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## Public Bid Law

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[R.S. 38:2211, et seq.](#)

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### Overview

This document discusses the general principles and guidelines concerning [\*\*Louisiana's Public Bid Law\*\*](#) using a frequently asked questions (FAQ) format. The FAQ also contains Attorney General Opinions and case law to aid understanding of this area of the law. While the document is fairly detailed, remember that every situation is unique and that each situation deserves careful individual review.

Note when working with federal contracts and FEMA reimbursements, the federal government requires a competitive process for procurement of materials and supplies and public works, particularly for FEMA disaster reimbursements. When considering procurement after a disaster, always follow the stricter law to ensure a competitive process and successful reimbursement.

To facilitate your use of this document, numerous links within the summary will direct your attention to related areas within the document and to documents posted on the Louisiana Legislative Auditor's website and on external websites. For example, under the Table of Contents section, you may go directly to any area of the FAQ by clicking the title of the section that you wish to view.

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CASE LAW – ([CLICK HERE](#))

## Frequently Asked Questions

### I. Public Bid Law

R.S. 38:2211, et seq.

#### Q.1. What is the Public Bid Law?

- A.1.** The Public Bid Law is the set of laws that governs contracts for public works and the purchase of materials and supplies by public entities that meet certain threshold requirements called the “**contract limit**” (minimum). This limit is \$30,000 for materials and supplies, and **\$250,000** for public works. The purpose of the public bid law is to ensure that public entities receive the best possible price when using public funds for the procurement of materials and supplies or public works. The Public Bid Law is a prohibitory law founded on public policy and therefore public entities must strictly comply with its provisions absent express exception in law.

Procurement rules for state executive branch entities are contained in the Louisiana Procurement Code (LPC). State executive branch entities (the legislative and judicial branches are exempt) are required to use the LPC for the purchase of materials and supplies. They are, however, required to use the Public Bid Law for public works projects.

Local governmental and political subdivisions are required to follow the Public Bid Law for the procurement of materials and supplies and public works projects. They may however, use the LPC for the procurement of materials and supplies when best interest dictates. They may choose by ordinance or resolution to adopt the LPC in part or in its entirety. They may also purchase from vendors that have been pre-approved by the Office of State Procurement (OSP). Purchasing off the state contract allows agencies to purchase items that have been pre-bid by OSP.

#### Q.2. Does the Public Bid Law apply to procurement by “my” public entity?

- A.2.** “**Public entity**” is defined in [R.S. 38:2211\(A\)\(11\)](#) as 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.

All public entities are required to follow either the Public Bid Law or the Louisiana Procurement Code. Absent a specific exception, all public entities must follow the Public Bid Law for contracts related to public works. Political subdivisions and local governmental entities must use the Public Bid Law for the purchase of materials and supplies, unless they choose to follow the LPC or purchase goods off the state contract. State executive branch entities must use the LPC for the purchase of materials and supplies.

#### Q.3. What types of contracts are covered by Louisiana’s Public Bid Law?

- A.3.** All contracts for public works (defined in [Q.4](#)) are governed by the Public Bid Law, regardless of whether the contracting entity is a local political subdivision or a state entity.



- Contracts for the purchase of materials and supplies are governed by the Public Bid Law if the entity is a local political subdivision or local governmental entity.
- State entities generally must use the LPC for the purchase of materials and supplies.
- Contracts for professional services procured by political subdivisions and local government entities are not subject to the Public Bid Law. Certain contracts for professional services such as architects, engineers, and landscape architects by State agencies are subject to the Public Bid Law. See [\[Q.80\]](#)

## **II. Public Works**

**R.S. 38:2211**

### **Q.4. What are public works?**

**A.4.** Public work, as defined in [R.S. 38:2211\(A\)\(12\)](#), includes any contract for the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity. These contracts also include labor and materials.

### **Q.5. Are contracts for routine maintenance considered public work contracts?**

**A.5.** Routine maintenance is specifically exempted from the definition of “public works” and contracts for routine maintenance are not required to be publicly bid unless the contract exceeds two years in duration. R.S. 38:2212(U) and (W)(1)

The difference between routine maintenance and a “repair” (and therefore a public work) is a fact specific determination that is made on a case by case basis. Examples of routine maintenance are replacing shingles on a roof; preservative repainting of a building; and the preventative dredging of a port’s finger pier and docks. See, AG Op. No. 16-0082.

### **Q.6. Are contracts for demolition considered public works?**

**A.6.** There is not unanimous agreement as to the answer to this question, as noted below. However, public entities can ensure that their contracts for demolition are properly let by bidding them out through the Public Bid Law.

The Attorney General (AG) in [AG Op. No.10-0026](#) opined that a contract for demolition was not a public work as demolition was not included in the definition of a public work (i.e. erection, construction, alteration, improvement or repair), and therefore not subject to the provisions of the Public Bid Law. The AG stated that a contract for demolition should be treated as a contract for services. The AG has not formally withdrawn this opinion.

In 2011, the Fourth Circuit Court of Appeal in *Concrete Busters of Louisiana, Inc. v. The Board of Commissioners of the Port of New Orleans* held that a contract for demolition was a public work, as demolition would result in an alteration of the immovable property of the public entity. Alteration is included within the definition of a public work. The Supreme Court and the other Appellate Courts have not issued a published opinion regarding the status of a contract for demolition being considered a public work. The Fourth Circuit’s decision, while persuasive, is not binding on public entities in other Louisiana Appellate Circuits.

The Fourth Circuit's decision in *Concrete Busters* was mentioned by the AG in [AG Op. No. 12-0066](#), but was not fully addressed by the AG. In this opinion, the AG opined that, when a public entity elects to utilize the bid process to execute a contract for demolition, it must comply with the requirements set forth in its bid documents. The AG did not address whether a contract for demolition is a public work in [AG Op. No. 12-0066](#), as the contract for demolition at question was valued below the contract threshold for a public work.

Given these differing determinations, it is possible that another appellate court may ultimately hold that a public entity's contract for demolition is not a public work, or may instead choose to adopt the reasoning of the Fourth Circuit and hold that it is a public work. Public entities should consult with their legal counsel to review these AG opinions and court decision to determine how it should proceed with any contract for demolition.

**Q.7. What are the procedures for executing contracts for public works?**

**R.S. 38:2212(A)**

- A.7.** All contracts for public works exceeding the current contract threshold of **\$250,000** must be advertised for bid and let for contract with the lowest responsible and responsive bidder.

The Legislative Auditor recommends that contracts for public works valued at **\$250,000** or less, be administered through a Request for Proposal (RFP) process and/or solicitation of at least three bids, even though the statute does not require them to be bid.

Public entities through their employees may undertake contracts for public works projects costing less than the contractual limit. All materials and supplies used in the construction must, however, be purchased in accordance with the Public Bid Law pursuant to [R.S. 38:2212.1. AG Op. No. 04-0079](#) **R.S. 38:2212(N)**

All contracts for public works by public entities must use the Louisiana Uniform Public Work Bid Form established by the Office of Facility Planning and Control.

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

Any timely changes by a bidder to the bid prior to submission of the bid shall be scratched through and initialed by the bidder or the person who submits the bid. The change as initialed shall be binding.

**R.S. 38:2212(B)(2)** as amended by [Act 205 of the 2021 Regular Session](#).

For the purpose of bids submitted electronically, the last timely bid submission by each and any bidder shall be binding.

**R.S. 38:2212(E)(1)**, as amended by [Act 205 of the 2021 Regular Session](#).

The Louisiana Uniform Public Work Bid Form is published in the Louisiana Administrative Code under Title 34, Government Contracts, Procurement and Property Control, Part III. Facility Planning and Control, Chapter 3.

**[Louisiana Uniform Public Work Bid Form.](#)**



**Q.8. What is the dollar threshold, or contract limit (minimum), for contracts for public works?**

**A.8.** The threshold, or contract limit, is currently set at **\$250,000**.

Changes in the 2014 Legislative Session, added an annual Consumer Price Index (CPI) calculation to the threshold. [Act 111 of the 2020 Regular Session](#) amended the contract limit to \$250,000 and delayed any further CPI modifications until February 1, 2025. Therefore, in 2025, the office of facility planning and control (OFPC) within the division of administration will resume adjusting the statutory contract limit (**\$250,000**) by an amount not to exceed the annual percentage increase in the CPI in the preceding year

**Q.9. Does the threshold, or contract limit, for Public Works change?**

[R.S. 38:2212\(C\)](#)

**A.9.** Yes, the Office of Facility Planning and Control (OFPC) is required to annually adjust the contract limit for public works by an amount not to exceed the previous year's increase in the Consumer Price Index (CPI). The CPI is commonly used when it is necessary to adjust prices or costs to account for the effect of inflation on the real value of various costs. [Act 111 of the 2020 Regular Session](#) increase the statutory contract limit for public works contracts to \$250,000 and delayed any further CPI increases until February 1, 2025.

**Q.10. What items must be included to determine whether a public works contract must be bid?**

**A.10.** [R.S. 38:2212\(C\)](#)(1) provides that the following shall be included:

- Labor;
- Materials;
- Equipment, as per rates in the latest edition of the Associated Equipment Dealers Rental Rate book; and
- Administrative overhead, not to exceed fifteen percent.

**Q.11. May a public entity construct a public work using its own employees without bidding?**

[R.S. 38:2212\(N\)](#)

**A.11.** Public works that are estimated to cost less than the contract limit may be undertaken by the public entity with its own employees. Any materials or supplies purchased in connection with the project must be procured in accordance with R.S. 38:2212.1. (See, [AG Op. No. 04-0079](#)) Those contracts let by any public entity for public works estimated to cost more than the contract limit shall be advertised and let by contract to the lowest responsible and responsive bidder.

**Q.12. Is there a different contract limit for public works related to drainage projects to be done by regular maintenance employees of the St. Charles Parish governing authority?**

[R.S. 38:2212\(C\)\(4\)](#)

**A.12.** The Legislature, through Act 201 of the 2019 Regular Session enacted R.S. 38:2212(C)(4), which created an exception to the general contract limit for public works related to drainage projects to be done by regular maintenance employees of the

St. Charles Parish governing authority. For such Public Works projects, the contract limit is \$250,000 per project, including labor, materials, and equipment, with administrative overhead not to exceed 15%. This provision shall terminate on December 31, 2020.

[Act 111 of the 2020 Regular Session](#) (effective July 1, 2020) subsequently increased the general contract limit for public works contracts to \$250,000. The contract limit for drainage public works projects by St Charles Parish will remain at the new \$250,000 general contract limit, upon the termination of the provisions of R.S. 38:2212(C)(4).

