

**JCDECAUX LOUIS
ARMSTRONG NEW ORLEANS
INTERNATIONAL AIRPORT
VENTURE**

VERSUS

**NEW ORLEANS AVIATION
BOARD**

*** NO. 2004-C-1069
* COURT OF APPEAL
* FOURTH CIRCUIT
* STATE OF LOUISIANA**

**ON APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 04-04360, DIVISION "G-11"
HONORABLE ROBIN M. GIARRUSSO, JUDGE**

JUDGE MICHAEL E. KIRBY

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Michael E. Kirby)

**DONNA D. FRAICHE
ALEXANDER M. McINTYRE, JR.
PAUL L. PEYRONNIN
BAKER DONELSON BEARMAN CALDWELL & BERKOWITZ, PC
201 ST. CHARLES AVENUE, SUITE 3600
NEW ORELANS, LA 70170
COUNSEL FOR RELATOR (NEW ORLEANS AVIATION
BOARD)**

**EDWARD D. WEGMANN
GENEVIEVE M. HARTEL**

JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRÉ
201 ST. CHARLES AVENUE, 47TH FLOOR
NEW ORLEANS, LA 70170

COUNSEL FOR RESPONDENT (JCDECAUX LOUIS
ARMSTRONG NEW ORLEANS INTERNATIONAL AIRPORT
VENTURE)

STATEMENT OF THE CASE

The defendant, the New Orleans Aviation Board, seeks review of the trial court's judgment denying its exception of no cause of action.

This litigation arises from the competitive bid process used by the defendant for the "advertising concession" at the Louis Armstrong New Orleans International Airport. The New Orleans Aviation Board initiated the competitive bid process when it announced that it would be taking bids for the advertising concession. Two bids were received, one from plaintiff, a joint venture, and one from In-ter-space Services, Inc. d/b/a/ Interspace Airport Advertising. The defendant chose to accept the bid of Interspace. The plaintiff thereafter filed a petition for preliminary and permanent injunction and other relief alleging that the defendant violated the bidding laws when it awarded the contract for the advertising concession to Interspace. Plaintiff alleged that it had the most responsive bid. The defendant filed an exception of no cause of action, claiming that it was not

subject to the bidding process of the Public Bid Law and the Home Rule Charter. After a hearing on the exception, the trial court rendered judgment on June 3, 2004, denying the exception of no cause of action.

DISCUSSION

The defendant contends that the trial court erred when it denied the exception of no cause of action. The defendant suggests that the bidding process for the advertising concession is not regulated by the public bid law provided for in the Home Rule Charter but is regulated by the competitive bid process outlined in the Mayoral Executive Orders.

The exception of no cause of action tests the legal sufficiency of the petition, and the court must determine whether the law affords a remedy for the particular harm alleged. Durand v. McGaw, 93-2077 (La.App. 4 Cir. 3/29/94), 635 So.2d 409, 410; Nehrenz v. Dunn, 593 So.2d 915, 917 (La.App. 4 Cir.1992). Well-pleaded facts are accepted as true. Lewis v. Aluminum Company of America, 588 So.2d 167, 169 (La.App. 4 Cir.1991). The petition must set forth the ultimate facts upon which a cause of action is based, and conclusions of law or fact are not considered. Butler v. Reeder, 93-764 (La.App. 5 Cir. 3/16/94), 635 So.2d 1206, 1207. No evidence may be admitted to support or controvert the exception. La.C.C.P. art. 931. If the petition states a cause of action on any ground or theory of recovery arising

from the same transaction or occurrence, the exception should be overruled.

Everything on Wheels Subaru, Inc. v. Subaru South, Inc., 616 So.2d 1234, 1242 (La.1993).

The combined provisions of the City Public Bid Law found in the Home Rule Charter for the City of New Orleans and the State Public Bid Law (La. R.S. 38:2211, et seq.) require that contracts for any services, other than "professional" services, be let out by public bid. New Orleans Rosenbush Claims Service, Inc. v. City of New Orleans, 94-2223 (La. 4/10/95), 653 So.2d 538.

