



**NEW LEGISLATION: ACT No. 726 (Designer's Estimate)**

To amend Public Works Act relative to designer's estimates and to the procedures for bidding.

R.S. 38:2212 is amended as follows:

g(3)(c)(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.

**COMMENT:** By this Act, the Legislature has required that on ALL public works projects, including those let by the State or any parish, city, school board or any other public entity, the "designer's" estimate developed at the completion of the "contract document phase" (presumably the final estimate developed prior to bidding) can not exceed the funds available for construction. Otherwise, the project shall not be advertised. The Act also requires that the designer's estimate be read aloud at the bid opening presumably for the purpose of determining whether the contract should be awarded if the lowest bid is higher than the designer's estimate. However, the ACT does not mandate that all bids be rejected even where the lowest responsive bid is higher than the designer's estimate.

**ACT No. 726 (Bid Forms)**

(ii) The bid form shall contain Bid Security or Bid Bond, Acknowledgment of Addenda, Base Bid, Alternates, Bid Total, Signature of Bidder, Name, Title and Address of Bidder, Name of Firm or Joint Venture Corporate Resolution and Louisiana Contractors License Number, and on public works projects where unit prices are utilized, their inclusion in the bid form.

Other documentation required shall be furnished by the low bidder at a later date, in accordance with the Bidding Documents. The division of administration, office of facility planning and control, shall develop and prescribe the necessary bid form for public works projects for public bid purposes and implement the provisions of this Section of the bid form in accordance with the Administrative Procedure Act.

**COMMENT:** While this part of ACT 726, which amends the public Bid Law R.S. 38:2212 g(3)(c)(ii), is now in effect, the Division of Administration, Office of Facility Planning and Control, has NOT yet developed and published the mandated bid form. As with the first part of the ACT (above), this legislation applies to ALL public works projects let by any public entity. Given that the State has not yet promulgated the new bid form, and absent any judicial interpretation, the best course of action is probably to prepare all bid forms to comply with the statute as best as possible by limiting the requirements on the bid form to only the items listed in the statute, which are:

- 1) Bid Security or Bid Bond,
- 2) Acknowledgment of Addenda,
- 3) Base Bid,
- 4) Alternates,
- 5) Bid Total,
- 6) Signature of Bidder,
- 7) Name, Title and Address of Bidder,
- 8) Corporate Resolution,

- 9) Louisiana Contractors License Number, and
- 10) on public works projects where unit prices are utilized, their inclusion in the bid form.

If the Owner wants any other information, such as proof of insurance or DBE certification, that information is to be furnished AFTER the bids are opened. This is all that can be done until the State publishes the new "uniform" bid forms.

**ACT 598 (Persons Prohibited from Bidding)**

R.S. 38:2212.7 is hereby enacted to read as follows:

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.

**Comment: WHAT DOES THIS MEAN?**

- 1) ***Any person*** (individual or corporate entity) -
- 2) ***contracting***- the term contract includes a simple agreement to do something, even though nothing of value is exchanged and no advantage obtained, called a gratuitous contract, whereby a person agrees to do something to benefit the other party, without getting anything in return.
- 3) ***with an agency***- the term "agency" has been defined in other legislation to mean any state board, commission, department, agency, or other State entity but does NOT include the State Legislature, any parish, municipality or any other unit of local government, school boards, special districts, or the courts
- 4) ***for the purposes of developing bidding documents, requests for proposals, or any other type of solicitation related to a specific procurement*** - thus the "contract" must be for the "purpose" of participating in the creation of documents to be used in connection with the bidding on a specific project
- 5) ***shall be prohibited from bidding, proposing, or otherwise competing for award of that procurement***- may not even respond to an RFP where any documents used in the RFP were developed by the Proposer.
- 6) ***Such persons shall further be prohibited from participating as subcontractors related to the award of that procurement***- thus the person who has the primary "contract" with the "agency" may not even participate in the project as a "subcontractor."

For example, if a designer is engaged by the State to develop a building program, that designer can not seek State selection to design the building when the program is part of the request for proposals, nor may that designer participate as a sub-consultant to another designer on the project, or serve on the design-build team.

The most problematic issue is: Whether a contractor or equipment vendor who provides budget information, constructability advice or equipment specifications to a designer under contract with the State, which information is then used by the designer to develop the bid documents, is prohibited from bidding on the project.

**Comment:** Legal arguments could be crafted both ways to respond to this issue however, a strict reading of the statute, which ought to be read strictly as it contains a "prohibition," is that the term "Such persons" refers ONLY to the "person contracting with an agency." However, there is some

jurisprudence which states that "persons contracting with an agency" are "public employees" making them subject to the same public laws as the "agency" such as public records, and governmental ethics. La. R.S. 42:1102 (18). Thus, an argument exists that an equipment vendor or contractor who furnishes information to the designer, is in reality furnishing information to the State, and if that information is used in the development of the bidding documents, then that contractor or equipment vendor may be prohibited from bidding the work. Absent any case law or Attorney General opinion, there is no further guidance this author can give.



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