**A. [Design Phase](#)**

**[Q.13.](#) Is a local public entity required to bid out a contract for design services (i.e. architect/engineer) for a public works project?**

**A.13.** No. Contracts for design services by a local public entity are not required to be bid.

In addition, [R.S. 38:2318.1](#) requires that public entities select providers of design services on a basis of competence and qualifications for a fair and reasonable price. Public entities are prohibited under R.S. 38:2318.1 from selecting providers of design services where price or price-related information is a factor in selecting an architect, engineer, or other design professional.

Public entities should utilize a Request For Qualifications (RFQ) process to seek and select a provider of design services and then attempt to negotiate a price with the provider selected as most qualified.

**[Q.14.](#) What preparations must the public entity make before advertising for a public work? [R.S. 38:2212\(H\)](#)**

**A.14.** 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.

Any and all bidders' information shall be available upon request, either no sooner than fourteen days following the bid opening or after the recommendation of award by the public entity or the design professional, whichever occurs first. The requester shall pay reasonable reproduction costs.

These requirements shall not apply to the Department of Transportation and Development.

**Q.15. What limitations apply to a consultant competing for contracts?**

[R.S. 38:2212.7](#)

- A.15.** R.S. 38:2212.7 provides limitations on consultants competing for contracts. Any person contracting with an agency for the purposes of developing bidding documents, requests for proposals, or any other type of solicitation related to a specific procurement shall be prohibited from bidding, proposing, or otherwise competing for award of that procurement. Such persons shall further be prohibited from participating as subcontractors related to the award of that procurement.

The statute further notes, however, that certain activities are not considered to be **“developing bidding documents, requests for proposals, or any other type of solicitation”** and would therefore not prevent a consultant from competing.

These activities are:

- (1) Architectural and engineering programming.
- (2) Master planning.
- (3) Budgeting.
- (4) Feasibility analysis.
- (5) Constructability review.
- (6) Furnishing specification data or other product information.
- (7) Any other services that do not establish selection qualifications or evaluation criteria for the procurement of an architect or engineer.

**B. Advertisement**

**Q.16. What are the requirements regarding the advertisement of bids for public works?**

[R.S. 38:2212](#)

- A.16.** All advertisements for contracts for public works exceeding **the contract limit for public works contracts (currently greater than \$250,000)**, unless an exception applies, 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\(G\)](#).

- Although the word ‘locality’ is not defined, the AG has interpreted it to mean the area where the political subdivision is located **AG Op. No. 83-0720**.
- Contracts by a public entity for any project to restore or rehabilitate a levee that is not maintained with federal funds nor undertaken by the public entity with its own resources and employees must be advertised for bid if they exceed \$1 million dollars. This exception for a heightened contract limit is slated to expire on December 31, 2022\* [R.S. 38:2212\(C\)\(3\)](#).
- 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, the bid shall be returned to the bidder marked "Rejected," and shall not be read aloud. Any bid that does not require the contractor to hold an active license shall state the exemption on the bid envelope and shall be treated as a lawful bid.

- Public entities must include all bid documents as defined in [R.S. 38:2211\(A\)\(1\)](#), on the electronic website accepting the electronic bids [R.S. 38:2212\(E\)\(7\)](#).
- 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\(I\)](#).
- 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 the project, the project shall not be advertised for bid. The designer's estimate shall be read aloud upon opening bids [R.S. 38:2212\(H\)](#).
- The Construction or Contract Document Phase is the coordination of all technical drawings and designs related to the project, the development of the specifications documents, finalization of details, and an updated statement of probable cost.
- If political subdivisions are required to, allowed to, or elect to allow for electronic submission of bids, the advertisement shall contain the electronic address of the public entity and shall establish the specific times for public access to the electronic interactive environment for purposes of submission of bids [R.S. 38:2212\(E\)](#).

Please note: Use of the electronic bidding option through services such as Central Bidding does not eliminate the newspaper advertising requirements of [R.S. 38:2212\(G\)](#).

**Q.17. May the advertisement for bids pre-qualify certain individuals and thereby disqualify others? [R.S. 38:2215](#)**

**A.17.** No, the general rule is that no pre-qualification may occur. For instance, geographic restrictions limiting the distance between the vendor and the public entity are not allowed. However, the entity may specify a time limit for needed repairs if included in the contract.

There are a very few exceptions to the general rule. An example of an exception under R.S. 38:2212.5 is that contracts for historic restoration for projects other than bridges and roads may be pre-qualified, due to the specific skills needed for the job.

Although public entities may not generally pre-qualify bidders, the public entity may still consider any issues that might otherwise prevent a bidder from providing the requested work or materials or suppliers when reviewing whether the bidder is responsive and responsible. Any disqualification under this review shall comply with the due process outlined in R.S. 38:2212(X).

**Q.18. What are addenda?**

**A.18.** 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.

**Q.19. What are the requirements for addenda?**

**A.19.** 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 the advertised time for opening bids, the public entity shall transmit -- within 24 hours of the issuance of the addendum -- a copy of the addendum to all prime bidders who have requested bid documents by one of the following methods:

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

**Q.20. May a public entity require bidders attend a pre-bid conference?**

**R.S. 38:2212(I)**

**A.20.** Yes. 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 pre-bid conference.

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

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

**Q.21. May the requirements of R.S. 38:2212 be waived?**

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

**A.21.** Public entities may not waive the requirements of R.S. 38:2212. Also, any additional requirements the public entity places in its advertisement for bids or its uniform bid form may not be waived.

- ❖ *“...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.**

**C. Bidding**

**Q.22. What documents must be included with a bid?**

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

**A.22.** R.S. 38:2212(B)(2) provides that the “bidding documents” shall 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)

**Q.23. How are bids delivered?**

**R.S. 38:2212(B)(6)**

**A.23.** Bids may be 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) Alternatively, bids shall be sent by registered or certified mail with a return receipt requested; or
- (3) Shall be submitted electronically.

The new law removes the stipulation that the requirement that all bids be sent by registered or certified mail shall not apply to bids received by municipal and parochial governing authorities. The current presumption is that these alternative requirements do apply to municipal and parochial governing authorities.

No public entity shall accept or take any bids, including receiving any hand delivered bids, on days that are recognized as holidays by the United States Postal Service.

**Q.24. What is electronic bidding?**

**R.S. 38:2212(E) and R.S. 38:2212.1(B)(4)**

**A.24.** Public entities shall provide, as an additional bidding option, a uniform and secure electronic interactive system for the submittal of bids for public contracts, both public works and materials and supplies, requiring competitive bidding. Any public entity, (including local entities) providing an electronic system shall follow the standards for the receipt of electronic bids adopted by the office of the governor, division of administration, and the office of information technology (See [LAC 4:XV.701 \(pg 159 of document\)](#)), providing that any special condition or requirement for the submission shall be specified in the advertisement for bids).

Please note: Use of the electronic bidding option through services such as Central Bidding does not eliminate the newspaper advertising requirements of [R.S. 38:2212\(G\)](#) for public works (See, [Q.16](#)) or [R.S.38:2212.1\(B\)\(1\)](#) for materials and supplies (See, [Q.47](#)).

**Q.25. Who is exempt from the electronic bidding requirement under the Public Bid Law?**

**A.25.** The exemptions from requiring public entities to accept electronic bid submission for **public works** provided by [R.S. 38:2212\(E\)](#) include:

- Public entities that are currently without available high-speed Internet access until high-speed Internet access becomes available;
- Any parish with a police jury form of government and a population of less than twenty thousand; Any city or municipality with a population of less than ten thousand;



- Any other public entity that is unable to comply with the law without securing and expending additional funding; and
- Public entities have the option to require that all bids be submitted electronically for any competitive bid let out for public bid.

Public entities shall include all bidding documents as defined in [R.S. 38:2211\(A\)\(2\)](#), on the electronic website accepting the electronic bids.

**Q.26. When is the bid opening and what must occur?**

**R.S. 38:2214**

**A.26.** The Bid opening shall be held at the date, time, and location noticed in the public entity's advertisement. The bid opening shall be at least 25 days after the first published advertisement.

At the bid opening, the public entity shall publicly open the submitted bids and read them aloud.

**Q.27. Can a public entity extend the time for submitting bids?**

**A.27.** Yes. A public entity may through the issuance of addendum extend the bid period for up to thirty (30) days, without requiring re-advertisement.

If 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. See [Q.19.](#)

Notice should be given to ensure that all potential bidders are aware of the extension.

**D. Bid Selection**

**Q.28. May the public entity reject any, or all, bids?**

**R.S. 38:2214**

**A.28.** 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;
- A 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.

**Q.29. What is a responsible and responsive bidder?**

**A.29.** A responsible and responsive bidder, according to [R.S. 38:2212\(A\)\(1\)](#), is one whose bid meets the requirements set out in the advertised bidding documents and who provides the required documentation within ten days of the bid opening. These documents may be required by statute, the Administrative Code, or the bidding documents.

- **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, the bid shall be returned to the bidder marked "Rejected," and shall not be read aloud. Any bid that does not require the contractor to hold an active license shall state the exemption on the bid envelope and shall be treated as a lawful bid.

The low bidder is required to furnish any other documentation, including the attestation required under [R.S. 38:2212.10](#), within ten days of the bid opening. The governing authority of any publicly owned commercial aviation airport to the Sewerage and Water Board of New Orleans and all agencies of the City of New Orleans including the Regional Transit Authority and the New Orleans Aviation Board are required to have the two lowest bidders furnish any other required documentation and attestations three days after the bid opening.

**Q.30. Who is a responsive bidder?**

[R.S. 38:2212\(A\)\(3\)](#)

**A.30.** R.S. 38:2212 adds the word "**responsive**" to the phrase "**responsible bidder**" to provide as follows:

*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.*

The law does not define "responsive bidder" but a reading of the law as to what constitutes a non-responsive bidder demonstrates that a responsive bidder is the apparent low bidder who submits the proper documentation within ten days of the opening of the bids.

The law provides that the bidding documents shall not require any bidder, other than the apparent low bidder, to furnish any other information or documentation, including the Attestation Affidavit and the E-Verification Form, any sooner than ten days after the date bids are opened; however, the apparent low bidder may submit such information or documentation at any time prior to the expiration of the ten-day period.

If the apparent low bidder does not submit the proper information or documentation as required by the bidding documents within the ten-day period, the law states that such bidder shall be declared **non-responsive**, and the public entity may award the bid to the next lowest bidder, and afford the next lowest bidder not less than ten days from the date the apparent low bidder is declared non-responsive, to submit the proper information and

documentation as required by the bidding documents, and may continue such process until the public entity either determines the low bidder or rejects all bids.

Therefore, by deduction, a responsive bidder is the apparent low bidder who submits the proper documentation within ten days of the opening of the bids.

**Q.31. What happens if a bidder is not a “responsible bidder”?** [R.S. 38:2212\(X\)](#)

**A.31.** If the public entity letting the contract proposes to disqualify any bidder, either as a potential bidder or as the low bidder, on grounds that such bidder is not a **“responsible bidder”** the public entity shall:

- Give written notice of the proposed action to the bidder and include in the written notice all reasons for the proposed action;
- 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.

