



Course 107

Public Bid Law and Donations (Cabela)

Description

This course is intended to help participants understand the laws and how they can use these to become more accountable and transparent and what needs to be done to be in complete compliance with the Public Bid Law.

Objectives

After this class participants will be able to:

- Explain the different laws and acts that they may be subject to.
- Participants will be able to clearly identify what are the laws and duties that they must perform to be in compliance with the laws.

Who Will Benefit


- Elected Officials/Appointed Officials
- Local Government Employees
- Local Government Auditors

About the Instructor

JENIFER SCHAYE, GENERAL COUNSEL

Jenifer Schaye is General Counsel for the Legislative Auditor of the State of Louisiana. She is a graduate of the University of Dallas and of St. Louis University Law School. She has practiced law continuously for the last forty-one years in Texas and Louisiana. Jenifer has substantial experience in the governmental arena. She has worked as a Legislative Aid to a State Representative in Texas. She was a Louisiana Assistant Attorney General for eleven years. As an Assistant Attorney General, she focused on tort, insurance law, and gaming law and all aspects of the Administrative Procedure Act. In her capacity as general counsel to the Legislative Auditor, Jenifer advises on public law issues and laws relating to fiscal matters, ethics issues, and all public laws which impact political subdivisions and the audits of political subdivisions on the local and state level. Jenifer also serves as a board member on the Louisiana Survivor's Benefit Board as the Legislative Auditor's designee. In addition, Jenifer represents the Legislative Auditor and staff in those matters where they are called to testify and/or to produce records for further inquiry by state and federal courts. She advises the Louisiana Legislative Audit Advisory Council on relevant audit law issues. Because of her governmental background, Jenifer has a broad knowledge of the processes of government and the relationships between the various branches of state and local government.

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**Public Bid Law
and
Donations (*Cabela*)**

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Presented by:
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General Counsel

Part I



Public Bid Law



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I. Public Bid Law



Public Trust

- Public Money
- Public Property
- Public Time
- Public Employee

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I. Public Bid Law



Summary

- BE PRECISE
- CAREFULLY ADVERTISE
- CAREFULLY EXECUTE
- CAREFULLY MONITOR THE PURCHASE OR THE CONSTRUCTION

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I. Public Bid Law




Public Contracts

- Two Types
 - Public Works
 - Materials & Supplies

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I. Public Bid Law



- **Article VII §14A of the Constitution**

Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private.

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I. Public Bid Law



- **Statutory References**

- R.S. 38:2211 *et seq.*

- ❖ Whenever a public entity purchases **materials** and **supplies** exceeding the sum of \$30,000 or desires to construct or alter a **public work**, such as a building, for a sum exceeding **\$157,700** there must be a public bid process which will give notice to potential vendors and contractors;

- ❖ Beginning January 2017, the contract limit for Public Works contracts was adjusted for inflation by the Office of Facility Planning and Control through the Louisiana Register. This is effective February 1, 2017.



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I. Public Bid Law



- **Facts**

- Materials and Supplies are materials and supplies

- ❖ Less than \$10,000: prudent person standard

- ❖ \$10,000 - \$30,000: 3 Telephone bids or fax bids

- ❖ \$30,000 +

- Advertise 2 times

- Electronic bid

- Advertise at least 15 days before opening of bids

- Open bids or cancel all bids



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I. Public Bid Law



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



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I. Public Bid Law



- **Materials & Supplies (cont'd)**
 - ❖ Requirements for letting a contract for materials & supplies:
 - Amount
 - Advertisement for Bid
 - Receiving & opening of Bids
 - Selection of lowest responsible bidder
 - Contract formation/Purchase Order

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I. Public Bid Law



Facts

- Public Work is building and renovation
 - ❖ For a public work under **\$157,770** – Prudent business person standard
 - ❖ Suggested to use RFP and/or solicitation of at least three bids



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I. Public Bid Law



Facts

- Public Work is building and renovation
 - ❖ **\$157,700+**
 - Advertise 3 times
 - First advertisement to appear 25 days before opening of bids and not occur on a Saturday, Sunday, or legal holiday
 - Electronic bidding exceptions
 - ❖ General Facts
 - No changes within 72 hours of opening
 - Can extend opening one week
 - Emergency requires notice



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I. Public Bid Law



Public Works

- Requirements for letting a contract for public works:
 - Amount
 - Advertisement for Bid
 - Receiving & Opening of Bids
 - Selection of lowest responsive & responsible bidder
 - Contract formation



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I. Public Bid Law



Public Works – Change Orders

- Change Orders – 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.
- Requirements – R.S. 38:2222 Change orders; recordation

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I. Public Bid Law



Public Works – Change Orders (cont'd)

- Outside the scope of the contract – means a change order which alters the nature of the thing to be constructed or which is not an integral part of the project objective.
- Within the scope of the contract – means a change order which does not alter the nature of the thing to be constructed and which is an integral part of the project objective.

