



MEMORANDUM

****Privileged and Confidential Attorney Work Product****

New Orleans Office

To: Keith Bartlett, Alysson Mills, and Tim Gray

**From: Lee Reid
Marshall Hevron**

Re: The applicability of the Louisiana Public Bid Law to Lycée Français’s renovation of the former Priestly School and the potential use of charter school development firm in this project.

File: 21882

Date: April 21, 2015

Short Answer: If structured in accordance with best practices, neither the Louisiana Public Bid Law, or La. R.S.38:2225.3 would apply to the proposed development of the former Priestly building.

Background: Our client, Lycée Français (“Lycée”), is a charter school which is in the process of purchasing the former Priestly school site from the Orleans Parish School Board (“OPSB”). Lycée is purchasing the site pursuant to La. R.S. 17:3982(B)(1), which requires local school boards to offer vacant property to charter schools before offering the property to the public. While it is not clear how this will occur, Lycée intends to sell the asset to a charter school development firm. The firm will purchase the site, renovate the Priestly building and lease the property to Lycée. Under this scenario, the development firm will own the Priestly site and will let any contracts to renovate the site. All construction work on the site will be paid for with funds of the development firm.

The applicability of the Public Bid Law, La. R.S. 38:2211-2317

There is a concern that La. R.S. 38:2225.3 will apply to this transaction. This statute provides:

No political subdivision of the state shall let any contract for a public work project with any person that is to be administered by or paid for, in whole or in part, with the political subdivision's funds, under which the person is to construct a building

or other structure which, upon completion, is to be purchased or leased by the political subdivision or leased with an option to purchase upon termination of the lease by the political subdivision.

La. R.S. 38:2225.3 was enacted in 2004. The statute has never been interpreted by a court and it has been the subject of one Attorney General Opinion, La. Atty. Gen. Op. No. 04-0382. In that opinion, the Attorney General considered whether a public university could lease university property to a private entity who would be obligated under the terms of the lease to construct student housing on the property. While the opinion does not explicitly state this, it is implied that the student housing would then be made available to individual students. The Attorney General found that La. R.S. 38:2225.3 did not apply to this scenario because there is a specific provision in the education code, La. R.S. 17:3361-3366, which allows a university or college to enter into this kind of arrangement. The Attorney General then took the analysis a step further and assumed, *arguendo*, that the university was not specifically exempted from the requirements of La. R.S. 38:2225.3. The Attorney General concluded:

La. R.S. 38:2225.3 would not apply because the Board would not be letting out any public work contract that requires the expenditure of state funds for the construction of a building which upon completion would be purchased or leased back to the state. Under the facts set forth in the opinion request a private entity, not the state, will let out the construction contract and no state funds will be used for the construction of the improvements.

The Attorney General essentially concluded that La. R.S. 38:2225.3 does not apply in instances where private funds are used for construction and where a private entity is letting out the contract. Based on this reading of the statute, Lycée's proposed arrangement with a charter school developer would be permissible because a private entity would use private funds to renovate a structure on private property.

There is another Attorney General Opinion that is helpful in this scenario, La. Atty. Gen. Op. 95-514. In this opinion, the State Division of Administration asked if the public bid law would allow it to enter into a transaction where a private party would construct a facility on private land and then sell it to the state. The opinion gives the following background facts: The legislature appropriated \$2.4M for the construction of a facility to house the State Printing and Forms Management Division. The state sought bids for the construction of the facility on state owned land, but the bids came in \$1M higher than the amount appropriated. The state then found privately owned property within the Capitol Complex and entered into a purchase agreement with the private owner. Under the terms of the agreement, the private owner was obligated construct a printing and warehouse facility on the site according to the state's specifications. No public funds would be used in the construction. After the facility was completed, the state would then purchase the property subject to the purchase agreement. The Attorney General found that the Public Bid Law did not apply to this arrangement for the following reasons:

It appears clear from the statutes and cases that the Public Bid Law applies only if a "public entity" contracts for the construction of a "public work" on a "public

property” using “public funds. The subject proposal involves a private entity contracting for a private work on private property using private funds. The property enters the public domain only after all of those transactions have been accomplished and the State completes the purchase of the improved immovable property. There are no State statutes which require the State to adhere to any specified procedures for the acquisition of real estate, and competitive bidding is neither required nor feasible given the variables of location, configuration, access and other factors inherent in the comparison of available land parcels.

It is important to note that this opinion was issued nine years before the enactment of La. R.S. 38:2225.3. However, it uses the same analysis as La. Atty. Gen Op. No. 04-0382, which concluded that the public bid law does not apply when a private entity lets a contract for the construction of a private building on private land.

Use of charter school development firm for Priestly renovation

We spoke with outside counsel for the OPSB about Encore Academy’s use of a charter school development firm in the renovation of the Shaw campus. According to OPSB counsel, Encore purchased the property but could not attain financing for the renovation. Encore then turned to a charter school development firm. When the development firm was engaged, Encore sold the site to the firm. The act of sale contains a provision which gives OPSB the right of first refusal to purchase the school if the charter school development firm tries to sell it for non-academic uses. This provision conforms with La. R.S. 17:3982(B)(2) which provides:

If a chartering group determines that a facility or property that was purchased from the Orleans Parish School Board is no longer needed for an educational purpose, the group shall first offer to sell the facility or property back to the Orleans Parish School Board prior to seeking to dispose of it to any other person or entity.

We were told me that the inclusion of this provision presented issues for the development firm when it sought financing for the project. Apparently, banks were hesitant to lend funds if OPSB’s right of first refusal were to be exercised in the event of a foreclosure. We do not know how the issue was ultimately resolved.

Without naming Lycée or Priestly, we also discussed the possibility of a charter assigning its purchase agreement for an OPSB site to a development firm. OPSB counsel did not think that there would be an issue with such an arrangement. OPSB counsel said that purchase agreements are frequently assigned when they result from of an auction of excess property. OPSB counsel said there are no known provisions that would restrict this arrangement. However, counsel was adamant that OPSB’s right of first refusal must be included in the assignment and the act of sale.