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DEPARTMENT OF JUSTICE
CIVIL DIVISION
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OPINION 23-0032

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90-A-1 PUBLIC FUNDS & CONTRACTS

La. R.S. 38:2225.2.4
La. R.S. 39:1301 *et seq.*

The provisions of the City of Mandeville's home rule charter and the Louisiana Local Government Budget Act set forth the applicable budgetary requirements for capital improvements undertaken pursuant to the Construction Management at Risk project delivery method.

Dear Ms. Sconzert:

Our office has received your request for an opinion on behalf of the Mayor regarding the required budgetary procedures to be used in connection with a project to renovate the property used by the City of Mandeville ("City") as its City Hall. As stated in your request, the project is anticipated to span multiple years, and the City intends to use the Construction Management at Risk ("CMAR") process provided in La. R.S. 38:2225.2.4 to deliver the project. Given the City's planned approach to the project, your request specifically seeks guidance on whether the entire amount of the "estimate of probable construction costs for the project" referenced in La. R.S. 38:2225.2.4(F)(2)(e) must be included in the City's annual budget prior to utilizing the CMAR method. As set forth below, the City's home rule charter and the Louisiana Local Budget Act ("LGBA") govern the financial processes to be used by the City when procuring contracts for the project, neither of which require the estimated construction costs of the project to be budgeted prior to initiating the CMAR process.

Louisiana's Public Bid Law, La. R.S. 38:2211 *et seq.*, prescribes specific conditions upon which public work may be performed on behalf of a political subdivision.¹ A public entity has no authority to take any action in pursuing a public works project that is inconsistent with the Public Bid Law.² In general, the Public Bid Law contemplates use of the "design-bid-build" method of project delivery, where detailed plans and specifications for the project are first prepared by a licensed design professional, and a construction contract is then solicited and awarded to the entity that submits the lowest bid to construct the public work according to the finalized plans and specifications.³ Particularly relevant to your inquiry are certain requirements imposed by La. R.S. 38:2212(H), which state in part:

¹ *Leblanc Marine, L.L.C. v. Div. of Admin., Off. of Facility Plan. & Control*, 2019-0053 (La. 10/22/19), 286 So.3d 391, 394, quoting *Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Auth.*, 2004-0211, 2004-0212, p. 6 (La. 3/18/04), 867 So.2d 651, 656.

² *Id.*

³ La. R.S. 38:2212; *see also*, La. Atty. Gen. Op. Nos. 14-0033 and 17-0105; 1 Bruner & O'Connor Construction Law § 2:15-18 (describing various methods of project delivery).

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. 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.

In 2014, the legislature enacted La. R.S. 38:2225.2.4, which amended the Public Bid Law to allow use of the CMAR project delivery method for certain public projects as an alternative to the Public Bid Law's existing design-bid-build procedures.⁴ In its current form, La. R.S. 38:2225.2.4 provides that the CMAR method is only available for projects estimated to cost at least \$5 million, and may only be used for projects estimated to cost between \$5 million and \$15 million if approved by the House and Senate Transportation, Highways, and Public Works Committees.⁵ As with a typical design-bid-build project, the owner of a CMAR project initially engages a licensed design professional to prepare the plans and specifications that will be used to construct the public work.⁶ Under the CMAR process, however, the owner also engages a "CMAR contractor" to provide input regarding constructability of the project and other "preconstruction services" prior to the project's design reaching thirty percent completion.⁷ Selection of a CMAR contractor entails the review, scoring, and ranking of information submitted by interested candidates by an owner-appointed "selection review committee" which then recommends the candidate to whom the owner should award the CMAR contract.⁸ The successful proposer then executes a contract with the owner to provide "pre-construction" design-related services for a specified amount of compensation.⁹

Prior to or upon completion of the final plans and specifications for the project, the CMAR contractor develops and provides the owner with a "guaranteed maximum price" for which it will construct the project according to the final plans and specifications developed during the CMAR process.¹⁰ If the owner and CMAR contractor are able to negotiate and agree upon a guaranteed maximum price, constructability, construction phasing and sequencing, and a maximum number of contract days needed to complete the project, the owner may award the construction contract for the project to the CMAR contractor without soliciting bids from other entities.¹¹ In the event the owner and CMAR contractor are unable to reach an agreement for the provision of construction services, only then would the owner solicit bids to construct the project in accordance with the Public Bid

⁴ Act No. 782 of the 2014 Louisiana Legislative Regular Session (enacting La. R.S. 38:2225.2.4).

