



*"Advocating Excellence in Acquisition Policy and Procurement"*

## **State and Local Procurement Law News**

State and Local Procurement Division

A 60-Second Update on What's Happening

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### **Announcements:**

The ABA Section of Public Contract Law's State and Local Procurement Division presents the first issue of its electronic newsletter, which will provide occasional updates on state and local procurement issues. Please read further for the latest developments in state and local procurement law among the several states. If you would like to contribute to future issues, please send Gerard Wimberly an e-mail at [gwimberly@mcglinchey.com](mailto:gwimberly@mcglinchey.com).

On March 23, 2011, please join the Section for a live webinar and teleconference on "Rising to New Heights: Trends and Lessons Learned in State and Local Bid Protests." For more information and to register, please visit: <http://apps.americanbar.org/cle/programs/t11rn1.html>

We are also happy to announce that the National Association of State Procurement Officials will be a sponsor of this year's State and Local Symposium. The 6<sup>th</sup> Annual State and Local Procurement Symposium – Panning for Gold in an Era of Tightened Budgets – will be held at the Sheraton Grand Sacramento, Sacramento, California, on May 12-13, 2011. Complete information about the program and registration can be found at:

[http://www.americanbar.org/groups/public\\_contract\\_law/events\\_cle/spring\\_symposium\\_2011.html](http://www.americanbar.org/groups/public_contract_law/events_cle/spring_symposium_2011.html)

If you are unable to attend the Symposium in person, the live webinar is the next best thing to being there. This three-program series is the most prudent and economical way to gain up to 4.5 hours of CLE in one day. You may register for the entire series or view additional information on each program at: <http://www.abacle.org/programs/t11pfg1.html>

## **Among the Several States:**

### **LOUISIANA**

#### **New Orleans Sanitation Dispute Comes to An End**

In an effort to reduce costs, New Orleans Mayor Mitch Landrieu attempted last fall to re-bid city sanitation contracts that were entered into by his predecessor in 2006 and renewed last year, before Landrieu took office, extending the contracts to 2014. The existing contracts were based on elevated costs present in the area immediately following the devastation of Hurricane Katrina. The city and the mayor were hoping to achieve a better deal by re-bidding the contracts, relying on "non-appropriation" clauses in the contracts that would allow them to expire if the city council denied funding. The New Orleans City Charter, however, specifically excludes sanitation (along with telecommunications and utilities) from the effects of non-appropriation clauses. This is most likely to prevent an interruption in basic city services based on pure politics. Eventually, New Orleans and the existing contractors reached a deal to modify the terms of the existing contracts to reduce the overall cost to the city without having to re-bid the city's sanitation contracts.

#### **Bidding Authority Must Observe Statutory and Bid Form Requirements**

The Louisiana First Circuit Court of Appeal has held that statutory and bid form requirements must be "completely and accurately" observed by the bidding authority and non-conforming bids must be rejected as non-responsive. *State v. Infinity Surety Agency, L.L.C.*, No. 10-0123 (La. App. 1 Cir. 9/10/10); 47 So. 3d 647. The State sought damages from the

successful bidder on a contract for the failure to produce an acceptable bond. The trial court dismissed the State's case for failure to state a cause of action, and the appellate court affirmed, holding that the bid bond had not been written by an authorized surety (in violation of La. R.S. 38:2219); therefore, the State should have rejected the bid initially as non-responsive for failure to comply with the Louisiana statutory requirements concerning bid underwriting.

## **With New Mayor, City of New Orleans Overhauls City Contracting**

On June 3, 2010, recently elected Mayor Mitch Landrieu signed various Executive Orders, overhauling the city's contracting procedures, following an earlier announcement of his intention to reform contracting procedures for the City of New Orleans. The new procedures focus on increased participation of local and disadvantaged businesses. [Executive Order MJL 10-05](#) revoked the former mayor's procurement policies and procedures and promulgated new guidelines and procedures to govern the procurement of professional services by contract for the executive branch of the New Orleans city government. [Executive Order MJL 10-04](#), signed the same day, created a Procurement Office in the city's Department of Finance to be chaired by a Chief Procurement Officer. Both measures are designed to adopt national best practices for procurement.

## **MARYLAND**

### **The Fourth Circuit Court of Appeals Has Affirmed a Trial-Court Ruling that Baltimore County Must Pay Nearly \$700,000 for Breaching a Contract with a Fuel Supplier**

Baltimore County argued that it did not have a valid contract with Petroleum Traders Corp. (PTC) because neither the appropriate officials nor the county law department had signed off on the agreement, which the county terminated in December 2005 after the parties performed under the contract for nearly two years. The appellate panel held, however, that the county acted as if there were a contract in its dealings with PTC and that as a matter of law the County could be and was estopped from denying the validity of the contract. *Petroleum Traders Corp. v. Baltimore County, Maryland, et al.*, No. 09-2097, 2011 WL 96739 (4th Cir. Jan. 12, 2011) (slip op.). *Contributed by Michael S. Elvin and Sandy L. Morris with Chico & Nunes, P.C. in Chicago.*

