

PUBLIC BID LAW – CURRENT DEVELOPMENTS

*Louisiana Department of Justice
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PUBLIC BID LAW – CURRENT DEVELOPMENTS

~~THE 2009 LEGISLATIVE SESSION~~

ATTORNEY GENERAL OPINIONS

THE 2008 LEGISLATIVE SESSION

~~Act 726 (HB 558) amended and reenacted R.S. 38:2212(A)(3)(a), (b), and (c), relative to designer's estimates and to the procedures for bidding including required forms used for such purposes. Specifically, the act provides that if, at the end of the contract document phase, it is determined that the designers **estimate is more than the funds budgeted by the public entity for the project then the project shall not be advertised.** If the project is advertised then the **designer's estimate shall be read aloud at the bid opening.**~~

THE 2008 LEGISLATIVE SESSION

The Act further provides that a **bid form shall be developed and prescribed pursuant to the APA by the Division of Administration, Office of Facility Planning & Control, and shall contain Bid Security or Bid Bond, Acknowledgment of Addenda, Base Bid, Bid Total, Signature of Bidder, Name, Title and Address of Bidder, Name of Firm or Joint Venture, Corporate Resolution and Louisiana Contractors License Number, and on public works projects where unit prices are utilized, their inclusion in the bid form. The low bidder shall furnish other documentation required at a later date, in accordance with the Bidding Documents.**

THE 2008 LEGISLATIVE SESSION

~~Act 727 (HB 563)~~ amended and reenacted R.S. 38:2212(A)(1)(b), provides that a **bid form** shall be developed and prescribed pursuant to the APA by the Division of Administration, Office of Facility Planning & Control, and shall require only the information necessary to determine the lowest bidder and **shall contain the following sections and information:** Bid Security or Bid Bond, Acknowledgment of Addenda, Base Bid, Bid Total, Signature of Bidder, Name, Title and Address of Bidder, Name of Firm or Joint Venture, Corporate Resolution and Louisiana Contractors License Number, and on public works projects where unit prices are utilized, their inclusion in the bid form. The low bidder shall furnish other documentation required at a later date, in accordance with the Bidding Documents.

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1. attend the report writing seminar conducted on behalf of the Board; and

2. pass the report approved, attestation of the Board and of Faculty and Council of trustees.

E. The trustee shall keep all work done in preparation for a submission of this report.

F. Upon completion of the required field training, the selected trustee shall provide the trustee with a completed record of training on a form approved by the board.

G. Before responding, with a qualified educational provider, the trustee shall first apply with the board. After consulting with a qualified educational provider, the trustee may provide the board with the name of the provider and the necessary contact information.

AUTHORITY NOTE: Promulgated in accordance with R.S. 17:507, R.S. 17:145-146.

HISTORICAL NOTE: Promulgated by the Department of Economic Development, Board of Public Planning and Control, August 2004, amended by the Office of the Governor, Board of Public Planning, LR 31-2011 (August 2005), LR 35-1123 (April 2006).

Article XI

Board of Public Planning and Control

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RULE

Office of the Governor
Division of Administration
Office of Public Planning and Control

Louisiana Uniform Public Work Bid Form
(LAC 34:111(C) (page 2))

In accordance with the provisions of the Administrative Procedure Act, LA 48:145(1) and the provisions of RS 14:111, the Division of Administration, Public Planning and Control has adopted a new Rule, LAC 34:111(C) (page 2), Louisiana Uniform Public Work Bid Form. This Rule is required by Acts 124 and 127 of the 2006 Regular Legislative Session and provides rules for the implementation as authorized by the Act.

THE 34 GOVERNMENT CONTRACTS, PROCUREMENT AND PROPERTY CONTROL

Part III, Public Planning and Control
Chapter 3, Louisiana Uniform Public Work Bid
Form

2008, March

A. The name of this document shall be the "Louisiana Uniform Public Work Bid Form" also referred to hereinafter as "the Form."

AUTHORITY NOTE: Promulgated in accordance with R.S. 14:111.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Office of Public Planning and Control, LR 35-1521 (August 2006).

2008, Authority

A. This form is prepared and issued in accordance with Acts 124 and 127 of the 2006 Regular Legislative Session.

AUTHORITY NOTE: Promulgated in accordance with R.S. 14:111.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Office of Public Planning and Control, LR 35-1521 (August 2006).

2008, Purpose

A. The purpose of this rule shall be to provide for the accurate and efficient letting of public work contracts and to establish a uniform standardized form to that end.

AUTHORITY NOTE: Promulgated in accordance with R.S. 14:111.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Office of Public Planning and Control, LR 35-1521 (August 2006).