⁵ La. R.S. 38:2225.2.4(A)(3).

⁶ La. R.S. 38:2225.2.4(B)(1) and (E)(2). The "owner" of a CMAR project is the public entity on whose behalf the project is being undertaken. La. R.S. 38:2225.2.4(B)(4).

⁷ La. R.S. 38:2225.2.4(B)(2), (F)(5), and (G)(2).

⁸ La. R.S. 38:2225.2.4(B)(5) and (F).

⁹ La. R.S. 38:2225.2.4(F)(2)(e).

¹⁰ La. R.S. 38:2225.2.4(G)(3).

¹¹ La. R.S. 38:2225.2.4(G)(4). "Negotiate" is defined by the Public Bid Law as "the process of making purchases and entering into contracts without formal advertising and public bidding with the intention of obtaining the best price and terms possible under the circumstances." La. R.S. 38:2211(A)(9).

Law's standard design-bid-build provisions.¹² While the requirements imposed by the Public Bid Law remain generally applicable to CMAR contracts, in cases of conflict the provisions of La. R.S. 38:2225.2.4 prevail.¹³

Under the legislatively established framework described above, it is clear that the provisions of La. R.S. 38:2212(H) requiring public entities to budget the estimated construction costs of a project prior to advertising the public work for bids are not applicable to CMAR projects. Unlike design-bid-build, there are no bids solicited or submitted by competing proposers during procurement of a CMAR contract. Instead, interested candidates only supply information pertaining to their performance on past projects and their planned approach to the CMAR project, which the selection review committee then uses to determine which entity is most qualified to perform pre-construction services for a fixed amount of compensation.¹⁴ In addition, the only obligations undertaken upon initial execution of a CMAR contract relate to the provision of design-related pre-construction services, and do not include "the erection, construction, alteration, improvement, or repair of any public facility" as contemplated in the Public Bid Law's definition of "public work."¹⁵ Moreover, the "probable construction costs" of a CMAR project would be unknown at the time the public entity advertises its request for qualifications ("RFQ"), as that phrase contemplates the estimated cost of constructing the project according to final plans and specifications.¹⁶ The plain language of La. R.S. 38:2212(H) therefore precludes application of its provisions to projects using the CMAR method of delivery.

The analysis does not end here, however. In order to identify the applicable budgetary requirements to which the planned CMAR project must conform, it is important to note that the City operates under a home rule charter plan of government adopted pursuant to Article VI, § 5 of the Louisiana Constitution of 1974.¹⁷ The City's budgeting processes are therefore governed by both the provisions of its Charter and the Louisiana Local Government Budget Act ("LGBA"), La. R.S. 39:1301 *et seq.*¹⁸ Article V of the Charter governs the City's financial procedures and requires preparation of an annual capital improvement budget covering a period of at least five years.¹⁹ The mayor is responsible for the preparation and submission of the capital improvement budget to the Mandeville Council ("Council") for review and approval.²⁰ The Charter specifies particular information that must be included in the capital improvement budget, including:

¹² La. R.S. 38:2225.2.4(G)(6). Under these circumstances, the CMAR contractor would be prohibited from bidding on the project. *Id.*

¹³ La. R.S. 38:2225.2.4(H).

¹⁴ La. R.S. 38:2225.2.4(F).

¹⁵ La. R.S. 38:2211(A)(13).

¹⁶ See La. R.S. 38:2211(A)(10) (defining "probable construction costs" as "the estimate for the cost of the project **as designed** that is determined by the public entity or the designer") (emphasis added).

