

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

RE: Docket Number 2013-CA-1589

Phylway Construction, LLC

-- Versus --

Terrebonne Parish Consolidated Government

32nd Judicial District Court

Case #: 167980

Terrebonne Parish

On Application for Rehearing filed 09/17/2014 by Byron E. Talbot Contractor, Inc.

Rehearing Denied

J.E. Kuhn, J would grant rehearing and assign reasons

James E. Kuhn

Jewel E. "Duke" Welch

Toni Manning Higginbotham

William J. Crain

Mitchell R. Theriot

Filed

NOV 19 2014

Christine L. Crow, Clerk

PHYLWAY CONSTRUCTION,
LLC

VERSUS

TERREBONNE PARISH
CONSOLIDATED GOVERNMENT

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2013 CA 1589

ON REHEARING

KUHN, J., dissenting.

I disagree with the majority's denial of the rehearing. I would grant the request for rehearing filed by Byron E. Talbot Contractor (BET) and affirm the trial court.

In *LL&G Construction, Inc. v. Greater Lafourche Port Commission*, 2011-1024 (La. 5/3/12) (an unpublished appeal), this court held that a public entity's award of a bid to a bidder who submitted its criminal record attestation with the bid documents did not violate either the applicable statutory or the actual bid document temporal requirements. The bid documents in *LL&G* set a 48-hour time period after the opening of bids for bidders to submit the criminal record attestation. The *LL&G* court noted that there is no definite time period for submission of the attestations under La. R.S. 38:2227 and adopted the trial court's analysis *in toto*. 2011-1024 at p. 4. Thus, the *LL&G* court concluded that the public entity could not require bidders to submit the attestation contemporaneously with their bids because such a requirement would violate the general requirement of La. R.S. 38:2227 that the public entity require each bidder, 'after the opening of bids ... to attest ...' to its criminal record under an application of the plain language of La. R.S. 38:2227 (as it existed before La. Acts 2012, No. 598, § 1). 2011-1024 at p. 3.

Presently, the statutory requirement of La. R.S. 38:2227 is that the public entity require the lowest bidder after the opening of bids to make (and hence submit) its attestation. Applying the rationale adopted by the plurality opinion in

LL&G, the requirement that “each” bidder submit a criminal record attestation rather than that the “lowest” bidder submit the attestation clearly violates the general requirement of La. R.S. 38:2227.

I disagree with the majority’s premise that the Terrebonne Parish Consolidated Government’s “requisites regarding the criminal record Attestation Clause for ‘each bidder’ obviously goes over and above the amended statutory requirements found in the Public Bid Law, which provides that only the ‘lowest bidder’ must submit the Attestation Clause within ten days after the bid opening.” *Phylway v. Terrebonne Parish Consolidated Gov.*, 2013-1589, p. 4 (La. App. 1st Cir. 9/5/14), --- So.3d ----, ----. Where an attestation is requested, the sworn written statements under oath exposes the one attesting to criminal sanctions for any errors. It is obvious that in modifying this requirement by La. Acts 2012, No. 598, § 1 in La. R.S. 38:2227, the legislature was mindful of the privacy rights of unsuccessful bidders. There is absolutely no advantage to the public entity to have attestations from unsuccessful bidders.

As I noted in my dissent, the majority’s ultimate error, of course, lies in its reasoning that *Hamp’s Construction L.L.C. v. City of New Orleans*, 2005-0489 (La. 2/22/06), 924 So.2d 104, is still good law vis-à-vis waivers because under the subsequent enactment of La. R.S. 38:2112(A)(1)(b)(ii)(aa) and (bb), the criminal record attestation is not among the provisions and requirements required of the bid documents such that Terrebonne Parish Consolidated Government may under the Public Bid Law legally waive it insofar as the “each” bidder requirement (under its bid documents) and conform this requirement to the present state of the Public Bid Law, which is that the “lowest” bidder (BET) could, within 10 days attest to its criminal record. Therefore, the trial court correctly concluded that only when BET became the lowest bidder did the attestation submission clock commence. And

under the *LL&G* holding, BET's submission before the expiration of the 10-day period was not a fatal defect. 2011-1024 at p. 4. Accordingly, I would grant the rehearing and affirm the trial court's judgment.

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Terrebonne Parish

On Application for Rehearing filed 09/19/2014 by Terrebonne Parish Consolidated Government

Rehearing DENIED

*James E. Kuhn, J. would grant rehearing
'AND ASSIGNS REASONS
Welch J.: would grant rehearing*

James E. Kuhn

Jewel E. "Duke" Welch

Toni Manning Higginbotham

William J. Crain

Mitchell R. Theriot

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STATE OF LOUISIANA

NO. 2013 CA 1589

ON REHEARING

 KUHN, J., dissenting.

I disagree with the majority's denial of the rehearing. I would grant the Terrebonne Parish Consolidated Government's request for rehearing and affirm the trial court.

In *LL&G Construction, Inc. v. Greater Lafourche Port Commission*, 2011-1024 (La. 5/3/12) (an unpublished appeal), this court held that a public entity's award of a bid to a bidder who submitted its criminal record attestation with the bid documents did not violate either the applicable statutory or the actual bid document temporal requirements. The bid documents in *LL&G* set a 48-hour time period after the opening of bids for bidders to submit the criminal record attestation. The *LL&G* court noted that there is no definite time period for submission of the attestations under La. R.S. 38:2227 and adopted the trial court's analysis *in toto*. 2011-1024 at p. 4. Thus, the *LL&G* court concluded that the public entity could not require bidders to submit the attestation contemporaneously with their bids because such a requirement would violate the general requirement of La. R.S. 38:2227 that the public entity require each bidder, 'after the opening of bids ... to attest ...' to its criminal record under an application of the plain language of La. R.S. 38:2227 (as it existed before La. Acts 2012, No. 598, § 1). 2011-1024 at p. 3.

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