2008, Applicability

A. This rule shall apply to all public agencies and political subdivisions. The bid form shall require only the information necessary to determine the lowest bidder. With the exception of unit prices, all items on the Louisiana Uniform Public Work Bid Form shall be included for public work projects. No other information may be required from the bidder. Other information, requested shall be furnished by the low bidder as a bid doc, in accordance with the bidding documents.

AUTHORITY NOTE: Promulgated in accordance with R.S. 14:111.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Office of Public Planning and Control, LR 35-1521 (August 2006).

2008, Definitions

A. For the purposes of the Louisiana Uniform Public Work Bid Form the following terms shall have the stated meanings.

Amount—A specified sum of consideration that is set apart by a separate fund. An amount may or may not be incorporated into the contract sum at the discretion of the owner at the time of contract award.

Bid—The amount of money stated in the bid as the sum for which the bidder offers to perform the work described in the bidding documents, plus the adjustment for alternate bids but excluding any bid prices.

Bid—A complete signed proposal to perform work as a designated owner for a specified sum. A bid is submitted in accordance with the bidding documents, is returned to public agencies and not subject to qualifications.

Bidder—an entity or parties who submit a bid in a prime contract with the owner. A bidder is not a contractor on a specific project until a contract is signed between the bidder and the owner.

Bid Form—A form provided to the bidder on which to submit a bid.

Bid Invoice—A bid bond or deposit submitted with a bid to guarantee to the owner that the bidder, if awarded by contract, will execute the contract within a specified period of time and will furnish any bonds or other requirements of the bidding documents.

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Act 598 (HB 918) enacted R.S. 38:2212.7 and R.S. 39:1496.2 and 1594.3, **prohibits bids or proposals** for public contracts by any person who contracts with an agency for the purpose of developing bid documents, requests for proposals, or any other type of solicitation. The person is also prohibited from participating as a subcontractor on the awarded contract.

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Act 590 (HB 610) amended and reenacted R.S. 38:2212(A)(1)(f) and 2212.1(B)(4), provides that public entities must provide contractors the option of **submitting bids electronically** through a uniform and secure electronic interactive system that conforms with the standards adopted by the State as provided for in LAC 4:XV.701. Public entities that do not have high-speed Internet access available are exempt until such access becomes available. Parishes with a population less than 50,000 and municipalities with a population less than 25,000 are also exempt.

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Act 392 (Senate Bill 84) amended and reenacted 38:2212.1(A)(1) to increase the limit for the purchase of materials and supplies to the sum of **thirty thousand dollars** without the necessity of advertisement. However, purchases of ten thousand dollars or more, but less than thirty thousand dollars shall be made by obtaining not less than three telephone or facsimile quotations with written confirmation of the accepted offer. Prior law established a twenty thousand dollar threshold.

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~~Act 161 (House Bill 353) amended and reenacted 38:2212(A)(1)(d) to increase the contract limit for public works to **one hundred fifty thousand dollars** per project, including labor, materials, and equipment. Prior law established a one hundred thousand dollar threshold.~~

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~~**Act 174** (Senate Bill 134) amended and reenacted 38:2212(A)(1)(b)(ii)(bb) and (3)(c)(ii) to provide that documentation and information not necessary to determine the low bidder may be required of all bidders at a **later time** in accordance with the Bidding Documents.~~

Act 227 (House Bill 823) enacted 38:2212(A)(1)(f)(v) and 2212.1(B)(4)(e) to **exempt any special service district** created by a parish with a police jury form of government from complying with the requirements relating to receipt of electronic bids if they are unable to comply without securing and expending funds.

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~~Act 433~~ (House Bill 801) amended and reenacted 38:2212.7 and 39:1496.2 and 39:1594.3 to provide exceptions in the prohibition for submitting bids or proposals for public contracts by certain **contract consultants** including exceptions for:

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architectural and engineering programming,
master planning,
budgeting,
feasibility analysis,
constructability review,
furnishing specification data or other product
information, and
any other service that does not establish
selection qualification or evaluation criteria for
the procurement of an architect or engineer.

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Act 184 (House Bill 354) amended and reenacted 38:2225.2.1(A) which extends by one year the time relative to the utilization of **design-build contracts** by certain public entities in the construction or repair of any public buildings destroyed or damaged by Hurricanes Katrina and Rita for three years (was two years) from July 10, 2007, and now includes any public building constructed or repaired to meet a homeland security or criminal justice need pursuant to a hurricane recovery plan and adds sheriffs and housing authorities to the list of approved public entities.

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~~**Act 432** (House Bill 719) amended and reenacted 39:1514(A)(1) to extend the allowable period for certain **multiyear contacts** for professional, personal, consulting, or social services from three to five years subject to prior approval of the Joint Legislative Committee on the Budget. New law does not apply to existing statutory exceptions.~~

Act 425 (House Bill 604) amended and enacted 33:4711 to authorize a police jury to sell, lease or **exchange property** with private persons or other political corporations of the state. Prior law did not include authority to exchange property.

