



TO BID OR NOT TO BID

Presentation to LPESA

Charenton, Louisiana

October 3, 2019

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INTRODUCTION

Louisiana Municipal Advisory and Technical Services Bureau— “LaMATS”

LaMATS, through its LPS Services, provides purchasing and procurement assistance and services primarily to Louisiana Municipal Association Members, but also to other local government agencies, including Parishes.

Services are at no charge to local government



The Basics

R.S. 38:2211 et. seq — “The Public Bid Law”

Who is Required to Follow the Public Bid Law?

“Public entity” means and includes the state of Louisiana, or any agency, board, commission, department, or public corporation of the state, created by the constitution or statute or pursuant thereto, or any political subdivision of the state, including but not limited to any political subdivision as defined in Article VI Section 44 of the Constitution of Louisiana, and any public housing authority, public school board, or any public officer whether or not an officer of a public corporation or political subdivision.

The Basics (continued)

R.S. 38:2211

What is a Public Work?

(12) "Public work" means the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.

- Not to be confused with *Services* which are not regulated by the Public Bid Law
- What constitutes a service?
- AG Op. No. 16-0082 – A contract for routine and preventative maintenance dredging of port's finger pier and docks is not a contract for public works, but a maintenance contract. Such maintenance contracts are specifically exempted from the definition of "public works" and are not required to be publicly bid, provided it has a term of less than two years.
 - Maintenance of watertower?
 - Maintenance of drainage?

• Just because a service does not have to be bid out does not mean it should not. Example: Maintenance to drainage

When is a Public Work Exempt from Bidding?

R.S. 38:2212

A.(1)(a) All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest responsible and responsive bidder who bid according to the bidding documents as advertised, and no such public work shall be done except as provided in this Part.

Contract Limit: C.(1) Except as provided in Paragraphs (2) and (3) of this Subsection, the term "contract limit" as used herein shall be equal to the sum of one hundred fifty thousand dollars per project, including labor, materials, and equipment.

The contract limit increases each year. The current contract limit is \$157,700.

PUBLIC WORKS BID PROCESS

The “Design—Bid—Build” Process

Design Services → Sealed Bid Solicitation/Award → Contractor Builds to Specifications at the Price Bid

"Design/Build" is prohibited unless a statutory exception applies. → R.S. 38:2225.2 ←

Exceptions:

- Projects below the Statutory Contract Amount
- Construction Management at Risk (CMAR)
→ R.S. 38:2225.2.3

EXAMINATION OF MEANING OF “DESIGN BUILD”

R.S. 38:2225.2. Design-build contracts

Neither the state nor any local entity, unless specifically authorized by law, may execute any agreement for the purchase of unimproved property which contains provisions related to the successful design and construction of a construction project prior to the transfer of title to the state or local entity.

And, Also:

AG Op. No. 14-0033 - Pursuant R.S. 38:2212 and R.S. 38:2225.2, the AG finds that unless specifically authorized by law, a public entity has no authority to enter into a design-build contract. Instead, the public entity must employ the design-bid-build method, which would require the public entity to first obtain the services of a design professional and then publicly bid the construction of the project pursuant to the Public Bid Law.

CMAR

CONSTRUCTION MANAGEMENT AT RISK

RS 38:2225.2.4

<http://www.legis.la.gov/Legis/Law.aspx?d=919372>

Notwithstanding any other provision of law to the contrary, a public entity may use the construction management at risk project delivery method to contract for a project to construct public works as set forth in this Section.

This Section creates an alternative project delivery method, known as construction management at risk", or "CMAR", for use by a public entity to award a contract to construct public works when deemed in the public interest, beneficial to the owner, and in accordance with the procedures in this Section. The following are reasons to use the CMAR delivery method: collaboration and cost control; concurrent execution of design and construction; a complex project with a tight time frame; owner, designer, and contractor with mutual project goals; risk identification controlled by owner; and minimization of the risk of construction and design disputes by using a collaborative process.