These provisions do not apply to the Department of Transportation and Development.

**Q.32. Does the apparent low bidder who is disqualified as non-responsive/non-responsible have any recourse?** [R.S. 38:2212\(X\)](#)

**A.32.** If the public entity letting the contract proposes to disqualify any bidder, either as a potential bidder or as the low bidder, on grounds that such bidder is not a **“responsible bidder”** such public entity shall do all of the following:

- (a) Give written notice of the proposed action to such bidder and include in the written notice all reasons for the proposed action.
- (b) Give the 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 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 such 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 provisions of this Subsection shall not apply to such actions of the Department of Transportation and Development.
- Although not mentioned in the statute, once a disqualified vendor has exhausted all administrative remedies, that vendor may seek an injunction or further action in the district court.

#### **D. Execution of Contract**

##### **Q.33. What is the time period for awarding public works contracts?**

**R.S. 38:2215**

- A.33.** R.S. 38:2215 provides that a public entity shall act not later than forty-five calendar days after the date of opening bids to award the public works contract to the lowest responsible and responsive bidder or to reject all bids. If, however, the public entity and the lowest responsible and responsive bidder agree by mutually written consent, the deadline for award may be extended in increments of thirty calendar days.

If the lowest responsible and responsive bidder has timely provided all documents required by R.S. 38:2212, and no injunction or temporary restraining order is in effect, the lowest responsible and responsive bidder and the public entity shall execute the contract not later than sixty calendar days after the date of the public entity's award of the contract to the lowest responsible and responsive bidder.

The public entity shall issue to the contractor a notice to proceed with the project or work order not later than thirty calendar days following the date of the second party's execution of the contract. However, the public entity and the contractor, upon mutual written consent of both parties, may agree to extend the deadline to issue the notice to proceed.

The provisions of this law do not apply to contracts to be financed by bonds that are required to be sold after opening of bids on the contract, or when the contract is to be financed in whole or in part by federal or other funds that will not be readily available at the time bids are opened, or on contracts that require a poll of the Legislature of Louisiana before funds are available to fund the contract. This exception shall be mentioned in the bidding documents for the project and in the official advertisement for bids required in accordance with R.S. 38:2212.

These provisions are not subject to waiver.

**Q.34. May changes be made to the contract after the contract has been executed?**

**R.S. 38:2212(M)**

**A.34.** Yes, the contract may be amended through change orders, if they are within the scope of the contract.

- All public work contracts shall contain provisions authorizing the issuance of change orders within the scope of the contract.
- All change orders shall be in writing or in electronic format if the public entity is capable of receiving change orders electronically. All change orders shall be signed by the contractor and the public entity or its design representative.
- The public entity shall pay the contractor for work performed by change order not later than sixty days after the date the public entity approves the application for payment for completion of the work performed in the change order.
- Any change order outside the scope of the contract shall be let out for public bid if it exceeds the contract threshold defined herein.
- Any change order pertaining to public work, not required to be let out for public bid, shall either be negotiated in the best interest of the public entity or let out for public bid. Where the change order is negotiated, the public entity shall require that such change order be fully documented and itemized as to costs, including material quantities, material costs, taxes, insurance, employee benefits, other related costs, profit, and overhead. If certain unit prices are contained in the initial contract, no deviations shall be allowed in computing negotiated change order costs.

**E. Change Orders**

**Q.35. What is a change order?**

**R.S. 38:2211(A)(3)**

**A.35.** 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.”

**Q.36. What is a change order that is within the scope of the contract?**

**R.S. 38:2211(A)(3)(c)**

**A.36.** A change order is within the scope of the contract when it does not alter the nature of the thing to be constructed and that is an integral part of the project objective.

**Q.37. What is a change order that is outside the scope of the contract?**

**R.S. 38:2211(A)(3)(b)**

**A.37.** A change order is outside the scope of the contract when it alters the nature of the thing to be constructed or that is not an integral part of the project objective

(See the AG Opinion discussed in [\[Q.38\]](#))

**Q.38. What are the requirements for a change order?**

**R.S.38:2212(M)**  
**R.S. 38:2222**

**A.38.** All change orders shall be in writing or in electronic format if the public entity is able to receive change orders electronically. All change orders shall be signed by the contractor and the public entity or its design representative.

The public entity shall pay the contractor for work performed by change order not later than sixty days after the date the public entity approves the application for payment for completion of the work performed in the change order.

- 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 contract limit as a best use of public funds.
- Change orders outside of the scope of the contract that exceed the 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**

- [R.S. 38:2222\(A\)](#) requires that each change order shall be recorded by the public entity which entered into the contract in the office of the recorder of mortgages in the parish where the work is to be done or if not a public work, where the entity is domiciled, not later than 30 days after the date of the change order which requires that the recordation take place. The requirement applies to:
  - Change order to a public works contract or to a contract for materials and supplies that adds an amount of 10% or more of the original contract amount, if the additional amount is at least \$10,000 or
  - All change orders to a contract aggregating to an amount of 20% or more of the original contract amount if the additional amount is at least \$10,000.
  - The original contract, if not previously recorded, shall be recorded with the change order.
- The requirements of R.S. 38:2222(A) do not apply to the office of facility planning and control and the office of state purchasing.
- [R.S. 38:2222\(B\)](#), enacted through [Act 205 of the 2021 Regular Session](#) requires that change orders shall be processed and issued by the public entity no later than forty (40) days following final execution of the change order.



## F. Miscellaneous

### Q.39. What are recent definitions added to the public bid requirements for public works?

**A.39.** Recent additions to the definitions section in [R.S. 38:2211](#), include:

- **“Alternate”** means an item on the bid form that may either increase or decrease the quantity of work or change the type of work within the scope of the project, material, or equipment specified in the bidding documents, or both.
- **“Change order”** means any contract modification that includes an alteration, deviation, addition, or omission as to a preexisting public work contract, which authorizes an adjustment in the contract price, contract time, or an addition, deletion, or revision of work.
- **“Probable construction costs”** means the estimate for the cost of the project as designed that is determined by the public entity or the designer.

### Q.40. May construction managers or other third party consultants employed by a public entity manage a construction project as the general contractor or act in the role of a general contractor? [R.S. 38:2212\(L\)](#)

**A.40.** No, the practice of using construction managers to oversee, direct, or otherwise perform the role of a general contractor on a public works project is prohibited [AG Op. No. 12-0232](#). This restriction shall not apply to the initial construction of a hospital, medical facility, or a combination of both, constructed by the Orleans Hospital Service District, but shall apply to the construction of any additions or modifications of a hospital, medical facility, or a combination of both, constructed by the Orleans Hospital Service District following the completion of the initial construction.

### Q.41. What is the A+B method to determine the lowest responsive bidder for public works contracts? [R.S. 38:2211.2](#)

**A.41.** R.S. 38:2211.2 provides for a pilot program to authorize local governmental subdivisions and political subdivisions to use A+B bidding method to determine the lowest responsive bidder on a contract for public works.

The law defines "A+B bidding" and "owner" as follows:

(1) "A+B bidding" means cost plus time bidding that factors time plus cost to determine the low bid. Under the A+B method, each submitted bid has two components where "A" is the traditional bid for the contract items and is the dollar amount for all work to be performed under the contract, and "B" is a "bid" of the total number of calendar days required to complete the project, as estimated by the bidder. Bid days are multiplied by a user cost, furnished by the project owner, and added to the "A" component to obtain the total bid. The bid for award to the lowest responsive bidder is based on a combination of the bid for the contract items and the associated cost of time.

(2) "Owner" means a "local governmental subdivision" or a "political subdivision" as defined in La. Const. Art. VI, Sec. 44(1) and (2).

The pilot program is limited to 15 projects subject to prior approval of the House and Senate committees on transportation, highways, and public works. If the legislative committees approve a project, the owner is required to submit in writing to the chairmen of committees, the name and address of the lowest responsive bidder awarded the contract, together with the bid values of the A+B components. Further, upon completion and acceptance of the project, the owner is required to submit in writing to the chairmen of the committees a project report that includes the final project cost and an evaluation of whether or not contract times were reduced, costs were acceptable, and quality was maintained by use of the A+B bid method.

The law provides that bidding documents may contain alternates, which allow for different materials or methods of construction, provided that any such alternate materials are currently approved by the local governmental subdivision or political subdivision.

The law became effective August 1, 2019. It supersedes any conflicting provisions of any law, including the Public Bid Law, but the provisions of the Public Bid Law are otherwise applicable to such contracts.

### **III. Materials and Supplies**

**R.S. 38:2212.1**

#### **Q.42. What are materials and supplies?**

**A.42.** Materials and supplies are not defined in the statutes; in this context, however, they are commonly understood to be the movable property necessary to conduct public business, from paper and pens to computers and printers.

#### **Q.43. Are all contracts for the purchase of materials and supplies subject to the Public Bid Law?**

**A.43.** Local political subdivisions and local governmental entities are required to use the Public Bid Law for the procurement of materials and supplies if the cost is over the contract limit of \$30,000, unless an exception exists. Examples of exceptions include: group purchasing options for hospitals ([R.S. 38:2212.1\(G\)](#)) and schools ([R.S. 38:2212.1\(N\)](#)); emergency procurements; or buying items off the state contract using the LPC. Transactions between public entities are not subject to the Public Bid Law, as long as a fair price is received for the goods.

State entities are required to use the LPC for the purchase of materials and supplies, and may purchase off the state contract or bid for items over \$25,000 pursuant to [R.S. 39:1594](#). [Executive Order JBE 2017-18](#) provides executive branch entities with certain procurement procedures for items under \$25,000.

#### **A. Contract Limits**

#### **Q.44. What is the threshold, or contract limit (minimum), for purchases of materials and supplies by local political subdivisions?**

**A.44.** Contracts by local political subdivisions and local governmental entities for purchases of materials and supplies with a value of more than **\$30,000** must be advertised and let for contract with the lowest responsible bidder. Purchases of \$10,000 or more, but less than \$30,000 dollars, shall be made by obtaining no fewer than 3 quotes by telephone,



facsimile, email, or any other printable electronic form. If telephone quotes are received, a written confirmation of the accepted offers shall be obtained and made a part of the purchase file. For purchases less than \$10,000, but greater than \$1,000, prudent practice suggests obtaining at least 3 written quotes, though the law does not so require.

