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Opinion 13-0008

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90-A-1 PUBLIC FUNDS & CONTRACTS

La. Rev. Stat. 38:2211, *et. seq.*

Jefferson Parish may reject a bid or bidder for lack of responsibility and/or lack of responsiveness, but may not "debar" a bidder.

Dear Ms. Cunningham Foshee:

Your opinion request has been assigned to me for research and reply. You have asked for our opinion on certain matters related to Louisiana's Public Bid Law. According to your opinion request, Jefferson Parish has established a Standard Bid Terms and Conditions for its public works projects. Recently, two specific provisions of the Standard Bid Terms and Conditions have been questioned as possibly violating Louisiana's Public Bid Law, La.Rev.Stat. 38:2211, *et. seq.*

The first provision in question states the following:

SECTION 4. REJECTION OF BIDS

B. Additionally, bids may be considered irregular and be rejected for any of the following, but is not limited to the following circumstances;

(5) If an owner or a principal office of the bidding firm is an owner or a principal officer of a firm which has been declared by the Parish to be ineligible to bid.

The second provision, SECTION 6.06, generally reserves to Jefferson Parish the right to declare a bidder not responsible and reject the bid if the bidder is using subcontractors who would not qualify as a responsible bidder had they submitted a bid on their own. You ask for our opinion as to whether these two standard bid provisions are allowed by Louisiana's Public Bid Law.

Louisiana's Public Bid Law is a prohibitory law founded on public policy. See *Hamp's Construction, L.L.C., v. The City of New Orleans*, 2005-0489 (La. 2/22/06), 924 So.2d 104. Louisiana courts have generally recognized that

Louisiana's Public Bid Law is sui generis and the public contract laws of this state are to be strictly construed. *Wilkin v. Dev Con Builders, Inc.*, 561 So.2d 66 (La. 1990). Furthermore, the privileges granted therein are not to be extended beyond the dictates of the statute. *Id.* Stated differently, a public entity has no authority to take any action which is inconsistent with Louisiana's Public Bid Law. *Broadmoor LLC v. Ernest N. Morial New Orleans Exhibition Hall Authority*, 2004-0211 (La. 3/18/04), 867 So.2d 651.

As a public entity, as defined in La. Rev. Stat. 38:2211, Jefferson Parish is subject to the provisions of the Louisiana Public Bid Law. Under the bid law, contracts for public works projects exceeding \$150,000 must be advertised and let to the lowest responsible and responsive bidder. A public works project means the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity. La. Rev. Stat. 38:2211. Public works projects that are estimated to cost less than \$150,000 are not subject to the advertising and bidding requirements of the Public Bid Law and may be undertaken by the public entity with its own employees or may be negotiated with one or more contractors.

Also under Louisiana's Public Bid Law, contracts for the purchase of materials and supplies exceeding \$30,000 must be advertised and let by contract to the lowest responsible and responsive bidder. La. R.S. 38:2212.1(A)(1)(a). Contracts for the purchase of materials and supplies costing \$10,000 or more, but less than \$30,000, must be made by obtaining no fewer than three telephone or facsimile quotations. La. R.S. 38:2212.1(A)(1)(b). For purchases of less than \$10,000, there is no prescribed procurement method.

Although neither term is defined by statute, the terms "responsible" and "responsive" have special meaning under Louisiana's Public Bid Law. Responsibility generally refers to the character or quality of the bidder. La. Rev. Stat. 38:2212(J) specifically authorizes a public entity to reject a bid or disqualify a bidder for lack of responsibility and provides the following:

If the public entity letting the contract proposes to disqualify any bidder, on grounds that such bidder is not a "responsible bidder" such public entity shall:

- (1) Give written notice of the proposed disqualification to such bidder and include in the written notice all reasons for the proposed disqualification; and
- (2) Give such 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.

On more than one occasion, Louisiana courts have recognized a public entity's right to reject a bid or otherwise disqualify a bidder for lack of responsibility. For example, in *A.M.E. Disaster Recovery Services, Inc. v. St. John Baptist Parish Sch. Bd.*, 10-500 (La. App. 5th Cir. 11/23/10), 54 So. 3d 719, the Louisiana Fifth Circuit Court of Appeal recognized that a public agency awarding a public works contract is vested with the power and discretion to determine the responsibility of the low bidder and to reject a bid that is unsatisfactory. In that regard, the *A.M.E.* court stated the following:

A public body has the right to take into consideration a number of factors in deciding who is the "lowest responsible bidder." The term "responsible bidder" is not limited in its meaning to financial resources and ability. What the public wants is quality performance of public contracts. Public authorities, therefore, are invested with discretionary powers to pass upon the honesty and integrity of the bidder, qualities which are essential to the faithful performance of the contract; upon the bidder's skill and business judgment; upon his experience and facilities for carrying out the contract; previous conduct under other contracts; and the quality of previous work; as well as the bidder's pecuniary ability. When that discretion is properly exercised the courts will not interfere.