Section 6-308(5) of the Home Rule Charter provides in pertinent part:

(5)(a) Except in the purchase of unique or noncompetitive articles, competitive bids shall be secured before any purchase, by contract or otherwise, is made or before any contract is awarded for construction, alteration, repair or maintenance or for the rendering of any services to the City, other than professional services, and the purchase shall be made from or the contract awarded to the lowest responsible bidder after advertisement prescribed by ordinance or by applicable State law.

(b) Contracts for professional services administered by the offices, departments, boards, and other agencies of the Executive Branch shall be awarded on the basis of a competitive selection process which shall be established by executive order of the Mayor.

Executive Order MHM 969-020 sets forth the guidelines and procedures to be used in the “procurement of all professional services as defined herein by any department, board or other agency of the Executive Branch of city government.” The Order’s definition of “professional services” provided:

Definition: Professional services as defined below shall apply throughout this Order.

Professional services comprise unique or specialized skills that cannot be provided through the classified or unclassified pay plans. Standards for recognition of professional status shall include the following:

completion of training or advanced study in a specialized field.

exercise of skills based on experiences and competence in a recognized discipline.

adherence to technical standards and practices in a learned discipline that confers status and may espouse and endorse codes of common practice and use of recognized methods.

Evidence of professional status may include diplomas, certificates of education and training, licenses or membership in organizations that endorse ethical standards and practices.

The following are examples of professional services: architects, engineers, accountants, business consultants, physicians, dentists, nurses, academics, appraisers, and attorneys.

Mayor Nagin recently further defined “professional services” in Executive Order CRN 02-01:

4. Definition: Professional Services as defined below shall apply throughout this Order.

Professional Services comprises unique or specialized skills that cannot be provided through the classified or unclassified pay plans. Standards for recognition of professional status may include but are not limited to the following:

- (a) completion of training or advanced study in a specialized field.
- (b) exercise of skills based on experience and competence in a recognized discipline.
- (c) adherence to technical standards and practices in a learned discipline that confers status and may espouse and endorse codes of common practice and use of recognized methods.

Evidence of professional status may include but is not limited to diplomas, certificates of education and training, licenses or membership in organizations that endorse ethical standards and practices.

Professional Services means work rendered by an independent contractor who has professed knowledge of some department of learning or science used by its practical application to the affairs of others or in the practice of an art founded on it, which independent contractor shall include but not be limited to accountants, appraisers, architects, claim adjusters and/or administrators, doctors, dentists, engineers, insurance agents and/or brokers, landscape architects, land surveyors, lawyers and veterinarians.

A professional is a vocation founded upon

prolonged and specialized intellectual training which enables a particular service to be rendered. The word “professional” implies professed attainment in special knowledge as distinguished from mere skill. Professional Services shall include consulting services rendered by either individuals or firms who possess specialized knowledge, experience, and expertise to investigate assigned problems for projects and to provide counsel, review, design, development, analysis, or advice in formulating or implementing programs or services, or improvements in programs or services, including but not limited to such areas as insurance, management, personnel, finance, accounting, planning, telecommunications, data processing, and advertising contracts.

The defendant contends that the recent amendment of the definition of “professional services” includes the advertising concession. However, the trial court disagreed, finding that the advertising concession included both professional and administrative functions.

This court considered the same issue in Transportation Displays, Inc. v. City of New Orleans, 346 So.2d 359 (La. App. 4 Cir. 1977). In that case, the plaintiff filed suit alleging that the defendant violated the Public Bid law when it awarded the airport’s advertising concession to the plaintiff’s competitor. The issues this Court considered on appeal were whether the New Orleans Aviation Board should have conducted public bidding in awarding the contract and, if so, whether the condition in the Board's

invitation for bids, which imposed responsibility for payment of residuals due under the previous contract, prevented bidding on a substantially equal basis.

In concluding that the advertising concession should be awarded in accordance with the Public Bid law, this Court stated:

The business of airport terminal advertising, while highly specialized, is obviously not non-competitive. The question as to whether competitive bidding by firms providing these services is feasible and is contemplated by the public bidding laws must be determined by the terms of the contract required of the successful bidding firm and the services performed by the present firm.