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I. Public Bid Law



Issues

- No splitting of jobs
- No out of hand disqualification
- Contract drafting must follow bid specs
- Change orders must be within contract scope and may require recordation.
- Procedure & Practice: precise and monitored
- Mandatory to use standard bid form provided by DOA
- Demolition considered public works (*Concrete Busters of Louisiana, Inc. v. Board of Commissioners of the Port of N.O.*)



<http://www.doa.louisiana.gov/osr/lac/34v01/34.doc>

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I. Public Bid Law



- Exception to Public Bid Law for “**Emergency**” and “**Extreme Emergency**” are defined in R.S. 38:1211(A)(5):
 - R.S. 38:2212(P)(1) & (2)
 - Emergency: Certification of emergency and notice within 10 days, published in official journal
 - Extreme emergency: Declaration and publication within 10 days or as soon as practicable **R.S. 38:2212(P)(1)(b)(ii)**
 - Written documentation required



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I. Public Bid Law



EMERGENCIES DEFINED

Emergency

- An unforeseen mischance bringing with it destruction or injury of life or property or the imminent threat of such destruction or injury.
- May also be the result of an order from any judicial body to take any immediate action which requires construction or repairs absent compliance with the formalities of the Public Bid Law, because there is not sufficient time to follow the advertising requirements as provided in R.S. 38:2212.
- In regard to 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 where the public entity has first advertised for bids as provided by this Part but has failed to receive more than one bid. R.S. 38:2211(A)(5)(a).

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I. Public Bid Law



EMERGENCIES DEFINED (cont'd)

Extreme Emergency

An extreme emergency is a catastrophic event which 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. R.S. 38:2211(A)(5)(b).



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I. Public Bid Law



Alternative Procurement Methods

- Public Entities do not have to publicly bid their contracts when using the following methods:
 - Purchasing Surplus Property from another Public Entity;
 - Purchasing off State Contract;
 - Political Subdivisions Telecommunications and Data Processing Procurement Law – R.S. 38:2234, *et seq.*; and
 - Political Subdivisions Used Fire and Emergency Response Vehicle Procurement Law – R.S. 38:2238, *et seq.*

Entities seeking Federal reimbursement should determine if additional action is required.

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I. Public Bid Law



Attorney General Opinions

- ***Home Rule Charters***

- **#16-0051** – The parish president of a home rule charter parish does not have the discretion to forestall the expenditure of property appropriated funds for legislatively-directed ends aside from obligations to comply with public bidding processes and any other legal requirements.
- **#09-0252** – City council has authority to establish stricter procurement policies for services under home rule charter.

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- ***Hiring Preferences***


- **#16-0020**
 - Absent legal authority to establish 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, 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.

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I. Public Bid Law



- **Rejection of Bids**
 - **#17-0175**
 - Public entity's requirement that bidders acknowledge receipt of Addenda by inserting addendum number and date went beyond the scope of what is required of bidders under the Public Bid Law.
 - Therefore, the failure of the lowest apparent bidder to include the date of each addendum on the Uniform Bid Form does not render their bid as non-responsive.

Process for disqualification – R.S. 38:2212(X)

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I. Public Bid Law



- **Contracts for Services**
 - **#11-0059** - Municipal and parish trash collection unless structured as an exclusive franchise may be negotiated rather than publically bid.
 - **#16-0082** - Contracts for maintenance services, such as silt removal and dredging, are not public works pursuant to R.S. 38:2212(U) and are therefore not subject to advertising and bidding requirements.
 - **#12-0066** - Public Bid Law is not applicable to a public works projects under \$152,400 (**now \$157,700**). However, by choosing to bid out...now bound by requirements set forth in bid document.
 - **#17-0027** - Purchases from Prison Enterprise.

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I. Public Bid Law



- **Uniform Bid Form**
 - **#09-0304**
 - Use of Uniform Bid Form is mandatory and may not be waived by a public entity.
 - Public entity must reject all bids if Uniform Bid Form is not utilized.
- **Piggy Backing/ Cooperative Purchasing**
 - **#17-0152**
 - Local government political subdivisions may utilize either the Local Services Law, R.S. 33:1324, or the provisions of R.S. 38:321.1 as an alternative procurement method to the Public Bid Law in order to piggyback off of a previously bid contract for materials and supplies.