¹⁷ City of Mandeville Home Rule Charter ("Charter"), Article I, § 1-01.

¹⁸ La. Atty. Gen. Op. Nos. 14-0120 and 21-0100; La. R.S. 39:1303(C).

¹⁹ City of Mandeville Home Rule Charter, Article V, § 5-03. Capital improvements include "construction, enlargement, improvement, repair, and remodeling of public buildings, structures, facilities, and other physical improvements..." *Fuselier v. State Mkt. Comm'n*, 259 La. 185, 194, 249 So. 2d 569, 572 (1971).

²⁰ City of Mandeville Home Rule Charter, Article III, § 3-05(4).

- (1) A clear general summary of its contents;
- (2) A list of all capital improvements and acquisitions which are proposed to be undertaken for at least the five fiscal years next ensuing with appropriate supporting information as to the necessity for such improvements and acquisitions;
- (3) Cost estimates, method of financing, and recommended time schedules for each such improvement or acquisition; and
- (4) The estimated annual cost of operating or maintaining the capital improvement to be constructed or acquired.²¹

The Charter provides that the amount indicated to be spent during the first year of the adopted capital improvement budget shall be the capital budget for that year.²² Upon the Council's enactment of an ordinance adopting the capital improvement budget or any amendment thereto, the budget constitutes the authority of the City's chief executive or administrative officers to incur liabilities and authorize expenditures from the budgeted funds during the applicable fiscal year.²³ The information included in the capital improvement budget is to be revised and extended each year with regard to capital improvements that are still pending or in the process of construction or acquisition.²⁴ The Charter also explicitly authorizes contracts that contemplate payments beyond the end of the fiscal year, but requires that contracts for services not covered by the public bid law shall not be for a term in excess of three years.²⁵

Returning to the facts stated in your request, you indicate that the project is currently expected to cost around \$6 million, though it is unclear whether this amount includes the costs of design and pre-construction services, or is instead limited solely to anticipated construction costs. The request also indicates the project is expected to span at least three fiscal years before it is complete. Under this scenario, the first step the City must take to pursue the project using the CMAR project delivery method is obtaining approval from the House and Senate Transportation, Highways, and Public Works Committees, as required by La. R.S. 38:2225.2.4(A)(3). While there are no other timing restrictions on the initiation of the CMAR process, the budgetary requirements described above preclude the City from undertaking any payment obligations associated with the project until the total estimated cost of delivering the project has been included in the capital improvement budget adopted by the Council.²⁶ The anticipated costs of the project should be apportioned in the capital improvement budget according to the fiscal years in which the identified costs are expected to be incurred.

²¹ *Id.* at Article V, § 5-03(B).

²² *Id.* at Article V, § 5-03(A).

²³ *Id.* at Article II, § 2-10(4) and Article V, § 5-03(D).

²⁴ *Id.* at Article V, § 5-03(A) and (B).

²⁵ *Id.* at Article V, § 5-04(B).

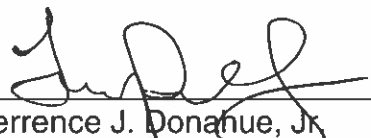
²⁶ *Id.* at Article V, § 5-04(A).

As the design and anticipated costs of the project become more refined through the CMAR process, the cost estimate initially included in the capital improvement budget would be expected to change. Subsequent capital improvement budgets should therefore be revised and updated to reflect current expectations as provided in the Charter. In the event the City and the CMAR contractor ultimately reach agreement on a guaranteed maximum price to construct the project, the capital improvement budget may also require amendment in order to accommodate the specific payment obligations undertaken by the City in the CMAR contract. Finally, revisions to the existing capital improvement budget may also become necessary if the City is unable to reach a construction agreement with the CMAR contractor and opts to solicit construction bids according to the Public Bid Law's design-bid-build provisions.

We hope that this opinion has adequately addressed the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

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