The invitation to bid stipulated that the contract with the successful proposer contain provisions granting the proposer "the exclusive right to conduct the sale of advertising space and facilities as set forth in the contract in the terminal building and adjacent facilities at the airport" and requiring the proposer "when necessary (to) design, plan, and supervise the construction of displays to occupy the advertising space, or assist the advertiser in such functions as required, and sell such advertising space and facilities in accordance with accepted advertising principles". Another required provision called for the initial allotment of advertising space and locations for advertising displays in accordance with a layout exhibit on which the space and locations were marked, but provided further for Board approval of any use of space not specifically allocated. Other pertinent provisions required the proposer to "supply necessary sales efforts and costs for the selling of any and all displays", to "approve and be responsible for the quality of displays installed in

the terminal", the Board reserving the right to approve and disapprove any advertising contract or display, and to "supply all facilities and displays to be used in the Terminal".

Our analysis of the numerous exhibits, as well as the extensive testimony, leads to the conclusion that the principal function of the Board's agent is to sell advertising space and to own and maintain the cases in which the advertising displays are contained. The agent is even told the amount and location of the displays. The displays themselves, the production of which apparently requires creativity, skill, taste and artistic talent, are produced by others and supplied to the agent, whose approval and responsibility for the quality of the displays is subject to the Board's approval.

The personal services exclusion (by statute or by court rule) from competitive bidding of public contracts has generated considerable litigation. See 15 A.L.R.3d 733 (1967). Generally, the public body is allowed to exercise discretion in contracting for services which require use of creative and individual talents or unique artistic skills, or which require counseling and advice based on training and experience in fields of science or learning, or which otherwise require such extraordinary skill and learning that other factors far outweigh monetary considerations in determining the acceptability of the bidder.

* * *

[T]his record does not show that the selling services contemplated by the contract under consideration are the type of services which are properly excluded from public bidding.

Transportation Displays, Inc. v. City of New Orleans, 346 So.2d at

361-363.

A similar case was presented in Council of City of New Orleans v. Morial, 390 So.2d 1361 (La. App. 4 Cir.1980), in which members of the city council sought a declaratory judgment that a contract for administrative services for the city's employee health care plan was covered by the public bid laws. An argument was made that the services were "professional services" and thus exempt. The court found otherwise and held that the contract must be put out for bid in accordance with the Home Rule Charter and the State Public Bid law. The court considered the services which were to be provided under the contract.

It is apparent that the vast bulk of the services are basically clerical. Much may be performed by persons of high school education and above who have been trained in the various degrees of skill required for claims adjusting and for work of processing the various applications and applying certain rules and regulations leading to a decision to approve or deny claims. A considerable portion of the work is simply clerical in nature. At the same time, it is apparent that there are decisions that cannot be made by employees in the lower echelon who must consult with their superiors and supervisors to ascertain the proper result in questionable claims, or those claims to which the rules do not clearly apply. These supervisors are required to have a higher degree of skill and expertise in handling these claims. Superimposed upon this structure it is necessary to have at least one person of considerable skill and expertise to exercise the function of account executive. It is he who must oversee the formulation of regulations and coordinate the entire operation with the city's consultants and in

accordance with its policies. It is also apparent that there are services to be performed in connection with this contract that can only be answered by professionals such as doctors, or on the insurance side by underwriters or actuaries. However, it is equally apparent that these services form only a small portion of the services contracted for and are usually obtained on a consulting basis in the case of a smaller, independent contractor as here, or furnished in house by other departments of a larger contractor such as insurance companies providing such services.

From the evidence presented, we cannot say that the services provided are exclusively professional or exclusively not professional services. There are no clear-cut guide lines to afford officials a precise determination, and it is apparent from the testimony that officials have had in the past to rely upon their own judgment as to whether such a contract may fall within the exception provided.

Council of City of New Orleans v. Morial, 390 So.2d at 1363-1364.