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WHAT THIS MEANS



- **Public Trust Using Public Funds:**
 - ❖ PUBLIC SERVICE IS NO SECRET SOCIETY
 - ❖ PUBLIC MONEY IS NO TREASURE TROVE



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QUESTIONS



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The slide features a blue header with the word "QUESTIONS" in white. In the top right corner is the Louisiana Legislative Auditor's seal. The main content area has a light beige background with a large yellow thinking emoji in the center. Surrounding the emoji are five blue icons: three question marks and two exclamation marks. The footer contains the date "October 2019", the organization's name, and the slide number "27".

Part II

CABELA



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The slide has a blue header with "Part II" in white. The Louisiana Legislative Auditor's seal is in the top right. Below the header, the word "CABELA" is written in large, bold, blue letters. Underneath is a photograph of a Cabela's store, showing its rustic wooden and stone exterior with a large deer head mounted on the wall. The footer includes the date "October 2019", the organization's name, and the slide number "28".

II. Cabela



- **Pre-Cabela***

1. The expenditure or transfer of public funds or property must be based on a legal obligation or duty;
2. The expenditure must be for a public purpose; and
3. The expenditure must create a public benefit proportionate to its cost.

**City of Port Allen v.
Louisiana Municipal Risk Management Agency, Inc.
439 So.2d 399 (La. 1983).*

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II. Cabela



- **New Requirements (2006*)**

1. A public purpose for the expenditure or transfer;
2. That the expenditure or transfer, taken as a whole, does not appear to be gratuitous;
3. Evidence demonstrating that the public entity has a reasonable expectation of receiving a benefit or value at least equivalent to the amount expended or transferred.

**Board of Directors of Indus. Development Bd. of City of Gonzales, Louisiana, Inc. v.
All Taxpayers, Property Owners, Citizens of City of Gonzales, et al,
938 So.2d 11 (La. 9/6/06).*

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II. Cabela



- Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private.

LA Const. Art. VII, § 14(A)

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II. Cabela



- **Cooperative Endeavor Agreements (CEA)**
 - Introduction
 - Elements of a CEA
 - Explanation of Elements
 - Current AG Test
 - Legal Sources

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II. Cabela



Attorney General Opinions

- ❖ **Op. No. 19-0001** - Since the stated purpose of NOLA 311 is not in accord with the stated purpose for the Orleans Parish Communication District, the AG has opined that the communications district may not use communications' funds to administer the NOLA 311 call center.
- **Op. No. 17-0022** - Authority of a public entity to reduce or waive abnormally high sewer usage fees that were caused by the 2016 Flood, pursuant to the public policy of providing for the general welfare of the public following a natural disaster.

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II. Cabela



Attorney General Opinions

- **Op. No. 17-0005** - Communications district may purchase radios for use by emergency responders within the district so long as the radios remain property of the district and use of the radios is restricted to emergency response activities.
- **Op. No. 16-0198** - Public entity will violate Article VII, §14 if it failed or declined to pursue all amounts owed by a judgment debtor, unless the public entity determines that the benefit or value of recovery of the full amount would not equal or exceed the costs of pursuing collection.

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II. *Cabela*



Attorney General Opinions

- **Op. No. 16-0046** - Placement of municipal law enforcement equipment in personal vehicle of a chief of police or law enforcement officer may be allowed so long as the equipment is only used in accordance to the official duties of the police chief or officer and no policy is in place prohibiting the placement of municipal equipment on or in private vehicles.
- **Op. No. 16-0057** - Public entity may weigh the costs in disposing of surplus waste dirt from dredging compared to the potential value the entity might obtain in any sale of the waste dirt, and thereby dispose of the waste dirt to private parties in order to realize substantial cost savings.

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II. *Cabela*



Attorney General Opinions

- **Op. No. 16-0022** - Reciprocal obligations will ordinarily render a payment or transfer onerous and thus sufficient to satisfy the second prong of the *Cabela* analysis. However, the AG cautions public entities against the use of language which might fail to impose a real obligation on the other party, such as “use its best efforts”, as this would create a possibility for a public entity to provide payment or services with no reciprocal return and thus lead to an impermissibly gratuitous payment or transfer in violation of Article VII, §14.
- **Op. No. 16-0001** - Parish Governing Authority may transfer funds to municipalities and sheriff’s office under the local services law, R.S. 33:1321, et seq., to assist in purchases of law enforcement vehicles and other equipment related to law enforcement without violating Article VII, §14.

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Research Tools


- **Legislative Auditor's Office**
 - Audit Reports
 - Summaries of Law
 - Legal Assistance FAQs
 - Best Practices

www.la.la.gov

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Contact Information Legal Section



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