Design Services

Engineers/Architects

Are not hired through a bid process; it is prohibited.

Engineers/Architects may be hired through a Request for Qualifications Process. If attempting a CMAR Project, the design professional is hired through a RFQ process.

Small Projects Under the Monetary Threshold

The AG states that these projects are exempt from the Bid Laws, do not have to be advertised and may be negotiated with one or more contractors.

The Legislative Auditor recommends an RFP Process.

According to the AG if a written solicitation is issued, selection must occur according to the terms and conditions of the solicitation.

Many municipalities have used this process with success: 1) Installation of “pre-built” structures; 2) Installation of fixed Equipment; 3) “Major Repairs” to HVAC

Just because a project is small and exempt does not mean that an engineer’s input is not crucial.

Advertisement

All advertisements for contracts for public works exceeding the contract limit for public works contracts shall be published once a week for 3 different weeks in a newspaper in the locality; the first advertisement shall appear at least 25 days before the opening of bids and not occur on a Saturday, Sunday, or other legal holiday R.S. 38:2212(G).

Bidding documents shall be available to bidders on the day of the first advertisement and until 24 hours before the bid opening date R.S. 38:2212(G)(2).

Contractor certification - R.S. 37:2163 provides that all architects, engineers, and awarding authorities shall place in their bid specifications the requirement that a contractor shall certify that he holds an active license by displaying his license number on the bid envelope. If the bid does not display the contractor's license number, the bid shall be automatically rejected.

When attendance by bidders is mandated at a pre-bid conference, the date, place, and time of the pre-bid conference shall be stated in the first advertisement R.S. 38:2212(I).

Advertisement (continued)

R.S. 38:2212(B)(2)

The bidding documents shall require only the following information and documentation to be submitted by a bidder at the time designated in the advertisement for bid opening:

Bid Security or Bid Bond, Acknowledgment of Addenda, Base Bid, Alternates, Signature of Bidder, Name, Title, and Address of Bidder, Name of Firm or Joint Venture, Corporate Resolution or written evidence of the authority of the person signing the bid, and Louisiana Contractors License Number, and on public works projects where unit prices are utilized, a section on the bid form where the unit price utilized in the bid shall be set forth including a description for each unit; however, unit prices shall not be utilized for the construction of building projects, unless the unit prices and their extensions are incorporated into the base bid or alternates.

...the public entity should not include any requirements in its advertisement for bids or bid form that it considers insignificant or waivable, because once included, these requirements are non-waivable as a matter of law.” **AG Op. No. 09-0304.**

Project Budget/Cost Estimate

If at the end of the contract document phase, it is determined that the designer's estimate is more than the funds budgeted by the public entity for project, the project shall not be advertised for bid. The designer's estimate shall be read aloud upon opening bids R.S. 38:2212(H).

Every public entity intending to advertise a public work for bids is required to estimate the probable construction costs of such public work or obtain an estimate from the project designer prior to advertising the public work for bids. No public entity shall advertise a public work for bids unless the public entity has budgeted funds that meet or exceed the estimate of the probable construction costs for the project.

The estimate of probable construction costs for the project shall be made available at the time of bid opening, either by posting the estimate electronically or announcing aloud the estimate at the bid opening.

Addenda

Addenda are used to make changes to the bid documents -- often to extend the bid period. As with change orders, addenda must be within the scope of the project.

The bid period may be extended up to 30 days through the issuance of an addendum without the requirement of re-advertising.

If, however, the addendum is issued within 72 hours of the advertised time of opening bids, the opening of bids must be extended for at least 7 but not more than 21 working days without the requirement of re-advertising. The addendum shall state the revised time and date of opening of bids.

If an addendum modifying plans and specifications is issued within 7 days prior to advertised time for opening bids, the public entity shall transmit -- within 24 s of the issuance of the addendum -- a copy of the addendum to all prime ers who have requested bid documents by one of the following methods:

- (1) Facsimile transmission;
- (2) E-mail; or
- (3) Hand-delivery.