**Q.45. Does an exception to this threshold exist for purchase by a local governmental unit of a used or new motor vehicle for conversion into a law enforcement vehicle? Please explain the meaning of [R.S. 38:2212.1\(A\)\(2\)\(a\)](#).**

**A.45.** The original purpose of [R.S. 38:2212.1\(A\)\(2\)\(a\)](#) was to provide an alternative procedure for use by local governments to purchase law enforcement vehicles valued under the contract limit for the purchase of materials and supplies as provided by R.S. 38:2212.1(A)(1)(a). At the time R.S. 38:2212.1(A)(2)(a) was last amended, the contract limit for the purchase of materials and supplies was \$20,000. The use of sealed competitive bidding was still required if the law enforcement vehicle purchased under R.S. 38:2212.1(A)(2)(a) was valued over the \$20,000 contract limit.

When the general contract limit was raised to \$30,000 by Act 392 of the 2009 Regular Session, the Legislature did not amend the language in [R.S. 38:2212.1\(A\)\(2\)\(a\)](#) to match the new higher bid threshold, effectively repealing it. It appears that local governments purchasing used or new motor vehicles for law enforcement that cost more than \$20,000 but that do not otherwise exceed the \$30,000 general contract limit, should obtain three quotes in accordance with R.S. 38:2212.1(A)(1)(b).

Purchases of \$20,000 or less for this purpose appear to remain subject to the exception contained in [R.S. 38:2212.1\(A\)\(2\)\(a\)](#) and the purchase, while not requiring a specific amount or type of quotes, should be fully documented in the public entity's contract files. Although the language of [R.S. 38:2212.1\(A\)\(2\)\(a\)](#) does not provide for a specific number of quotes to be obtained, it does appear to require that more than one form of documentation be obtained to support the reasonableness of the purchase and be retained in the contract files of the public entity.

**Q.46. What procedures exist for procurement of Materials and Supplies?**

**A.46.** Absent an exception, contracts by local political subdivisions and local governmental entities for the purchase of materials and supplies that exceed the threshold of \$30,000 must be advertised for bid and let for contract to the lowest responsible bidder.

Public entities that have contracts for purchases of materials and supplies for less than **\$30,000** but greater than or equal to **\$10,000** must, pursuant to [R.S. 38:2212.1\(A\)\(1\)\(b\)](#):

**Obtain no less than three quotes by telephone, facsimile, email, or any other printable electronic form; and if telephone quotes are received, a written confirmation of the accepted offers shall be obtained and made a part of the purchase file.**

If a lower bid than the accepted bid is rejected, the reason for the rejection must be noted.

Although not mandatory, public entities seeking contracts for purchases of materials and supplies for less than \$1,000 should consider, as part of a good public policy requiring governmental accountability, obtaining and documenting at least 3 verbal quotes, if possible.

Public entities seeking contracts for purchases of materials and supplies for less than \$10,000, but greater than \$1,000, should consider, as part of good public policy requiring governmental accountability, obtaining at least 3 written quotes.

**B. Advertisement**

**Q.47. What requirements exist for the advertisement of bids?**

**R.S. 38:2212.1(B)(1) and R.S. 38:2214**

**A.47.** The advertisement for bids shall be published 2 times in a newspaper in the locality. The word 'locality' is not defined; the AG has interpreted it to mean the area where the political subdivision is located **AG Op. No. 83-0720**.

The first publication must appear at least 15 days before the opening of the bids and shall not occur on a Saturday, Sunday or legal holiday.

Plans and specifications shall be available to bidders the day of the first advertisement and until 24 hours before bid opening date.

R.S. 38:2214(A), states that the advertisement for bids shall include the time and place that the bids will be received and shall at that time and place publicly open the bids and read them aloud. No public entity shall accept or take any bids including hand-delivered bids on days that are recognized as holidays by the United States Postal Service.

**Please note: Use of the electronic bidding option through services such as Central Bidding does not eliminate the newspaper advertising requirements of R.S. 38:2212.1(B)(1).**

**Q.48. May a public entity specify alternates?**

**R.S. 38:2212.1(B)(3)**

**A.48.** The public entity may specify no more than three (3) alternates and must accept them in the order they appear on the bid form. Determination of the low bidder shall be on the basis of the sum of the base bid and any alternates accepted. However, the public entity may accept alternates in any order that does not affect determination of the low bidder.

The Attorney General has opined that public entities are under no obligation to accept an alternate. If the public entity exercises its discretion to accept alternates, they must be accepted in the order in which they are listed, unless it does not affect the determination of the low bidder.  
**See AG Op. No. 15-0052**

**Q.49. May a public entity specify a particular brand?**

**R.S. 38:2212.1(C)(1) and (2)**

**A.49.** Yes, if in the public interest, a public entity may specify a particular brand, make, or manufacturer in the specifications using the model or catalog number. These specific brand names denote the quality standard of the product desired and does not restrict prospective bidders; equivalent products must be acceptable.

### C. Bidding

#### Q.50. What is electronic bidding?

[R.S. 38:2212.1\(B\)\(4\)\(a\)](#)

**A.50.** Contractors shall be provided the option to submit bids for public contracts through a uniform and secure electronic interactive system. Political subdivisions shall follow the standards for the receipt of electronic bids adopted by the office of the governor, division of administration, and the office of information technology as provided for in LAC 4:XV.701, and shall make the appropriate provisions necessary for the acceptance of electronic bids for all purchases requiring competitive bidding. Any special condition or requirement for the submission shall be specified in the advertisement for bids.

Please note: Use of the electronic bidding option through services such as Central Bidding does not eliminate the newspaper advertising requirements of [R.S. 38:2212\(G\)](#) for public works (See, [Q.16](#)) or [R.S.38:2212.1\(B\)\(1\)](#) for materials and supplies (See, [Q.47](#)).

#### Q.51. Who is exempt from the electronic bidding requirement under the Public Bid Law?

**A.51.** The exemptions from requiring public entities to accept electronic bid submission for **materials and supplies** provided by [R.S. 38:2212.1\(B\)\(4\)](#) include:

- Public entities that are currently without available high-speed Internet access until high-speed Internet access becomes available;
- Any parish with a police jury form of government and a population of fewer than twenty thousand;
- Any city or municipality with a population of fewer than ten thousand; and
- Any special service district created by a police jury form of government that is unable to comply without securing and expending additional funding.

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

#### Q.52. When is the bid opening and what must occur?

**A.52.** The Bid opening shall be held at the date, time, and location noticed in the public entity's advertisement. The bid opening shall be at least 15 days after the first published advertisement.

At the bid opening, the public entity shall publicly open the submitted bids and read them aloud.

#### Q.53. What are the rules on the opening of bids?

[R.S. 38:2214](#)

**A.53.** [R.S. 38:2212.1\(J\)](#) provides that the opening of bids is governed by the provisions of [R.S. 38:2214](#). This statute requires the public entity to designate the time and place that the bids will be received in the advertisement for bids. It further requires the public entity at that time and place to publicly open the bids and read them aloud. No public entity

shall accept or take any bids, including hand-delivered bids, on days that are recognized as holidays by the United States Postal Service.

#### **D. [Bid Selection](#)**

**Q.54. May the public entity reject any, or all, bids?** [R.S. 38:2214](#)

**A.54.** R.S. 38:2214(B) provides that the public entity may reject any and all bids for just cause. The statute does not define “just cause” for materials and supplies, but does define “just cause” for public works. See [Q.28.](#)

- **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.

**Q.55. What is a responsible and responsive bidder?**

**A.55.** A responsible and responsive bidder is one whose bid meets the requirements set out in the advertised bidding documents.

**Q.56. What happens if a bidder is not a “responsible bidder”?**

**A.56.** While [R.S. 38:2212.1](#) does not provide for a formal process for the disqualification of an apparent low bidder who the public entity determines is not a responsive and responsible bidder, the public entity can utilize the procedures outlined in [R.S. 38:2212\(X\)](#) for public works contracts [Q.31.](#) to ensure that due process is afforded in the disqualification process. See [AG Op. No. 13-0008](#).

#### **E. [Exceptions](#)**

**Q.57. What are the exceptions to bidding requirements for contracts for materials and supplies?**

**A.57.** Yes, there are exceptions for certain purchases of materials and supplies. These exceptions include:

- purchases off the State Contract under cooperative purchasing agreements; [R.S. 38:2212.1\(F\)](#)
- purchases of surplus materials and supplies from another public entity or the government of the United States or if the particular transaction is governed by the procurement code; [R.S. 38:2212.1\(D\)](#)
- purchases off of the Federal General Services Administration Lists, provided that the items are not otherwise available cheaper on State Contract and the public entity utilizes a Louisiana licensed dealer or distributor; [R.S. 38:2212.1\(E\)](#)
- purchases by hospitals service districts under qualified group purchasing organizations; [R.S.38:2212.1\(G\)](#)

- purchases of used fire and emergency response vehicles, including associated equipment, with a per unit purchase cost of less than one hundred thousand dollars; [R.S. 38:2238](#), *et seq.*
- lease, rental, or purchases of telecommunications data processing systems, including equipment, and related services, by political subdivisions through a request for proposals; [R.S. 38:2237](#)
- purchases of materials, equipment and supplies by school districts and schools through a qualified group purchasing organization; [R.S. 38:2212.1\(N\)](#)
- purchase of materials, supplies, vehicles or equipment by the State, any levee district, levee drainage district, municipality, parish or other political subdivision of the state through an existing public contract of another political subdivision within one year of the opening of bids; [R.S. 38:321.1](#); and
- purchases of animals trained to perform special task, including but not limited to narcotics detection, bomb detection, arson investigation, and rescue techniques by:
  - Any local law enforcement agency for the principal purpose of aiding in the detection of criminal activity, enforcement of laws, or apprehension of offenders, and
  - Any local public safety agency for the purpose of search and rescue services.

**[Q.58.](#) Does the Public Bid Law apply to a procurement transaction between two public entities? [R.S. 38:2212.1\(D\)](#)**

**A.58.** Generally no, R.S. 38:2212.1(D) provides that the Public Bid Law does not apply to:

- a public entity purchasing surplus materials and supplies from another public entity; or
- the government of the United States; or
- a transaction governed by the procurement code.

**1. [Piggybacking](#)**

**[Q.59.](#) When may public entities piggyback on other public entities' contracts under [R.S. 38:321.1](#)? [R.S. 38:321.1](#)**

**A.59.** R.S. 38:321.1 provides an alternative procurement method as a cost-savings alternative for certain purchases. This method, commonly referred to as "piggybacking," provides that, in addition to the procurement methods available to all political subdivisions, the State, levee districts, levee drainage districts, municipalities, parishes or other political subdivisions of the state may purchase materials, supplies, vehicles or equipment through an existing public contract of another political subdivision within one (1) year of the opening of bids, provided that the following conditions are met:

- (1) The contract was bid in compliance with [R.S. 38:2211](#) et seq.\*

- (2) The total purchases on the contract do not exceed two times what was purchased by the political subdivision bidding the contract.
- (3) The written consent of the political subdivision which bid the contract is obtained, as well as the contract number, and if applicable, the resolution accepting the contract.
- (4) The vendor agrees to the additional purchase.
- (5) The vendor, product, materials, supplies, vehicles, or equipment are identical to those specified in the existing public contract of the other political subdivision, and the price is the same as the original contract price.

