

# Louisiana Appellate Court Affirms City's Rejection of Lowest Bid Based on Bidder's Non-Responsibility

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Ordinarily, the award of a public contract must go to the lowest responsive bidder under Louisiana's Public Bid Law. However, the lowest bidder can be disqualified and its bid rejected if the bidder is deemed "non-responsible" or, in other words, if the bidder fails to demonstrate its ability to fulfill the obligations expected under the proposed contract.

As recently highlighted by the Louisiana Court of Appeals in *MST Enterprises, LLC v. City of New Orleans*, 2015-0112 (La. App. 4 Cir. 7/29/15); 2015 WL 4597996, a public entity is afforded wide discretion in determining a bidder's responsibility, which cannot be disturbed so long as the entity exercised good faith when rejecting the bid. Furthermore, it emphasizes the importance of a bidder to provide requested documents and the danger that failure to do so could result in a finding of non-responsibility.

The *MST Enterprises* case involved a public bid dispute over a large-scale tree planting project along one of New Orleans' most scenic and historic streets, Esplanade Avenue. The City's invitation to bid specified that the project had to be completed by a licensed and certified arborist. Three parties, including plaintiff MST Enterprises, LLC, submitted bids for the project. MST's bid did not offer any evidence that MST employed a licensed and certified arborist and, as a result, a purchasing agent for the City made several requests over a six week period for MST to provide documentation that satisfied the requirement. MST failed to provide proof of its certified arborist status, but eventually informed the City that it would obtain the necessary certification prior to starting work on the project. The City subsequently rejected MST's bid as nonresponsive.

MST protested the City's rejection by commencing suit in state court. A hearing was held and the lower court determined that the arborist certification was not a required bid or post-bid document. Consequently, MST's failure to submit a certification did not render its bid nonresponsive. However, the court found that MST's failure to provide the requested certification was "non-responsible," entitling MST to an administrative hearing with respect to the responsibility determination.

The day after the trial court's decision, counsel for the City informed MST that the administrative hearing would take place four days later. That same day, MST informed the City that its arborist had passed the certification requirement. At the administrative hearing, the hearing officer concluded that the City did not act arbitrarily or

capriciously in determining that the failure of MST to timely provide the arborist certification made MST a non-responsible bidder. The hearing officer based its conclusion on the amount of time allowed by the City for MST to submit the required information. Moreover, the hearing officer determined that the fact that MST provided the information after its bid rejection did not require the City to reverse its decision.

MST challenged the hearing officer's decision by filing a petition for preliminary and permanent injunctive relief and writ of mandamus, compelling the City to award the contract to MST. The trial court held that MST received a fair responsibility hearing, but that the hearing was untimely because it did not take place within five days of the City's rejection. As a result, the trial court decided that MST was entitled to injunctive relief and ordered the City to award the contract to MST. The City appealed.

The appellate court sided with the City. Noting that "mandamus is an extraordinary remedy," the court observed that the City is vested with wide discretion when determining the responsibility of a bidder. "When reviewing such a determination, the court should not substitute its judgment for the good faith of the city." The appellate court noted that it was the responsibility of the lower court to determine whether the City "acted in a fair and legal manner and not arbitrarily" when it disqualified MST as non-responsible. The standard applied by the Louisiana appellate court mirrors that applied in federal bid protest cases – a reviewing court can only set aside a public agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this standard, a procurement decision may be set aside if it lacked a rational basis or if the agency's decision-making involved a clear and prejudicial violation of statute, regulation or procedure," but this standard is highly deferential. *Excel Mfg., Ltd. v. United States*, 111 Fed. Cl. 800, 805 (2013).

The appellate court concluded that there was no evidence that the City's decision was arbitrary, unfair, or contrary to the law. The City complied with Louisiana's Public Bid Law and afforded MST with plenty of time to provide the required certification before rejecting MST's bid. Further, the City provided MST with an administrative hearing within the required time. Although it occurred after the City's rejection, the five-day requirement is based on a determination that the bidder is not responsible, which did not take place until the trial court determined that the lack of certification pertained to responsibility. Therefore, "[i]t was not within the trial court's purview at that point to substitute its judgment for the good faith of the city." The appellate court deemed the mandamus improper and reversed the lower court's decision.

The *MST Enterprises* decision emphasizes the wide discretion afforded to a public entity when making a responsibility determination. So long as the entity makes a good-faith decision that a bidder is non-responsible, then such determination will be upheld. Moreover, the case affirms a court's role when reviewing the public entity's decision. Namely, a court is only responsible for determining whether the entity's decision was so unreasonable as to be arbitrary. Thus, bidders should be mindful from the onset of its two-fold obligation not only to submit a responsive bid, but also to demonstrate its responsibility or ability to perform under the proposed contract.

If you have any questions on this issue, please contact a member of our Government Relations, Contracts, and Lobbying team.