schedules (LaMAS). See OSP cite for further information. <http://www.doa.state.la.us/osp/CONTRACTS/LaMARS.htm>. R.S. 38:2212.1(E).
- **State Contracts through Local Dealer.** Purchases may be made from available **state procurement contracts**, without the necessity of bidding, and may be bought through a local vendor selling the exact same product. ( R. S. 39:1710)
- **Piggy Back Purchases.** Purchasing can be done **jointly** with other political subdivisions or purchase can be made under a **viable contract** entered by another Louisiana public entity if the vendor consents. (La. R. S. 33:1321)
- **Homeland Security.** **R.S. 38: 2212.6** authorizes purchases from GSA for **Homeland Security** subject to prior approval from the State Office of Homeland Security, purchase from a Louisiana distributor, and use of the GSA competitive ordering procedures.
- **Adopt Procurement Code.** Political Subdivisions and Municipalities can **adopt** all or part of the Louisiana Procurement Code to govern their procurements, but must still use the Public Bid Law for public works contracts.

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