Responsiveness, on the other hand, generally refers to whether a particular bid complies with the bid law's statutory requirements and the requirements stated in the bid documents as advertised by the public entity. It is generally well-settled that the provisions and requirements of Louisiana's Public Bid Law, as well as those provisions and requirements stated in the bid documents shall not be waived by any public entity. See La. Rev. Stat. 38:2212 (A)(1)(b); *Hamp's Construction, LLC v. City of New Orleans*, 2005-0489 (La. 2/22/06), 924 So.2d 104; *Beverly Construction Company, L.L.C. v. Parish of Jefferson*, 2007-847 (La. App. 5 Cir. 2/6/08), 979 So.2d 551. Once a requirement is established, that requirement must be uniformly followed by all bidders. A failure to comply with any statutorily imposed requirement would render a bid non-responsive and would warrant a mandatory rejection by the public entity. The same holds true for a failure to comply with any validly imposed requirement stated in the public entity's bid documents. Numerous Louisiana courts have recognized that the statutory requirements, advertisement requirements, and bid form requirements, including those included by reference to other documents, must be completely and accurately observed and a bidder's failure to comply with every detail can invalidate the bid. See *Hamp's, supra*, *Beverly, supra*.

Turning attention now to the question presented, as support for including the two standard bid provisions at issue, your opinion request makes reference to La.Rev.Stat. 38:2214 and the recent Louisiana First Circuit Court of Appeal decision in *Gibson & Associates, Inc. v. LA DOTD*, 2010-1696 (La. App. 1 Cir. 5/18/11), 68 So.3d 1128.

La.Rev.Stat. 38:2214 concerns the time and place for opening bids and the right to reject bids. Additionally, La.Rev.Stat. 38:2214 specifically allows a public entity to reject any and all bids for "just cause." La. Rev. Stat. 38:2214 defines certain situations that constitute "just cause," but provides that the definition is not limited to those circumstances. *Gibson* concerned the awarding of a Louisiana Department of Transportation and Development ("DOTD") construction contract. At issue there, were the provisions of DOTD's Standard Specification 102.08(g) which provides the following:

"[b]ids may be considered irregular and non-responsive and will be subject to rejection...[i]f an owner or a principal officer(s) of the bidding entity is an owner or a principal officer(s) of a contracting entity which has been declared by the [DOTD] to be ineligible to bid."

According to DOTD, the purpose of Standard Specification 102.08(g) is to prevent contractors which have been previously disqualified from bidding on future contracts. In its ruling, the court in *Gibson* relied upon the provisions of Standard Specification 102.08(g) to hold that a particular bid was "subject to rejection" and that since such provisions were made a part of the construction proposal, DOTD had no discretion or authority to waive any of the requirements in light of La.Rev.Stat. 38:2212 and La.Rev.Stat. 48:255.

After review, we believe the decision in *Gibson* is distinguishable. As mentioned earlier, *Gibson* concerned a DOTD construction project. La.Rev.Stat. 48:250 specifically provides that DOTD construction contracts are to be exclusively governed by Title 48 of the Louisiana Revised Statutes.¹ Title 48 specifically allows DOTD to "debar" a bidder or otherwise prevent them from bidding. La.Rev.Stat. 48:295.1 defines "debarment" as the "disqualification of a contractor to receive invitations for bids or requests for proposals or the award of any contract by the department..." La.Rev.Stat. 48:295.2 further authorizes DOTD to debar a contractor and proscribes the process and procedure for debarment.

¹ Louisiana courts have recognized that the provisions of Title 38 apply to DOTD to the extent they do not conflict with Title 48. See *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, *JB James Construction, L.L.C. v. Louisiana Department of Transportation and Development*, 12-0237 (La. 3/30/12), 85 So.3d 122.

However, as discussed earlier, as a public entity as defined by La.Rev.Stat. 38:2211, Jefferson Parish's construction contracts are exclusively governed by Title 38 of the Louisiana Revised Statutes. Our review of Title 38, including La.Rev.Stat. 38:2214, fails to reveal any authority to "debar" a bidder.

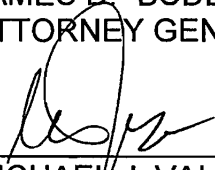
As such, with respect to the first standard provision at issue, Section 4, REJECTION OF BIDS, our reading of the provision indicates that it is an attempt to "debar" bidders. Since we can find no authority in Title 38 specifically granting public entities the ability to "debar" bidders, it is the opinion of this office that such a provision is not allowed under Louisiana law. With respect to the second standard provision at issue, we are of the opinion that such a provision is allowed by Louisiana law, provided the process outlined by La.Rev.Stat. 38:2212(J) is followed.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,

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BY:



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