*\*The State, municipality, parish or other political subdivision of the state may rely on the certificate of the political subdivision that the contract was bid in compliance with State law.*

A state agency or any local government agency may rely on certificates of the office of state procurement (OSP) that the contract was bid in compliance with Title 39 (Procurement Code) and was adopted as a statewide cooperative contract pursuant to the cooperative purchase provisions of [R.S. 39:1702](#), et seq., or from a local political subdivision that the contract was bid in compliance with State law. State agencies should consult with OSP prior to utilizing this provision.

[R.S. 38:321.1](#) is not applicable to contracts for Public Works. [AG Op. No. 16-0192](#)

**Q.60. With enactment of R.S. 38:321.1, can parishes, municipalities and political subdivisions still “piggyback” using the Local Services Law?**

[R.S. 33:1324](#)

- A.60.** Yes. In [AG Op. No. 17-0152](#), the AG opined that [R.S. 38:321.1](#) provides an alternative procurement method for a parish, municipality or political subdivision to piggyback off of a contract procured by another political subdivision. However, these entities may also utilize the Local Services Law ([R.S. 33:1324](#)) to piggyback off of a public contract procured by another political subdivision.

The following steps are necessary for a parish, municipality or other political subdivision to piggyback off of a public contract procured by another political subdivision using the Local Services Law:

- (1) Verify that the contract was bid in compliance with state law.
- (2) Verify that the contract is still active, fresh or “viable.”
- (3) Obtain written consent or approval from the other public entity who bid the contract and obtain confirmation as to the contract number and, if necessary, the council resolution accepting the contract/bid.
- (4) Confirm that the vendor and the product, services, materials, supplies or equipment are the same and that the price is same or lower.

Additionally, the Attorney General recommends that entities utilizing the Local Services Law to piggyback off of another political subdivision’s public contract to adopt and advertise an ordinance or resolution setting forth the terms of its purchasing method in accordance with [R.S. 33:1325](#).

Therefore, a parish, municipality or political subdivision may use either method, R.S. 38:321.1 [\[Q.59\]](#) or [R.S. 33:1324](#) (Local Services Law), to piggyback off of a public contract procured by another political subdivision, as long as all relevant steps are followed.

## 2. [Cooperative Purchasing](#)

**Q.61. May hospitals engage in cooperative purchasing?**

[R.S. 38:2212.1](#)

**A.61.** [Yes. R.S. 38:2212.1\(G\)](#)) authorizes any hospital owned or operated by a hospital service district, a municipality, the state, or any other public entity to enter into an agreement with one or more qualified group purchasing organizations for the purpose of obtaining bids for the purchase of materials and supplies, with certain requirements.

The term “**qualified group purchasing organization**” means an organization, whether for profit or not for profit, that has contracts for the sale of materials or supplies with at least fifteen hospitals within the United States.

1. The qualified group purchasing organization shall submit a price list for those materials and supplies it offers.
2. Price list must remain in effect for a stated period of time that may not be less than three months.
3. The price list shall thereafter be considered for all purposes to be a valid and binding bid by the qualified group purchasing organization during the effective period of the agreement, and no additional bid by the qualified group purchasing organization shall be necessary.

**A hospital owned by the state** may purchase equipment from a qualified group purchasing organization if the price is less than that for the same or comparable equipment on the state contract.

[R.S. 38:2212.1\(H\)](#) provides that the commissioners, governing board, or governing authority **of any hospital owned or operated by a hospital service district, a public trust, any municipality, or any other public entity, may authorize by resolution,** the participation in, or the purchasing from, a qualified group purchasing organization for the purchase of supplies and materials, without complying with the Public Bid Law or any other applicable provision of law when it appears to the authority or secretary that participation would positively affect the economic situation or efficiency of operations of the hospital. A positive effect on the economic situation or efficiency of operations shall be presumed when the total price of items to be purchased from the qualified group purchasing organization is less than the total price of those items if purchased from the state bid list.

The secretary of the Department of Health and Hospitals for any hospital owned or operated by the state, may also authorize the participation in, or the purchasing from, a qualified group purchasing organization for the purchase of supplies and materials, without complying with the Public Bid Law or any other applicable provision of law when it appears to the authority or the secretary that participation would positively affect the economic situation or efficiency of operations of the hospital.

**Q.62. May school districts and schools engage in cooperative purchasing?**

**R.S. 38:2212.1(N)**

**A.62.** R.S. 38:2212.1(N), allows any public school district or public school to enter into an agreement with one or more qualified group purchasing organizations for the purchase of materials, equipment, and supplies, including any installation thereof.

- ❖ Any such agreement requires the qualified group purchasing organization submit a price list for those materials, equipment, and supplies offered by it and that the prices quoted on the list remain in effect for a stated period of not less than three months.
- ❖ Any such price list shall be considered, for all purposes, to be a valid and binding bid by the qualified group purchasing organizations during the effective period of the agreement, and no additional bid by the qualified group purchasing organization is necessary.
- ❖ Price lists submitted by a qualified group purchasing organization are not public records and shall not be available for inspection; however, the agreement setting forth the existence of the price list and the effective date thereof is a public record. That portion of the price list setting forth the price of the materials, equipment, or supplies being purchased shall become a public record at the time of opening bids or upon the execution of a contract for the purchase of materials, equipment or supplies.

A “**qualified group purchasing organization**” means an organization, whether for profit or not for profit, of which two or more public school districts are members and that solicits proposals or bids from vendors of materials, equipment, or supplies of the type and nature as may be purchased by a public school district or public school.

A school board may purchase materials, equipment, or supplies directly from or through a qualified group purchasing organization if the price is less than that for the same or substantially similar materials, equipment, or supplies on the state contract or bid list. A school board may also purchase materials, equipment, or supplies directly from or through a qualified group purchasing organization if the same or substantially similar materials, equipment, or supplies are not under State contract or on the State bid list.

**3. Reverse Auctions**

**Q.63. May electronic bidding be used for “reverse auctions”?**

**R.S. 38:2271**


**A.63.** Yes, if the procurement officer for the political subdivision determines that electronic bidding is in the best interest of the political subdivision and that electronic online bidding is more advantageous than other methods, reverse bidding may be used.

R.S. 38:2271 provides the detailed procedure. The statute defines "reverse auction" as a competitive online solicitation process on the internet for materials, supplies, services, products, equipment or consulting services\* in which vendors compete against each other online in real time in an open and interactive environment. The statute further provides that in a reverse auction, the political subdivision shall develop policies and may require, among other things, that:

- (1) Vendors register before the opening date and time.




- (2) Vendors be prequalified prior to placing bids.
- (3) The solicitation shall designate an opening date and time and the closing date and time.
- (4) At the opening date and time, the using agency shall begin accepting online bids and continue accepting bids until the bidding is officially closed. Registered bidders shall be allowed to lower the price of their bids below the lowest bid posted on the Internet until the closing date and time.
- (5) Bidders' identities shall not be revealed during the bidding process.
- (6) All bids shall be posted electronically and updated on a real-time basis.
- (7) The using political subdivision shall retain the right to cancel the solicitation if it determines that it is in the political subdivision's best interest.
- (8) The using political subdivision shall retain its existing authority to determine the criteria that will be used as a basis for making awards.

 \*[Act 102 of the 2021 Regular Session](#) added “consulting services” for use in a reverse auction; however, local political subdivisions should note that consulting services are excluded from the Public Bid Law. Therefore, solicitations of bids – even by reverse auction -- to award contracts for consulting services is not required by law and is completely discretionary for local political subdivisions.

**Q.64. What are the notice requirements for a “reverse auction”?** [R.S. 38:2271\(C\)](#)

**A.64.** R.S. 38:2271 requires adequate public notice for purchases of materials, supplies, equipment or consulting services\* by a political subdivision using a reverse auction be given as follows:

- The advertisement or notice shall be published twice in a newspaper in the locality, the first advertisement to appear at least 15 days before the opening date of the reverse auction. The word ‘locality’ is not defined; the AG has interpreted it to mean the area where the political subdivision is located **AG Op. No. 83-0720**.
- In addition to the newspaper advertisement, a political subdivision may also publish an advertisement by electronic media available to the general public.
- The first publication of the advertisement shall not occur on a Saturday, Sunday, or legal holiday.

 \*[Act 102 of the 2021 Regular Session](#) added “consulting services” for use in a reverse auction; however, local political subdivisions should note that consulting services are excluded from the Public Bid Law. Therefore, solicitations of bids – even by reverse auction -- to award contracts for consulting services is not required by law and is completely discretionary for local political subdivisions.

#### 4. Other Exceptions

##### Q.65. How do political subdivisions procure computers and software?

[R.S. 38:2234](#)

**A.65.** Pursuant to R.S. 38:2234, known as the Political Subdivisions Telecommunications and Data Processing Procurement Law, political subdivisions **may** lease, rent, or purchase telecommunications or data processing systems, including equipment, and related services, through a Request for Proposal (RFP).

This law is a permissive alternative to the Public Bid Law. Political subdivisions may still use public bid or purchase such items off the state contract.

Procedures for such procurement are contained in [R.S. 38:2237](#).

- Public notice of the RFP shall be given at least thirty days prior to the date scheduled for opening the RFP.
- Written notice of the RFP shall be mailed to persons and corporations who are known to be in a position to furnish the equipment, systems, and related services.
- This public notice may also be given by electronic media available to the general public.
- The RFP will indicate the relative importance of price and other evaluation factors, shall clearly define the tasks to be performed under the contract, the functional specifications, the criteria to be used in evaluating the proposals, and the time frames within which the work must be completed.
- An award shall be made to the responsible offeror whose proposal is determined in writing by the governing authority of the political subdivision to be the most advantageous, considering price and other evaluation factors set forth in the RFP. This is different from when the public entity is letting the contract through sealed bidding as the public entity is required to award the contract to the lowest responsive and responsible bidder.
- The governing authority of the political subdivision may reject all proposals when the action is deemed in the best interest of the political subdivision.
- If vendors submit written proposals, the proposals of the successful vendor shall be incorporated into the final contract consummated with that vendor.

Political subdivisions may, at their option, procure telecommunications and data processing equipment, systems, or related services in accordance with the Public Bid Law. However, in the event an invitation for bids is used in lieu of a RFP, written notice of that fact shall be given to all bidders, and that notice shall also state that the RFP procedure will not apply.

**Q.66.** What are the rules for purchases from the federal government related to homeland security? [R.S. 38:2212.6](#)

**A.66.** R.S. 38:2212.6 provides that any public procurement unit may procure materials, supplies, equipment, and services related to homeland security from federal General Services Administration supply schedules. Such purchases shall:

- Use a Louisiana distributor.
- Use the competitive ordering procedures of the federal General Services Administration.
- Receive prior approval from the director of the Governor's Office of Homeland Security and Emergency Preparedness, or his designee.

