

NOT DESIGNATED FOR PUBLICATION

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

*

NO. 2012-CA-1051

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VERSUS

COURT OF APPEAL

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

FOURTH CIRCUIT

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STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2012-02098, DIVISION "M"
Honorable Paulette R. Irons, Judge**

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr.,
Judge Joy Cossich Lobrano)

**TOBIAS, J., CONCURS IN THE RESULT IN PART AND ASSIGNS
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MARCH 14, 2013

**AFFIRMED IN PART; REVERSED IN
PART; AND REMANDED**

The City of New Orleans; Mitchell J. Landrieu in his official capacity as Mayor of the City of New Orleans (City); Durr Heavy Construction, LLC.; and Metro Disposal, Inc. (collectively, Metro/Durr) appeal the trial court's judgment that found that the demolition contract between the City and Metro/Durr was an absolute nullity, granted attorney fees and costs in favor of plaintiff/appellee, Hamp's Construction, L.L.C. (Hamp's), denied their exceptions of prematurity, no right/no cause of action, and their request for attorney's fees. For the following reasons, the judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2007, the City advertised for public bid a contract for comprehensive demolition work. The contract was awarded to Metro/Durr as the lowest responsive and responsible bidder. The bid specifications provided for a three-year initial term and an option for the City to extend the term for no more than five, one-year extensions. The initial contract between Metro/Durr and the City was

entered on January 25, 2008 for a two-year term. In December 2009, the City executed a written extension that extended the contract through January 1, 2011. During the period from January 1, 2011 to June 3, 2011, the City continued to issue purchase orders to Metro/Durr for demolition work, although the City had not signed a written extension of the contract. The City executed a written extension of the contract on June 3, 2011. Thereafter, the City agreed to a third extension of the contract on February 29, 2012 for the 2012 calendar year.

Hamp's filed a Petition for Mandamus against the City and the Mayor, claiming that the contract had expired. The petition stated that the services performed under the contract are those that must be let for public bid pursuant to the Louisiana Public Bid Law (La. R.S. 38:2211 *et seq.*) and the City's Home Rule Charter.¹ Therefore, Hamp's argued that the City violated the Louisiana Public Bid Law and the Home Rule Charter when it continued to issue work orders to Metro/Durr after the contract had allegedly expired. Hamp's prayed for summary process and requested that a writ of mandamus issue directing the Mayor to let a new contract for the demolition services.

Hamp's Amended and Restated Petition For Mandamus added Metro/Durr as a party. The amended petition pled that the contract had expired. Hence, any contract extension was an absolute nullity because the Louisiana Public Bid Law

¹ Home Rule Charter, Ch. 3, Section 6-308(5) states: "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 shall be awarded to the lowest responsible bidder after advertisement prescribed by ordinance or by applicable state or municipal law."

and the City's Home Rule Charter required the contract to be let for public bid, and it was not.

In response, the City and Metro/Durr filed exceptions of no cause and no right of action and an exception of prematurity.² They argued that Hamp's had not complied with the provisions of La. R.S. 38:2220.3 that require a party claiming a violation of the Public Bid Law to first inform the Attorney General and then proceed with a civil action in the event the Attorney General has not acted on the alleged violation within thirty days. The City and Metro/Durr also requested attorney's fees and costs pursuant to La. R.S. 38:2220.4(B)(1), which mandates an award of attorney's fees and costs to the prevailing party who wins a Public Bid Law challenge.

At the hearing on the mandamus petition and the defendants' exceptions, the trial court denied Hamp's petition for a writ of mandamus. The court took notice that a writ of mandamus to a public officer can issue only to compel the performance of a ministerial duty required by law. *See* La. C.C.P. art. 3863. Therefore, the trial court opined that it could not issue a mandamus to compel the Mayor to let the demolition contract for competitive bid as that act did not qualify as a "ministerial" duty. Finding that Hamp's petition stated a cause and right of action and that it sought nullification of the contract, the trial court also denied the City's and Metro/Durr's exceptions and their request for attorney's fees.

² The City and Metro/Durr filed these exceptions although they questioned the applicability of the Public Bid Law to the contract. They asserted that the Public Bid Law only applies to contracts for "public works." Therefore, because the contract involved the demolition of private and commercial structures, not any property owned, used, or leased by a public entity, the Public Bid Law did not apply.

However, the trial court, *sua sponte*, declared the contract absolutely null based on its determination that the contract had expired. The trial court advised that La. C.C. art. 2030 gave it the requisite authority to nullify the contract on its own initiative.³ It described the period between January 2011 and June 3, 2011, when the City had not yet executed a written contract extension, as a “dead” period. The trial court concluded that the contract expired during this time.

In deciding that the contract was an absolute nullity, the trial court relied on La. C.C. art. 7 which provides: “Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.” The court therefore reasoned that, inasmuch as the City did not let the contract out for public bid after its expiration, any contract extension was an absolute nullity because it violated the combined provisions of the Louisiana Public Bid Law and the City’s Home Rule Charter.