The Pre-Bid Conference

Public Entities may mandate that prospective bidders on a public works contract attend a pre-bid conference. The public entity shall include notice of this mandate in its advertisement along with the date, time, and location of the e-bid conference.

Prospective bidders must remain in attendance for the duration of the conference.

Prospective bidders who fail to attend the conference or main for the duration shall be prohibited from submitting a bid for the project.

Is a voluntary attendance pre-bid conference allowed?

Bidding

R.S. 38:2212(B)(2) provides that the “bidding documents” all require only the following to be submitted by a bidder on a public works project:

Completed Louisiana Uniform Bid Form • Bid Security or Bid Bond • Acknowledgment of Addenda • Base Bid • Alternates • Signature of Bidder • Name, Title, and Address of Bidder • Name of Firm or Joint Venture • Corporate Resolution or written evidence of the authority of the person signing the bid and • Louisiana Contractor’s License Number (must also be on the envelope)

Bids (continued)

Delivery

Bids are delivered one of three ways:

(1) For bids hand delivered by the bidder or his agent, a written receipt shall be handed to the deliverer; (2) Registered or Certified Mail with a return receipt requested; or (3) Electronically.

See R.S. 38:2212(B)(6)(2) and (E)(1)

What about bids sent through the regular mail?

Electronic Bidding

R.S. 38:2212(E)

Shall provide . . . a uniform and secure electronic interactive system for the submittal of bids for public works requiring competitive bidding.

Primary Exceptions:

1. Municipalities under 10,000 population
2. Parishes under 20,000 population

Any special condition or requirement for submission shall be specified in the advertisement for bids required by this Section.

Public entities shall have the option to require that all bids be submitted electronically for any competitive bid let out for public bid.

Rejection of Bids

R.S. 38:2214(B) provides that the public entity may reject for just cause any and all bids. The statute does not define “just cause” for materials and supplies, but does define “just cause” for public works, including but not limited to:

The public entity's unavailability of funds sufficient for the construction of the proposed public work;

The failure of any bidder to submit a bid within an established threshold of the preconstruction estimates for that public work, as part of the bid specifications;

Substantial change by the public entity prior to the award in the scope or design of the proposed public work;

A determination by the public entity not to build the proposed public work within twelve months of the date for the public opening and reading of bids; and

The disqualification by the public entity of all bidders.

Rejection of Bids (continued)

All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest responsible and responsive bidder who had bid according to the bidding documents as advertised, and no such public work shall be done except as provided in this Part. See R.S. 28:2212 (X)

Give the bidder who is proposed to be disqualified the opportunity to be heard at an informal hearing at which the bidder is afforded the opportunity to refute the reasons for the proposed action. The informal hearing shall be conducted prior to award of the public work. The informal hearing shall be a condition precedent to any action by the bidder adverse to the public entity, its representatives, employees, and designers.

The informal hearing shall be conducted by the public entity not later than five business days after the date of the notice of disqualification of the bidder. The public entity shall issue a ruling in writing and deliver it to the affected bidder not later than five business days after the date of the informal hearing.

No award of the contract for the public work shall be made by the public entity prior to the expiration of at least five working days following the date of issuance of the decision by the hearing official. The disqualified vendor has the right to seek redress in a court of law after exhausting administrative remedies.

Change Orders

A change order is any contract modification that includes an alteration, deviation, addition, or omission as to a preexisting public work contract that authorizes an adjustment in the contract price, contract time, or an addition, deletion, or revision of work. Change orders may be either “within the scope of the contract” or “outside the scope of the contract.”

Change orders within the scope of the contract may be negotiated in the public's best interest or let out for bid. Public entities may wish to consider letting out for bid change orders within the scope which are more than the statutory contract limit as a best use of public funds.

Change orders outside of the scope of the contract that exceed the statutory contract limit must be let for bid.

The AG has opined that any additional public work outside of the scope of the existing contract that is below the contract limit should be negotiated or let out for public bid rather than by change order to the existing contract. See AG Op. No. 03-0263

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