**Q.67.** What requirements exist for purchases made by a public safety agency spending federal grant dollars?

**A.67.** Louisiana law provides that purchases made by a public safety agency following the guidelines and restrictions established pursuant to the expenditure of federal grant dollars shall be made by obtaining not less than three telephone or facsimile quotations. The agency must, however, also comply with the federal grant requirements, which may include competitive bidding. If stricter, federal law must be followed.

**Q.68.** Are there any exceptions that allow procurement without bidding of specialized cranes and replacement parts by port commissions and port, harbor, and terminal districts? [R.S. 38:2320.1](#)

**A.68.** Yes. R.S. 38:2320.1 authorizes port commissions and port, harbor, and terminal districts to purchase port-related specialized cranes and any replacement parts through a request for proposals process, in lieu of formal bidding. The procedures outlined in R.S. 38:2320.1 shall be followed in order for the exception to the ordinary bid process to apply.

## **IV. Emergencies**

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**Q.69.** Are there exceptions to the Public Bid Law for emergencies? [R.S. 38:2212\(P\)](#)

**A.69.** Yes, exceptions exist for 2 types of emergency situations: emergency and extreme emergency. The purchase of materials or supplies in the case of an extreme public emergency shall be governed by the provisions of **R.S. 38:2212(D)**, which is now **R.S. 38:2212(P)**. **R.S. 38:2212.1(K)**

**A. Emergency**

**Q.70.** What is an emergency? [R.S. 38:2211\(A\)\(5\)\(a\)](#)

**A.70.** An emergency is an unforeseen mischance bringing with it destruction or injury of life or property or the imminent threat of such destruction or injury.

An emergency may also result from an order by any judicial body to take any immediate action that requires construction or repairs absent compliance with the formalities of the Public Bid Law, because of insufficient time to follow the advertising requirements as provided in R.S. 38:2212.

For a municipally owned public utility, an emergency shall be deemed to exist and the public entity may negotiate as provided by R.S. 38:2212(P) for the purchase of fuel for the generation of its electric power if the public entity has first advertised for bids as provided by this Part but has failed to receive more than one bid.

**Q.71. When is the emergency exception applied? [R.S. 38:2212\(P\)](#)**

**A.71.** After the emergency has been certified by the public entity at a public meeting, the Public Bid Law may be waived provided that notice was given to the public by publishing in the official journal within 10 days of declaring the public emergency.

**Q.72. What special documentation is required for purchases under the emergency exception? [R.S. 38:2212\(P\)](#)**

**A.72.** Every contract that is negotiated shall be supported by written determination and findings by the public entity justifying the emergency.

If contract action is taken pursuant to telephone or other oral offers, written confirmation of the accepted offer must be included in the file.

The file of the public entity must contain:

- ❖ A minimum of the description of the work to be performed;
- ❖ The name and address of each offeror quoting; and
- ❖ The performance time and terms of each offer.

If quotes lower than the accepted quote are not accepted, reasons for rejection must be in the file. Records must be kept a minimum of 6 years.

**B. Extreme Emergency**

**Q.73. What is an extreme emergency? [R.S. 38:2211\(A\)\(5\)\(b\)](#)**

**A.73.** An extreme emergency is a catastrophic event that causes the loss of ability to obtain a quorum of the members necessary to certify the emergency prior to making the expenditure to acquire materials or supplies or to make repairs necessary for the protection of life, property, or continued function of the public entity.

**Q.74. How is the extreme emergency exception applied? [R.S. 38:2212\(P\)](#)**

**A.74.** In the event of an emergency or an extreme emergency, the political subdivision may make such purchases to deal with the emergency as may be required immediately. After the events requiring immediate emergency procurement, the president of the police jury, the president of the parish council, the mayor of the municipality, or a person designated to act on behalf of the governing authority of the political subdivision, shall declare that an extreme emergency exists and shall cause such declaration to be published in the official journal within ten days or as soon as practicable thereafter.

**Q.75.** What documentation is required for purchases under the extreme emergency exception? [R.S. 38:2212\(P\)](#)

**A.75.** The requirements are the same as for emergencies listed above. [\[Q.71.\]](#)

## **V. Prohibitions**

**Q.76.** May public entities who are not in compliance with the Audit Law let contracts for Public Works and Materials and Supplies? [R.S. 38:2211.1](#)

**A.76.** R.S. 38:2211.1 prohibits public entities who have failed to comply with the audit provisions of [R.S. 24:513](#) from letting any public contracts under the Public Bid Law that utilizes any state funds, whether received through direct appropriations or through transfer from another public entity or whose funding relies upon the full faith and credit of the state.

For the purposes of this provision, the term “state funds” includes any federal funds, including grants, that pass through the state.

Any public entity that has been subject to this restriction, upon coming into compliance with the provisions of [R.S. 24:513](#), shall immediately inform the Legislative Audit Advisory Council (LAAC) in writing of their compliance and, upon confirmation by LAAC, shall be immediately released from the restrictions that were imposed.

**Q.77.** May public entities split public works projects or purchases of materials and supplies into several smaller projects/purchases to avoid the Public Bid Law?

**A.77.** No. Under no circumstances shall there be a division or separation of any public work project into smaller projects (splitting) if the division or separation would have the effect of avoiding the requirement that public work be advertised and let by contract to the lowest responsible and responsive bidder. [R.S. 38:2212\(V\)](#)

The Attorney General has also opined that the purchase of like commodities (materials and supplies) during the course of a fiscal year must be aggregated and publicly bid if the total amount of purchases of like commodities during the fiscal year exceeds the contract limit. See [AG Op. No. 02-0122](#).

**Q.78.** What provisions in the Public Bid Law address rejecting bids from convicted felons? [R.S. 38:2212.9](#)

**A.78.** R.S. 38:2212.9 provides that in awarding contracts, any public entity is authorized to reject the lowest bid from or avoid awarding the contract to, a business in which any individual with an ownership interest of five percent or more has been convicted of, or has entered a plea of guilty or *nolo contendere* to any state felony crime or equivalent federal felony crime committed in the solicitation or execution of a contract or bid awarded under the laws governing public contracts.

The law does not impose a duty, responsibility, or requirement on a public entity to perform criminal background checks on contractors, vendors, or subcontractors. It shall be the responsibility of any person, company, or entity making an allegation of prior convictions on the part of any individual with an ownership interest of five percent or more in any

bidder to present prima facie evidence supporting their claim to the public entity. If proved, the company whose bid is rejected shall be responsible to the public entity for the costs of rebidding, the increased costs of awarding to the second low bidder, or forfeiture of the bid bond, whichever is higher.

**Q.79. May a commission, fee or other consideration be split or shared?**

**R.S. 14:141**

**A.79.** Criminal code article R.S. 14:141 makes it a crime to split fees or commissions derived from the sale of goods and services with a public officer or employee in his official capacity. The penalty upon conviction is a mandatory fine of not more than \$10,000 or imprisonment for not more than 10 years, or both.

## **VI. Professional Services**

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**Q.80. How are professional services for executive branch entities defined?**

**R.S. 38:2310**

**A.80.** The phrase “**professional services**” has two meanings; one meaning specific to executive branch entities engaging in certain contracts for the procurement of professional services, and one meaning every other type of professional service.

For executive branch entities, the phrase “**professional services**” has a very specific meaning that does not apply to local governmental entities or political subdivisions. In this context, professional services are a specific type of service sought by an executive branch entity that requires a specific kind a professional. These particular professional services are defined in [R.S. 38:2310\(7\)](#) to include contracts by executive branch agencies only for services performed by architects, engineers, or landscape architects. Further, the estimated project costs for these contracts must exceed five hundred thousand dollars ([R.S. 38:2316](#)). These contracts for services performed by an architect, engineer, or landscape architect must be bid according to [R.S. 38:2312](#). Competence and qualifications of the contractor must be the deciding factors. See [R.S. 38:2318.1\(A\)](#)

**Q.81. Are the professional services sought by local political subdivisions and other local entities subject to the Public Bid Law?**

**A.81.** No. Local governments and political subdivisions are not required to advertise, receive bids or engage in competitive negotiations for contracts for professional services. Nevertheless, sound practice dictates seeking the best price available for the service sought to be performed. Sound practices include seeking quotes, using an RFP process, or simply following the Public Bid Law. If an entity does follow the Public Bid Law when it is not required to, it must follow all the rules of Public Bid Law for that purchase.

**Q.82. Are other types of contracts for services subject to the Public Bid Law?**

**A.82.** No. The Public Bid Law is relevant to the procurement of materials and supplies and public works, not services.

**Q.83. What laws apply to other contracts by executive branch agencies?**

**R.S. 39:1551**

**A.83.** Other contracts by executive branch agencies for services are addressed in the State Procurement Code found at [R.S. 39:1551, et seq.](#)

**Q.84. Are garbage contracts professional services contracts?**

**R.S.33:4169.1**

**A.84.** Yes garbage contracts are professional services contracts. However, if the granting of a garbage contract creates a monopoly, they are required by R.S. 33:4169.1(A)(2) to be let through public bid.

**VII. Louisiana Procurement Code (LPC)**

**R.S. 39:1551,et seq.**

**Q.85. What is the LPC?**

**A.85.** The LPC is the set of procurement laws that executive branch agencies of the State are required to follow instead of the Public Bid Law when they are purchasing materials and supplies. The LPC, through the Office of State Procurement, provides a list of vendors and products that have been pre-bid for easy purchase by executive branch agencies. Click [here](#) to go to the Legislative Auditor's Summary of the LPC.

**Q.86. May a public entity that is subject to the Public Bid Law choose to be subject to the LPC?**

**R.S. 38:2212.1(F)**

**A.86.** Yes. Political subdivisions are authorized to adopt by ordinance or resolution all or any part of the LPC and its accompanying regulations for the procurement of material and supplies. If the political subdivision adopts the LPC for the procurement of materials and supplies, then the LPC and not the Public Bid Law applies to those purchases. Any public entity may, however, purchase materials, supplies, and equipment from the state contract under the LPC without actually adopting the LPC.

**Q.87. May a local governmental entity purchase an item on the state contract?**

**R.S. 39:1702**

**A.87.** Yes, a local entity may purchase an item on the state contract employing the cooperative purchasing provisions of [R.S. 39:1701](#) et seq. The entity is not required to adopt the LPC "all or in part" for this transaction because the purchase is permitted through the Public Bid Law pursuant to [R.S. 38:2212.1\(F\)](#). As a matter of prudent administration, the governing body should, at a minimum, document the details for the purchase through resolution, ordinance, or minutes.

