

**HAMP'S CONSTRUCTION,
L.L.C.**

*

NO. 2012-CA-1051

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**CITY OF NEW ORLEANS AND
MITCHELL J. LANDRIEU IN
HIS OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF
NEW ORLEANS**

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STATE OF LOUISIANA

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**TOBIAS, J., CONCURS IN THE RESULT IN PART AND ASSIGNS
REASONS.**

I respectfully concur in the result reached by the majority. I write separately in this matter to address things that were not, in my view, addressed sufficiently by the majority and/or to express my further views on the subject.

I agree with the trial court and the majority that mandamus did not lie in this case. Hamp's petition, as amended, merely sought a writ of mandamus to require the city and the mayor to re-bid the contract for demolition services. (Mandamus does not lie to require a public body or public official to perform a *non-ministerial* act.) In doing so, Hamp's asserted that the contract between the city and Metro/Durr was, so-to-speak, null because it had expired as a matter of law. The thrust of Hamp's argument is that because the city and Metro/Durr did not execute a *written* one-year extension prior to the time of a prior one-year extension, the contract, as extended, expired by operation of law and could not be revived – ergo, in a sense, was “null” as of the date that the first one-year extension expired.¹

¹ Oral extensions in a publicly bid/let contract are not allowed for the obvious reasons that no one would know when a contract had expired and the public body could spend public money unlimitedly for an indeterminate period. That is, how would anyone know what the public body must budget for the future? How would anyone be able to contest the matter or know when and if a contract had expired?

The initial bid specifications advertised by the city, that were ultimately incorporated into the initial two-year contract dated 29 January 2008, in pertinent part reads:

...The terms, conditions and duration of this agreement may be modified by an executed, written amendment to this Agreement.

10. EXTENSIONS: This agreement may be extended at the option of the City, provided that funds are allocated by the Council of the City of New Orleans and the extension of the agreement facilitates the continuity of services provided herein. The agreement may be extended by the City on an annual basis for no longer than five one year periods.

The first one-year extension appears to have originally borne a date of 4 December 2009, which date was changed by hand to 20 January 2010. Such establishes *de facto* that the city had agreed to extend the contract *before* the initial term of two years expired. Thus, as of 30 January 2011, no contract between the city and Metro/Durr existed; it had expired.²

Any argument that a contract for demolition services by a public body is not subject to the Public Bid Law is not supported by the jurisprudence.

Demolition contracts fall under the Public Bid Law, La. R.S. 38:2211, *et seq.* See *Concrete Busters of La., Inc. v. Board of Com'rs of the Port of New Orleans*, 10-1172, p. 8 (La. App. 4 Cir. 2/2/11), 69 So.3d 484, 489. Also, it is of no importance whether the demolition work to be performed is of a public structure or a private structure; demolition entails both, and if the city wants to demolish structures, it must of necessity let the contract by public bid if the thresholds for public bidding are met.

² I think the trial court's determination that the contract between the city and Metro/Durr was an "absolute nullity" is misplaced. Rather, in context, the court meant the contract had *expired*. Absolutely nullity implies null *ab initio* for some legal cause.

Because Hamp's petition, as amended, sought a writ of mandamus only to compel a re-bidding of the city's demolition work, La. R.S. 38:2220.4,³ respecting attorney's fees, never comes into effect because the issue was not over La. R.S. 38:2211, *et seq.*, insofar as the former letting of a new public contract. The Public Bid Law contemplates attorney's fees as possibly recoverable in declaratory judgment actions, not in mandamus actions, to compel a public body to advertise for public bid in matters that are discretionary with the public body. Hamp's petition, as amended, sought no declaratory relief. Thus, neither the city nor Metro/Durr may presently recover attorney's fees in this case. If Hamp's wants declaratory relief, they must specifically plead the facts and pray for same.

Finally, the record before us does not allow us to address the defendants' dilatory exception of prematurity. La. R.S. 38:2220.3, read literally, would imply that Hamp's would first have to inform the attorney general of Louisiana before filing its suit. In *Natchitoches Parish Police Jury v. Natchitoches Sportsman's Ass'n.*, 11-102, pp.3-4 (La. App. 2 Cir. 6/15/11), 67 So.3d 1284, 1286, *writ denied* 11-1559 (La. 10/7/11), 71 So.3d 315, the court held that the attorney general need

³ La. R.S. 38:2220.4, contained in Chapter 10, Part II, of Title 38, on the letting of contracts, reads:

A. The court shall enter an order declaring whether a violation of R.S. 38:2211 *et seq.* has occurred. The declaration shall have the force and effect of a final judgment or decree.

B. (1) The court shall also award to the principal plaintiff as determined by the court, if successful in his action, reasonable attorney fees. The court shall also award to any prevailing defendant costs and reasonable attorney fees. However, if the court finds fraud on behalf of a defendant, the award to the plaintiff shall be twice the amount of reasonable attorney fees.

(2) When the public entity has depended upon the written opinion of the attorney general that the action taken by the public entity would be in compliance with law, the public entity shall not be liable for the costs and attorney fees of the adverse party.

C. A person providing information to the attorney general or bringing a civil action under the provisions of R.S. 38:2220.2 and 2220.3 shall not be subject solely for such reason to dismissal, suspension, or any other form of disciplinary action by an employer, unless the civil action is found by the court to be frivolous.

not be informed if and only if no state monies⁴ are involved in the public work. I agree with the Second Circuit's decision. The record on appeal lacks *evidence* regarding the sources of monies for the demolitions that Metro/Durr has been performing; allegations by parties of the sources of the monies are inadequate to address this issue. A remand is in order to properly address the issue and to allow Hamp's to file a declaratory action if they care to do so.

⁴ State monies could be expanded to include federal monies because of state-federal governmental relations; but that issue must be addressed another day when the issue is properly before the court.