Likewise, in New Orleans Rosenbush Claims Service, Inc. v. City of New Orleans, supra, the Louisiana Supreme Court held that a contract which provided for the handling of the city's self-funded workers' compensation program sought administrative services, not professional services, and was not exempt from the public bid law under the Home Rule Charter. The court noted that

[a]n examination of the present bid proposal demonstrates that the services sought are primarily administrative or clerical. They include maintaining claim files, preparing reports, processing claims and making payments on claims.

Many of the services will be performed under the direct supervision of or within the rules and regulations established by the City Attorney's Office. Serious policy-making decisions will be made by the City Attorney's Office. We further note that the services described in bid proposal FTC-# 2618 are virtually identical to those described in the four previous bid proposals, particularly FTC-# 2324 which was awarded to Rosenbush in 1989.

New Orleans Rosenbush Claims Service, Inc. v. City of New Orleans,
653 So.2d at 546 –547.

In the case at bar, the request for proposals for the airport advertising concession describes the scope of the concession as follows:

The Board desires to enter into an agreement with a qualified and responsive entity or individual to design, install, operate, and manage an innovative state-of-the-art Airport Advertising Concession. The Board is seeking an advertising program to enhance the Airport and accomplish the following: 1) an innovative state-of-the-art advertising program that optimizes advertising effectiveness and minimizes visual clutter; 2) a quality advertising program that creatively reflects the City and region's culture, character and quality of life; 3) advertising displays that are aesthetically consistent with the Airport's design and architecture without interfering with operational efficiencies; 4) contemporary advertising approaches, innovative media and the latest technology; 5) opportunities for disadvantaged businesses; and 6) maximum revenues for the Airport to the extent practical consistent with the other objectives for the program and a fair profit for the concessionaire. The Board has not specified locations, sizes, type of media or other programming characteristics for the offered concession. Rather, the Board is seeking proposals

that present location, quantities, media, design and programming plans that reflect the respondent's experience and professional judgment as to the best means to achieve the advertising program objectives. It is the Board's intent to award the offered concession to the proposal from a qualified and responsive respondent that best achieves, in the Board's sole judgment, the stated program objectives.

The Board encourages respondents to be creative in proposing locations and advertising media that will meet the program objectives. At a minimum, advertising displays should be located in public areas of the terminal and concourses, baggage claim areas, and ground transportation centers. Other areas of the Airport that may be proposed by respondent include, but are limited to, flight information display monitors, selected gate information plasma displays, parking garage, roadways, jet boarding bridges, and baggage claim carousels. Further, respondents should propose creative advertising media types that include, but are not limited to, backlit wall and free-standing dioramas, spectaculars, showcases, wraps, banners, scrolling units, multi-media devices, interactive kiosks, and other media types. Please note that all proposed locations and advertising displays are subject to approval by the Board. Any future locations identified for advertising will be made available to the Concessionaire, subject to the terms of the Concession Agreement and approval by the Board. (All approved locations are collectively referred to as the "Assigned Area.") The Concessionaire will have exclusive rights to the Assigned Area; provided, however, the Board reserves the right to allow non-commercial advertising for City agencies, City-sponsored events or non-profit organizations located in the New Orleans metropolitan area in the Airport in areas not part of the Assigned Area or vacant parts

of the Assigned Area.

The rights granted under this Concession Agreement do not include the following:

Airline-related advertising and displays, if in leased airline spaces;

Advertising within the leased areas of other concessionaires, provided that such advertising relates to the products and services offered by the concessionaire; and

Advertising in locations or on property that are prohibited by other agreements in effect as of the date of issuance of this RFP to which the Board is a party.

The RFP also provides for the operating requirements and performance standards that are to be maintained by the concessionaire.

To ensure a quality advertising program, the Concessionaire is required to maintain certain standards throughout the Term. Should the Concessionaire fail to meet any of the following operating standards, as well as others described in the Form of Agreement, it shall constitute a default of the Concession Agreement and may be cause for termination by the Board.