**Q.88. May a local governmental entity purchase an item from a local vendor at the state bid price?**

**R.S. 39:1710**

**A.88.** Yes, R.S. 39:1710 allows these purchases with certain limitations. The statute provides that:

When a local governing authority purchases an item at the state bid price through a local vendor, the local governing authority may pay to the local vendor the costs for shipping, preparation, and delivery of the item, provided that these costs shall not exceed the state

bid price by seven percent on purchases up to ten thousand dollars, five percent on purchases over ten thousand dollars and up to twenty thousand dollars, and three percent on purchases over twenty thousand dollars.

The Attorney General in [AG Op. No. 96-0044](#) opined that the following steps would be required to comply with the statute:

In order to facilitate use of these provisions, we would advise that the following steps be taken by a local governing authority:

1. Determine from State Central Purchasing if there is a competitively bid state contract for the needed material or supply and obtain the State Contract Number and the specification for the item on state contract.
2. Contact a local vendor for the item to determine if he/she can provide the item meeting the exact same specification as the state contract item and obtain a written price quote for delivery of the item to the local governing authority. While the statute provides no definition for the word "local", it is interpreted in this context to mean a vendor situated within the boundaries of the governing authority seeking to make the purchase.
3. If the delivered price offered by the local vendor is within the percentages set forth in the statute for contracts of various values, a purchase order may be issued by the local governing authority to the local vendor, reflecting the state contract number, state contract specification, state contract price and the markup allowed to the local vendor for shipping, preparation and delivery of the item(s).
4. A copy of the local governing authority's purchase order shall be furnished to the State Central Purchasing Office for monitoring compliance with the provisions of [R.S. 39:1710](#).

The statute in question is an exception to the otherwise sweeping requirement of [R.S. 38:2212A\(1\)](#) that all purchases above the contract amount (presently \$30,000) made by a public entity with public funds be made by sealed bid pursuant to advertising. The procedures set forth above are intended to assure compliance with the letter and spirit of both the Public Bid Law ([R.S. 38:2211-2237](#)) and [R.S. 39:1710](#).

## **VIII. Retainage**

**Q.89. Is a public works contract required to contain a retainage fee?**

**R.S. 38:2248**

**A.89.** There is not a requirement that a public works contract contain a retainage fee; however, R.S. 38:2248 provides that if an entity chooses to use a retainage fee in its public works contract, that fee cannot exceed 10% if the contract price is less than \$500,000 and it cannot exceed 5% if that contract price is \$500,000 or more.



## IX. Enforcement of Payments under Contract

**Q.90.** What actions may a contractor take to enforce payments by public entities which are due and payable under the public contract?

[R.S. 38:2191](#)

**A.90.** [R.S. 38:2191\(A\)](#), as amended by [Act 205 of the 2021 Regular Session](#), requires all public entities to promptly pay all obligations, including approved change orders, arising under public contracts when the obligations become due and payable under the contract. It further provides that “[a]ll progressive stage payments and final payments shall be paid when they respectively become due and payable under the contract.”

A contractor, pursuant to [R.S. 38:2191\(D\)](#), may file a mandamus action with the district court to compel the payment of sums due (progressive payments or final payments) under the contract, up to the amount of the appropriation made for the award and execution of the contract, including any authorized change orders.

Once a public entity receives a certified request for payment for a progressive stage payment from a contractor, the public entity has forty-five days to make payment. If the public entity fails to make such progressive stage payment within forty-five days of receipt of a certified payment demand, without reasonable cause, the public entity shall be liable for reasonable attorney fees and interest. The contractor may then file a mandamus action under [R.S. 38:2191\(D\)](#).

If a public entity fails to make any final payments after final acceptance within forty-five days of receiving a clear lien certificate from a contractor, the public entity shall be liable for reasonable attorney fees and interest. The contractor may then file a mandamus action under [R.S. 38:2191\(D\)](#).

For further discussion on [R.S. 38:2191](#) see *Woodrow Wilson Construction LLC v. Orleans Parish School Board*, 245 So.3d 1 (La. App. 4 Cir. 04/18/18) and *Law Industries, LLC v. Board of Supervisors of Louisiana State University*, \_\_\_ So.3d \_\_\_ 2020 WL 1024901 (La. App. 1 Cir. 03/02/20).

[R.S. 38:2248](#), addresses retainage fee withholding of payments by public entities. [R.S. 38:2248\(C\)](#) to address and authorize the withholding of liquidated damages by public entities for public works contracts for flood protection projects or integrated coastal protection projects, notwithstanding any other law to the contrary, including [R.S. 38:2191](#).

[R.S. 38:2211\(A\)\(14\)](#) defines liquidated damages as follows:

**“Liquidated Damages” means a fixed sum of damages stipulated in a public works construction contract that are intended to compensate a public entity as a result of a delay in performance by the contractor and may be assessed for a project not being substantially complete within the time provided for by the public works contract.**

## **X. Additional Legal Sources**

### **Relevant Attorney General Opinions**

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**AG Op. No. 21-0059** – The Public Bid Law prohibits a political subdivision from using an annual requirements or delivery contract process when advertising or letting out a public work project.

**AG Op. No. 20-0118** – The Public Bid Law is not applicable in cases of emergency provided the public entity has properly complied with the declaration and notice requirements set forth in [R.S. 38:2212\(P\)](#).

**AG Op. No. 21-0005** – Fire, police, and EMS agencies may utilize either the “piggy backing” procurement method under the Local Services Law ([R.S. 33:1324](#)) or the method under the Public Bid Law ([R.S. 38:321.1](#)) as an additional procurement method in order to purchase materials and supplies provide all relevant steps are followed. However, they may not engage in qualified group purchasing organization methods that are solely available to hospitals and schools under current legislation.

**AG Op. No. 19-0170** – A public entity is not required to comply with the Public Bid Law in the sale of naming rights to a public facility.

**AG Op. No. 19-0080** – A public entity may not make payment for the purchase of materials and supplies totaling more than \$10,000 but less than \$30,000 without obtaining no fewer than three quotes by telephone, facsimile, email, or any other printable electronic form as required under the Public Bid Law. Contracts for purchases of materials or supplies executed in violation of the provisions of the Public Bid Law shall be null and void.

**AG Op. No. 18-0006** – Tax exempt foundation created by charter school for the purpose of financing, constructing, and leasing building for use by charter school was a private entity and was not required to follow the public bid law for construction of a new school building on land subleased from the charter school utilizing private funds.

**AG Op. No. 17-0152** – With the enactment of [R.S. 38:321.1](#), the Legislature provided parishes, municipalities and political subdivisions an additional procurement method to piggyback off of a contract procured by another political subdivision. However, the method for parishes, municipalities and other political subdivision to piggyback off of an existing public contract of another political subdivision under the Local Services Law ([R.S. 33:1324](#)) is still available. A parish, municipality or political subdivision may use either method to piggyback provided all relevant steps are followed.

**AG Op. No. 16-0192** – [R.S. 38:321.1](#) (piggy backing) is not applicable to public works contracts.

**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.



**[AG Op. No. 16-0153](#)** – A contract whereby an agency negotiates and purchases insurance policies on behalf of a public entity is a contract for professional services and is not subject to the requirements of the Public Bid Law.

**[AG Op. No. 16-0020](#)** – Absent any legal authority to establish a local hiring preference or otherwise require contractors to hire local workers, the inclusion of such a requirement would be impermissible and against Louisiana Public Bid Law. Similarly, the inclusion and evaluation of a contractor's efforts to hire local workers as part of the Public Bid Law solicitation process would be impermissible and against Louisiana Public Bid Law.

**[AG Op. No. 15-0139](#)** – Pursuant to [La. R.S. 38:2212\(B\)\(2\)](#) the City may not require potential bidders to complete either Document A305, or Statement C-451 as part of the pre-bid materials. The City may, however, include such forms as part of their bidding documents and include a requirement and instruction to potential bidders that such forms would be required to be completed and submitted by the apparent low bidder within ten days after the date bids are opened.

\*\*Note: [La. R.S. 38:2212\(B\)\(3\)\(b\)](#) provides that all bidders bidding on public works for East Baton Rouge or Jefferson Parish shall submit all bid forms required by statute or by the Louisiana Administrative Code to the governing authority of parish prior to the opening of all bids relative to a contract for public works.

**[AG Op. No. 15-0080](#)** - The AG discussed the issues whether a Volunteer Fire Department is a public entity and whether it must comply with state laws including, but not limited to, the Open Meetings Law, Public Records Law, Public Bid Law, Local Government Budget Act, Audit Law, etc.

**[AG Op. No. 15-0052](#)** - The apparent low bidder's failure to comply with the bid documents and instructions to bidders, which required all potential bidders to complete all spaces on the bid form including the space to provide a price for alternate no.1, renders their bid nonresponsive and the Town must reject their bid.

**[AG Op. No. 15-0018](#)** - Louisiana municipalities may not make a direct purchase from a NJPA contract. A NJPA contract is not a purchasing contract that was competitively bid by another Louisiana local political subdivision. As such, the piggyback direct purchasing alternative is not available to a Louisiana municipality.

**[AG Op. No. 14-0217](#)** – A contract between a sheriff's office and a private business for the design and preparation of an informational report is a contract for service and is not subject to the provisions of the Public Bid Law. A contract for the printing of the informational report is a printing contract under [R.S. 38:2255](#), which is subject to the provisions of the Public Bid Law in [R.S. 38:2212.1](#).

**[AG Op. No. 14-0142](#)** - Louisiana's Public Bid Law applies to the proposed dietary management services agreement, as the predominant component of the agreement calls for the purchase of materials and supplies.

**[AG Op. No. 14-0005](#)** - An exchange of public property between two public entities is authorized under the provisions of the Local Services Law, La. [R.S. 33:1324](#). When property is exchanged between two public entities, those entities are not bound by the advertising and bidding requirements set forth in La. [R.S. 33:4712](#) but the terms of the transfer or exchange must comply with the mandates of [La. Const. art. VII, Sec. 14](#).

[AG Op. No. 12-0165](#) – A public entity may not “piggy-back” off a contract (including those established by a national cooperative purchasing organization) that has not been competitively bid by another Louisiana public entity.

[AG Op. No. 12-0066](#) - The Public Bid Law does not apply to a public works project under \$150,000 (now \$250,000). However, by choosing to bid out the project, the municipality became bound by the requirements set forth in the bid document and should award the contract to the bidder whose bid is responsive and most advantageous to the municipality. Mentions the Fourth Circuit Court of Appeal’s holding in Concrete Busters of Louisiana Inc., which determined that a contract for demolition is a public work subject to the Public Bid Law. See [\[Q.10.\]](#) for additional information concerning demolition contracts.

[AG Op. No. 11-0181](#) - A prospective bidder should not be penalized for failing to comply with a bidding requirement or condition that is not allowed or authorized by Louisiana’s Public Bid Law.