## **OHIO**

### **Former County Auditor Pleads Guilty to Taking More Than \$1 Million in Bribes in Exchange for County Government Contracts**

Frank Russo, a former Cuyahoga County Auditor, was charged in early September for taking bribes in exchange for the award of county government contracts. On September 16, 2010, Russo pleaded guilty to more than 20 corruption-related offenses. He will be sentenced to 22 years in prison. The [charges](#) included several counts of conspiracy to obstruct, delay, and affect commerce and the movement of articles in commerce in violation of the Hobbs Act, 18 U.S.C. § 1951 (alleging that Russo and co-conspirators took over \$20 million in kickbacks), conspiracy to commit bribery concerning programs receiving federal funds in violation of 18 U.S.C. § 371, conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 1341, 1346, and 1349, tampering with a witness, and one count of making and subscribing false tax returns.

### **Supreme Court Rules on Availability of Bid-Preparation Costs When Public Authority Violates State Bidding Laws**

Rejected bidder may recover “bid-preparation damages” in an action against a public authority for violation of state competitive-bidding laws if it promptly seeks injunctive relief and such relief is denied. *Meccon, Inc. v. University of Akron*, 933 N.E.2d 231 (Ohio 2010). The Supreme Court of Ohio considered the issue of whether bid-preparation costs could be recovered as damages by a bidder who establishes that its bid on a public-improvement project was wrongfully rejected because the public authority awarding that contract failed to comply with the state competitive-bidding laws. The court examined the issue in light of an earlier opinion in 2006 holding that a rejected bidder cannot recover lost profits because such recovery would harm the persons whom competitive bidding protects: the taxpayers. In *Meccon*, the court held, however, that allowing a rejected bidder to recover bid-preparation costs – but not lost profits – was not inconsistent with its earlier ruling when the rejected bidder had promptly sought injunctive relief and was denied. The court held that in such instances where injunctive relief is denied and contract performance ensues, the proper way to punish a public contracting authority for violating its own competitive bid laws and procedures is to award bid-preparation costs to the bidder that would have been awarded the contract but for the public contracting authority’s violations.

## **Standing Debate – Appellate Court Holds that Simply Submitting a Bid Does Not Demonstrate Actual Injury for Standing to Challenge Bid Award**

An Ohio appellate court has acknowledged that submitting a bid is a threshold requirement necessary for standing to challenge a bid award but is not the only requirement. Rejected bidder must also allege actual injury; simply submitting a bid that is not selected does not demonstrate actual injury. *State ex rel. N. Ohio Chapter of Assoc. Builders & Contractors, Inc. v. Barberton City School Dist. Bd. of Education*, 935 N.E.2d 821 (Ohio App. 9 Dist. 2010). Other appellate decisions have since distinguished the test set forth in *N. Ohio Chapter of Assoc. Builders & Contractors* as it relates to prevailing wage requirements, with one finding that common law standing principles do not apply. *Ohio Valley Associated Builders & Contractors v. Rapier Electric, Inc.*, Nos. CA2010-08-217, CA2010-08-219, 2011 WL 282428 (Ohio App. 12 Dist. Jan. 18, 2011).

## **TEXAS**

### **Prompt Payment for Goods and Services Act Does Not Apply to Funds Not Owed Under a Contract**

An appellate court in Texas has found that funds in dispute are not funds owed under a contract and therefore are not subject to the state's Prompt Payment for Goods and Services Act. *M.T.D. Environmental, L.L.P. v. City of Midland*, 315 S.W.3d 606 (Tex. Ct. App. 2010). The contractor had a contract with the city government to grind and haul yard waste materials. After completing its grinding at the city landfill, the contractor submitted an invoice for payment, but the city disputed the actual amount of work performed and notified the contractor of the dispute. The court held that because the city had demonstrated that a "bona fide dispute" existed between it and the contractor, the prompt payment requirement of contracting authorities in Texas law did not apply to this contractor's invoice.

### **McGregor Act Examined**

To ensure payment to subcontractors, which cannot place a lien against a public building, the Texas State legislature passed the McGregor Act. An appellate court examined the Act's notice requirements in *United Fire & Casualty Co. v. Boring & Tunneling Company of America*, 321 S.W.3d 24 (Tex. Ct. App. Feb. 11, 2010). According to the court, the McGregor Act

requires general contractors to secure a bond from a surety and allows a subcontractor to sue the surety for unpaid balances for work and materials. In *United Fire*, the subcontractor had submitted notice to the general contractor's surety of the general contractor's failure to pay. The subcontractor's notice was on a sworn statement form, but the notary had failed to attach a seal or signature. The court held that because the subcontractor's notice provided actual notice to the surety, the subcontractor had "substantially complied" with the McGregor Act's requirements.

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