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Act 41 (House Bill 597) enacted 48:252(C)(2)(e) 1496.1(A) to provides that a **DOTD** notice of addenda may be issued by **electronic transmission** that informs a bidder that an addendum is posted on the departments website and that the notice may be sent to the e-mail address given by the bidder or through the online registration information submitted by bidders.

Act 42 (House Bill 601) amended and enacted 48:250 to provide that **DOTD contracts**, bonds or any other document that must be in writing may be in the form of an electronic document with an electronic signature and shall be accepted and recorded by the recorder of mortgages by electronic means.

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~~**Act 167** (House Bill 559) enacted 39:2171-2179~~ relative to **Veterans Affairs** to provide for state goals for procurement and public contracts for veteran and service connected disabled veteran-owned small entrepreneurships and to provide for certification, training and initiative coordinators and to provide for responsibilities of the Louisiana Department of Veterans Affairs.

HCR 176 creates the **Hudson Initiative Task Force** to study the feasibility of offering business opportunities through state procurement and public contracts to small entrepreneurships in the state of Louisiana.

CASE LAW UPDATE

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

Unsuccessful low bidder on parish public works project (Beverly) sued parish, seeking injunction, nullification of contract, or damages, claiming it was the lowest responsible bidder and that its bid should not have been rejected and the project awarded to Kass Brothers, the next lowest monetary bidder.

The bid of Beverly was rejected on the basis that it did not comply with the bid requirements stated in the advertisement for bids. Beverly argued that its bid was responsive and that the parish acted arbitrarily in interpreting its advertised bid requirements or, in the alternative, that the parish could waive a requirement stated in the bid advertisement.

The bid advertisement stated “THIS BID PACKAGE MUST BE RETURNED IN ITS ENTIRETY” and “BID PACKAGE, INCLUDING INSTRUCTIONS AND SPECIFICATIONS, MUST BE RETURNED IN ITS ENTIRETY FOR THE BID TO BE VALID”. **Beverly failed to return and include in its bid the corporate resolution form that was part of the bid package.**

Instead, Beverly removed the bid form and submitted its own corporate resolution form. The 24th Judicial District Court, Parish of Jefferson, affirmed the rejection of the Beverly bid and affirmed that the contract was properly awarded to Kass Brothers, the next lowest monetary bidder. Beverly appealed.

The Appeals Court, in following the Hamp's case, found that the case is governed by La.R.S. 38:2212(A)(1)(b), which clearly does not allow the Parish, a public entity, to waive its mandatory bid requirements.

The court held that the advertised bid required that the corporate resolution form that was included as part of the bid documents be returned by all bidders with the bid package and that this requirement could not be waived by the parish. Beverly failed to return the form and therefore its bid was properly rejected as non-responsive.

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

City issued bids for the Lincoln Beach Demolition Project. City accepted the low bid of Concrete Busters and Hamp, the second low bidder, sued seeking injunctive relief and mandamus to compel City to award the contract to it claiming low bidder failed to attach a copy of the City's "Invitation to Bid" as required in the bid specifications.

Trial court issued temporary restraining order but at the hearing on the merits denied permanent injunction finding that the low bidder "complied with the substantive formalities set forth in the bid requirements and was the lowest responsible bidder to which the job should have been awarded."

~~The city then awarded the contract to Concrete Busters, the low bidder and Hamp appealed. The Appeals Court found that the low bidder was not responsive because it failed to attach the required “Invitation to Bid” and stated that the City should have awarded the contract to the second low bidder.~~

Because the contract was already awarded and work performed injunctive relief was no longer an option so the Appeals Court held that the second low bidder was entitled to damages. See *State Machinery v. Livingston Parish Gravity Drainage Dist. #5*, (La. App. 1 Cir. 11/14/01), 818 So.2d 133).

Supreme Court affirmed the judgment of the court of appeal and held that R.S. 38:2212A(1)(b) is express and unambiguous in that “any requirements stated in the advertisement for bid, and any requirements required on the bid form shall not be waived by the public entity”.

“The public entity does not have the discretion to determine, after bids have been submitted, whether a requirement is substantive or non-substantive, waivable or non-waivable. Once the public entity establishes a requirement, that requirement must be uniformly followed by all bidders.” Good review of legislative and judicial history of 38:2212A(1)(b).

ATTORNEY GENERAL OPINIONS

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

08-0071- In the event the Sheriff's office is able to effectively demonstrate that it has a reasonable expectation of receiving a benefit or value at least equivalent to the amount expended or transferred, we believe the proposed transaction would be acceptable.