[AG Op. No. 11-0059](#) – Citing [R.S. 33:4169.1](#) relative to municipal and parish collection and disposal of garbage and trash, the AG opines that contracts for the collection and disposal of solid waste, unless structured as an exclusive franchise, may be negotiated rather than awarded by public bid.

[AG Op. No. 10-0134](#) – If an entity requires attendance at a pre-bid conference, a bidder who does not attend the entire conference is disqualified.

[AG Op. No. 10-0058](#) - Debris removal is a contract for services that is not subject to the advertising and bidding requirements of Louisiana’s Public Bid Law as long as the municipality does not violate other applicable local statutes or charter provisions.

[AG Op. No. 10-0026](#) – A demolition contract is a contract for services which is not subject to the advertising and bidding requirements of Louisiana’s Public Bid Law as long as the municipality does not violate other applicable local statutes or charter provisions. See [\[Q.10.\]](#) For additional information concerning demolition contracts.

[AG Op. No. 09-0296](#) - A contract for the purchase of materials and supplies is no longer “viable” once the materials and supplies have been transferred to the public entity and payment has been received by the contract vendor. Further, a contract would no longer be “viable” if it has a specific term of duration and that term has passed.

The AG opines that the following steps are necessary for a local political subdivision to piggy-back off an existing public contract of another local political subdivision pursuant to [R.S. 33:1321-1327](#):

1. Verify that the contract was bid in compliance with state law.
2. Verify that the contract is still active, fresh, or “viable.”
3. Obtain written consent or approval from the other public entity that bid the contract and obtain confirmation as to the contract number and, if necessary, the Council Resolution accepting the contract/bid.
4. Confirm that the vendor and the product, services, materials, supplies or equipment are the same and that the price is same or lower.

[AG Op. No. 09-0304](#) - Under Louisiana's Public Bid Law and beginning August 20, 2009, public entities are required to use the Louisiana Uniform Public Works Bid Form when soliciting bids for public works projects required by [R.S. 38:2212](#).

[AG Op. No. 06-0051](#) - If a public entity uses the bid method for contract, then the entity is bound to follow the rules for Public Bid Law regardless of whether or not the Public Bid Law applied to the contract initially.

### **Public Works**

[AG Op. No. 14-0033](#) - Pursuant [R.S. 38:2212](#) and [R.S. 38:2225.2](#), the AG opines 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.

[AG Op. No. 05-0445](#) - Absent an escalation clause in a public works contract, a municipality may not amend a public works contract to pay a contractor for increases in material cost required to perform under the contract.

[AG Op. No. 04-0079](#) - Public works contracts that do not exceed the contract limit are not subject to the advertising and bidding requirements of the Louisiana Public Bid Law and may be: undertaken by the public entity using its own employees; negotiated with one or more contractors; or let out for public bid.

### **Materials and Supplies**

[AG Op. No. 14-0142](#) - If a contract involves the merger of services with the purchase of materials and supplies, the entity must make a factual determination as to whether the predominant or substantial component of the contract is either services, or materials and supplies.

If a contract has a substantial materials and supplies component compared to its services component, the AG has opined that the contract must be bid in accordance with Louisiana's Public Bid Law. On the other hand, if the materials and supplies component of the contract is negligible, then the AG's opinion is that the contract may be characterized as one for services, and, thus, not subject to the advertising and bidding requirements of Louisiana's Public Bid Law.

[AG Op. No. 07-0278](#) - Public Bid Law applies to the proposed food services contract if the predominant component of the proposed food services contract is the purchase of food materials needed to prepare the meals.

[AG Op. No. 05-0314](#) - Louisiana Public Bid Law authorizes a school board purchasing a school bus to specify the type, quality or performance standards of the bus to be purchased, but the specifications must permit a functionally equivalent equal; the board must interpret its bid specifications in a fair and legal manner.

[AG Op. No. 01-0126](#) - When no bids are received in response to a solicitation, public entity should re-advertise and actively solicit bids from potential vendors in the area. Consideration should also be given to state contracts or contracts of other Louisiana public

entities that may be accessed without bids. As a last resort, public body should consider whether the emergency provisions of the Public Bid Law may be used.

**Lowest Responsible Bidder**

[AG Op. No. 13-0050](#) - 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. R.S. 38:2212](#) (B)(1); *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 consequences result from 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 incorporated by reference to other documents, must be completely and accurately observed, and that a bidder's failure to comply with every detail can invalidate the bid. See *Hamp's*, supra, *Beverly*, supra.

[AG Op. No. 05-0140](#) - General rule prohibiting prequalification of bidders also prohibits using bidding documents to pre-qualify only Louisiana resident contractors for contract.

**Professional Services**

[AG Op. No. 13-0135](#) - Louisiana courts have held that contracts for services, professional or otherwise, are not subject to the requirements of the Louisiana Public Bid Law. Numerous Attorney General Opinions have expressed the same conclusion in response to inquiries on a wide variety of service contracts. See generally [AG Op. No. 00-0246](#), [AG Op. No. 07-0278](#), and [AG Op. No. 09-0252](#).

Thus, under applicable Louisiana law, political subdivisions are generally free to contract for professional services without engaging in any sort of competitive bid process. Nevertheless, a political subdivision is not prohibited from implementing or establishing a policy or competitive bid process for procuring professional services. For example, a political subdivision may establish a policy that requires an RFP or Request for Qualifications (RFQ) process when procuring professional services.

[AG Op. No. 06-0183](#) - Legal services constitute a contract for professional services, which are not subject to the Louisiana Public Bid Law. Public Bid Law is not applicable when contracting for services, whether of a professional or other nature.

[AG Op. No. 05-0260](#) - Contract entered into by the Town of Amite for cemetery maintenance is a contract for services, not subject to the Public Bid Law.

**Emergencies**

[AG Op. No.-06-0067](#) - Due to health and safety concerns at its post-Hurricane Katrina temporary courthouse facility, Plaquemines Parish may invoke the emergency provisions of the Public Bid Law in the construction of new temporary courthouse facilities.

## Computers and Computer Software

[AG Op. No. 13-0224](#) - In addition to the customary invitation to bid method for purchases of more than \$30,000, Louisiana's Public Bid Law allows political subdivisions to use the request for proposals process when procuring telecommunications or data processing systems, equipment, and related services pursuant to [R.S. 38:2234](#), et seq. Therefore the AG opines that in addition to using the procurement methods set forth in [R.S. 38:2212.1](#) and [R.S. 38:2234](#), et seq., a public entity subject to the Public Bid Law is also authorized to purchase computers and other computer related items directly from the state contract vendor pursuant to [R.S. 39:1702](#).

## XI. Case law

### Barriere Construction Co., L.L.C. v. Parish of Tangipahoa, 2018-0279 (La. App. 1 Cir. 9/24/18); 2018 WL 4561698.

**Summary:** The court held that the provisions of the Public Bid Law, specifically R.S. 38:2212(B)(6)(c), which requires that in cases where there is a discrepancy between the base bid total and the sum of the extended unit prices, the unit price bid shall govern, and not the provisions of the Public Bid Law prohibiting waiver of provisions in the stated bid documents was applicable in regard to post-bid opening request by low bidder to clarify their bid.

### F.H. Myers Construction Co. v. State of Louisiana, Division of Administration, Office of Facility Planning and Control, 2013-2153 (La. App. 1 Cir. 06/18/14); 2014 WL 3702302, Writ Denied, 2014-C-1793 (La. 11/07/14); 2014 WL 6464484.

**Summary:** The court held that R.S. 38:2216(H) prohibits the inclusion of contractual language which limits a contractor from recovery of delay damages only in circumstances where the delay is wholly attributable to the public entity.

### Concrete Busters of Louisiana, Inc. v. The Board of Commissioners of the Port of New Orleans, LA. 69 So.3d 484 (La. App. 4 Cir. 2/2/11), rehearing denied (02/25/2011)

**Summary:** The court held that a contract for demolition is a public work and subject to Public Bid Law.

See [Q.6.](#) For additional information concerning demolition contracts.

### Beverly Const. Co., L.L.C. v. Parish of Jefferson, 979 So.2d 551, 2008 WL 331185 (La. App. 5 Cir., 2008).

**Summary:** The court held that the advertised bid requirement that corporate resolution form be returned with the bid package could not be waived by the parish.

**Hamp's Const., L.L.C. v. City of New Orleans, 924 So.2d 104 (La., 2006).**

**Summary:** The Supreme Court held that any requirements of the Public Bid Law, any requirements stated in the advertisement for bid, and any requirements required on the bid form cannot be waived by the public entity.

**Regency Construction, Inc. v. Lafayette City-Parish Consolidated Government, 2003 WL 2127719, 847 So.2d 796 (La. App. 3 Cir. 6/4/2003), writ denied**

**Summary:** Contract for removal of Hurricane Lili debris from property including private property was not a public work and thus was not subject to Louisiana's Public Bid Law.

**Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Authority, (App. 4 Cir. 2003), 865 So.2d 136, 2003-1996 (La. App. 4 Cir. 12/22/03), writ granted 868 So.2d 702, 2004-0211, 2004-0212 (La. 2/11/04), affirmed 867 So.2d 651, 2004-0211, 2004-0212 (La. 3/18/04), rehearing denied, on subsequent appeal 896 So.2d 251, 2004-1274, 2004-1275, 2004-1276 (La.App., writ denied 896 So.2d 985, 2005-0483 (La. 3/16/05), writ denied 896 So.2d 985, 2005- 0542 (La. 3/16/05).**

**Summary:** Public entity waived certain requirements mandated under Public Bid Law. For example, the bid form required the attachment of an insurance certificate thus making attachment a mandatory and not waivable requirement for bidder. Public board acted impermissibly in waiving the requirement and selecting bidder that did not include the certificate.

**State Mach. & Equip. Sales, Inc. v. Livingston Parish Gravity Drainage No. 5, 98-1207 742 So.2d 26 (La. App. 1 Cir. 6/25/99)**

**Summary:** The court found that the evidence established that the bid specifications tracked one manufacturer's product description to such an extent that, although no brand name was specified, the criteria were so limited that the effect was that of a closed specification bid.

**Board of Directors of the Industrial Development Board of the City of Gonzalez, LA v. All Taxpayers, Property Owners, Citizens of the City of Gonzalez, LA, et al. (Cabela), 938 So.2d 11 2005-2298 (La. 2006)**

**Summary:** In reviewing application of the TIF Act, the Louisiana Supreme Court overturned its prior decision in *City of Port Allen*, 439 So.2d 399 (La. 1983) regarding Constitutional [Article VII, §14](#) (A) and its prohibition of donations of public funds and public property. The Court held that the TIF Act was constitutional and that Louisiana Constitution [Article VII, §14 \(A\)](#)'s prohibition applied only to gratuitous donations in which there were no reciprocal obligations incurred by the parties.