The Concessionaire is responsible, at its sole cost, for the installation of new equipment and improvements necessary to provide a first-class advertising concession program consistent with the objectives of this RFP and the design standards described above, as proposed by Concessionaire in its proposal and accepted by the Board.

The Concessionaire must replace, at its own cost and expense, all existing hotel/motel courtesy telephone centers as proposed by Concessionaire

in its proposal and accepted by the Board.

Only commercial and public service advertising shall be placed at the Airport. Political and issue-oriented advertising of any kind is not acceptable for display at the Airport. The Director may require the removal of any advertising that he, in his sole discretion, deems objectionable.

The Concessionaire shall implement the advertising program according to the transition plan and schedule as forth in its proposal and accepted by the Board.

The Concessionaire shall maintain in good condition, at its sole cost and expense, all of its fixtures, displays, and equipment. Any damaged, defaced, or inoperable displays shall be repaired, replaced, or removed immediately. At no time shall a display be left empty. Appropriate “filler” material as approved by the Director shall be used in any empty spaces. The corrective action on maintenance requests by the Director generally must be completed within 24 hours of notice.

In addition to its continuing maintenance obligations, and provided that the Board exercises the renewal option, the Concessionaire must refurbish or replace its fixtures, displays and equipment at the beginning of the option renewal term. The scope and extent of the option period refurbishment will be jointly determined by the Board and Concessionaire.

The Concessionaire must name a local service manager who will be the primary contact with the Director for all aspects of management of the Concession. The local service manager’s principal place of work must be located within 50 miles of the Airport. Further, maintenance personnel are to be available for emergency

contact during all hours of Airport operation.

The Concessionaire shall use diligent and good faith efforts to maximize advertising sales as best as possible. The Board expects the Concessionaire to maintain at least 80% average annual display case occupancy after the first 12 months of the Agreement. Further, if during any month of the Term, the sum of vacancy and the number of scheduled expirations of advertising agreements over the ensuing three months (both measured as percentages of space availability) indicate more than 20% space availability, then the Board expects the Concessionaire to make and document a minimum of four sales call per business day of the month.

The Board expects the Concessionaire to promote the local and regional area through the Concession. Accordingly, the Concessionaire should prepare and implement a marketing plan that targets a minimum of 50% advertising from local and regional businesses.

The Concessionaire shall not demolish, modify, or remove, in whole or in part, any advertising fixture or display except with the prior written approval of the Board.

The Concessionaire must regularly submit to the Board detailed reports as reasonably requested by the Board so that the Board can monitor the advertising program and Concessionaire's achievement of the performance standards. These reports may include, but be not limited to, monthly advertising revenues, monthly advertising sales, listing of current advertising agreements, listing of current advertising rates, maintenance activities and sales call reports.

After reviewing the bid specifications, we conclude that the trial court did not err when it denied the defendant's exception of no cause of action. While defendant suggests that the concession is one of professional services, the bid specifications reveal otherwise. While there are some "professional" aspects of the concession, there are substantial portions which indicate that the concessionaire must provide services which incorporate the areas of advertising sales and the maintenance and repair of the advertising display units. In fact, much of the contract deals with these areas. The RFP states that the concessionaire should obtain advertising for eighty percent of the advertising units and if that is not attainable, then the concessionaire must provide proof to the defendant that the concessionaire is making sales calls. Further, the RFP indicates that much of the work done by the concessionaire is subject to the defendant's approval. The RFP also indicates the type of advertising which the concessionaire should seek to obtain for the advertising concession. Given the amount of supervision that the defendant has over the concessionaire, it is clear that the advertising concession is not a "consulting" concession where the defendant would rely upon the concessionaire's expertise. The advertising concession is more of a "management" concession where the defendant is seeking a concessionaire to operate the advertising for the airport but which management is subject to

the direction and approval of the defendant. As such, the RFP does not seek professional services and thus, is subject to the public bids laws of the Home Rule Charter and the State Public Bid law. The trial court did not err when it denied the defendant's exception of no cause of action.

Accordingly, we grant the New Orleans Aviation Board's writ application, but deny relief.

WRIT APPLICATION GRANTED; RELIEF DENIED