ATTORNEY GENERAL OPINIONS

~~08-0167-~~ The new coroner's facility is a public works project. As such, the project can not be divided, separated, or otherwise subcontracted out without first complying with advertisement and competitive bidding requirements of the Louisiana Public Bid Law. In addition, the coroner may not act as general contractor for a public work project of his office.

ATTORNEY GENERAL OPINIONS

~~**08-0128** - The Jefferson Davis Parish School Board and the City of Jennings may enter into an intergovernmental agreement splitting the portion of the total cost of the sidewalk which exceeds the grant.~~

08-0134 - The City of Tallulah may contribute funds to the Madison Parish Council on Aging for use in programs for the aid and support of the needy as long as there is some type of objective criteria, such as income level, used to establish those who are truly needy.

ATTORNEY GENERAL OPINIONS

08-0156 - Using public funds to purchase and apply the required insecticides on all citrus trees throughout Plaquemines Parish to protect the citrus trees from the Asian Citrus Psyllid and greening is not a violation of La. Const. art. VII, Sec. 14(A).

08-0168 - The sheriff or jailkeeper may engage in cooperative endeavor agreements with the Levee District whereby inmate laborers working on Levee District projects are provided with lunches paid for and provided by the Levee District.

ATTORNEY GENERAL OPINIONS

08-0199- Absent an escalation clause contained in the original public works contract, there is no authority to amend the contract so as to permit an increase in the contract price due to the increased cost of fuel incurred by the contractor.

08-0222- The requirements of Act 590 of the 2008 Regular Legislative Session are not applicable to the purchase of materials and supplies of ten thousand dollars or more, but less than twenty thousand dollars.

ATTORNEY GENERAL OPINIONS

~~08-0317~~ - Based on the plain language of Act 590 of the 2008 Louisiana Regular Legislative Session (“Act 590”), which amended La. R.S. 38:2212 and R.S. 38:2212.1, it is the opinion of this office that the DeSoto Parish School Board does not meet the conditions of the exemptions pertaining to electronic bid requirements. As such, the DeSoto Parish School Board is required to comply with the provisions of Act 590.

ATTORNEY GENERAL OPINIONS

~~08-0300- West Feliciana Parish Police Jury and West Feliciana Parish School Board may enter into a cooperative endeavor agreement pursuant to La. Const. art. VII, Sec. 14(A) and (C) with a private entity for the purpose of providing public internet access to the private entity in exchange for providing the public entities with public service programming of equivalent value.~~

ATTORNEY GENERAL OPINIONS

~~08-0197-~~ If Parish Police Jury elects to advertise and accept bids for a particular public works project valued at under \$100,000, then the Police Jury is bound to comply with the requirements of the prescribed bid process set forth in the bid documents, including those related to advertisement, bid specifications, evaluation, and the awarding of a contract. Such requirements must be applied fairly and reasonably in accordance with the plans and specifications as advertised and the Police Jury is prohibited from acting arbitrarily or capriciously in the awarding of the contract.

ATTORNEY GENERAL OPINIONS

~~**08-0351-** Pursuant to La. R.S. 38:2212 (A), the provisions and requirements stated in the advertisement for bid, the bid documents, and those required on the bid form shall not be waived by any public entity. As such, the City may not accept the bid of the presumptive low bidder who failed to acknowledge receipt of Addendum No. 1 on the outside of its envelope as required by Addendum No. 1.~~

09-0078- City may use Request for Proposals when procuring telecommunications equipment, systems, and related services. Contracts for services are not subject to the requirements of the Public Bid Law and do not have to be let for bid.

ATTORNEY GENERAL OPINIONS

~~09-0098-~~ Under Louisiana's Local Services Law, any governmental entity, including local Fire Departments and Fire Districts may “piggy-back” onto a previously bid and viable contract for the same equipment and supplies at the same or lower price and subject to the written consent of all parties. Louisiana's Public Bid Law does not allow public entities to make direct purchases from an out-of-state contract.

ATTORNEY GENERAL OPINIONS

~~08-0328 - The City of Monroe may not use public funds to host strictly social gatherings for city employees.~~

ATTORNEY GENERAL OPINIONS

~~**09-0061**- City may legally sell whatever rights it owns in a former railroad property to the contiguous land owners at private sale provided that the procedure laid out in La. R.S. 33:4712 is followed and fair value is received.~~

09-0111- Provisions of 38:2212.7 that prohibits any person who contacts with an agency to develop bidding documents, requests for proposals or other type of solicitation from bidding, proposing or otherwise competing for award does not apply to Port Commission, a political subdivision, in the evaluation of low bidder for construction of a floating dry dock facility.

ATTORNEY GENERAL OPINIONS

~~09-0069~~ - The proposed cooperative endeavor agreement between the Plaquemines Parish Government and the Plaquemines Parish School Board is permissible under La. Const. art. VII, Sec. 14(A) and (C).

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

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