The trial court also awarded Hamp’s attorney fees and costs. This award was premised on its finding that Hamp’s proved that the City had violated the Public Bid Law which entitled Hamp’s to attorney’s fees under La. R.S. 38:2220.4(B)(1).

The City and Metro/Durr filed this appeal from that part of the judgment that nullified the contract, awarded attorney’s fees to Hamp’s, and denied the City’s and Metro/Durr’s exceptions and request for attorney’s fees.⁴

³ La. C.C. art. 2030 states: “A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed. Absolute nullity may be invoked by any person or may be declared by the court on its own initiative.”

⁴ Hamp’s did not appeal the trial court’s denial of its Petition For Mandamus.

DISCUSSION

We first consider the City's and Metro/Durr's claims that the trial court erred in issuing a declaration regarding the validity of the contract in a summary proceeding and in declaring the contract an absolute nullity.

The City and Metro/Durr allege that the trial court improperly granted declaratory relief when it nullified their contract in the context of a summary proceeding. They note that Hamp's prayed for summary process in the mandamus action and that the only relief requested asked the trial court to direct Mayor Landrieu to "immediately let for public bid a new contract for comprehensive demolition services before any more purchase orders are issued to Metro/Durr." Hence, the City and Metro/Durr contend that the trial court committed clear legal error and exceeded the scope of its authority in issuing a declaratory judgment that was not prayed for in the pleadings, in the context of a summary proceeding, and after it had already denied the relief requested in Hamp's mandamus action.

This Court acknowledges that the Code of Civil Procedure distinguishes between ordinary proceedings and summary proceedings. Summary proceedings are generally conducted rapidly, without the observance of all the formalities required in ordinary proceedings, and are limited to specific proceedings. *See* La. C.C.P. arts. 2591 and 2592. A writ of mandamus may be tried summarily. La. C.C.P. art. 3781. On the other hand, a suit for declaratory judgment, akin to Hamp's request to invalidate the contract, should be heard in an ordinary

proceeding, which entitles the litigants to the protections afforded by ordinary proceedings, such as a full trial and discovery. La. C.C.P. art. 851.

We agree with the City and Metro/Durr that Hamp's request to nullify the contract based on its alleged expiration amounted to a petition for declaratory relief that properly should have been tried through ordinary proceedings. However, the fact that it was not does not amount to reversible error because, as noted by the trial court, La. C.C. art. 2030 gave it the requisite authority to declare the contract an absolute nullity on its own initiative, whether through ordinary or summary proceedings. Thus, what this Court must decide is whether or not the trial court committed legal error in finding that the contract was an absolute nullity. Based on our review of the record and the applicable law, we conclude that it did.

The Public Bid Law was enacted in the interest of Louisiana's taxpaying citizens, and its purpose is to protect them against contracts entered into by public officials because of favoritism and involving extortionate prices. *Concrete Busters of Louisiana, Inc. v. The Board of Commissioners of the Port of New Orleans*, 2010-1172, p. 4 (La. App. 4 Cir. 2/2/11), 69 So.3d 484, 486, citing *Haughton Elevator Div. v. State, Div. of Admin.*, 367 So.2d 1161, 1164 (La. 1979). In the present matter, the initial award of the contract was done in compliance with the Public Bid Law. The object of the contract, to provide comprehensive demolition services, was not illicit or immoral. The City awarded Metro/Durr the contract through the proper bid procedure. The parties agreed that Metro/Durr had been the lowest, responsible bidder. Even the City's option to extend the contract did not

contravene the Public Bid Law as that aspect of the contract was also a part of the advertised bid specifications. Therefore, on its face, the contract was valid.

Upon review, the trial court took two steps to decide that the contract was an absolute nullity. The first step was to decide that the contract had expired. After making that determination, then, it took the second step and declared the contract extension an absolute nullity. Therefore, the trial court did not nullify the contract because its purpose violated public policy; instead, the trial court nullified the contract extension only because it first found that the underlying contract had terminated. However, based on this Court's determination that the contract itself was valid, the trial court erred in utilizing La. C.C. art. 2030 and La. C.C. art. 7 to declare the contract an absolute nullity. In conjunction with this finding, the trial court also erred in awarding Hamp's attorney's fees based on the nullification of the contract.

The City's and Metro/Durr's next assignments of error argue that the trial court erred in overruling their exceptions of prematurity and no right/no cause of action relative to Hamp's failure to comply with La. R.S. 38:2220.3 of the Public Bid Law and in denying their request for award attorney's fees as allowed by La. R.S. 38:2220.4(B)(1). They note that La. R.S. 38:2220.3 requires a complainant to give notice to the Attorney General prior to the initiation of a civil suit that alleges a Public Bid Law violation and that La. R.S. 38:2220.4(B)(1) mandates an award of attorney's fees to the prevailing defendant in a Public Bid Law complaint.

However, this Court did not consider the applicability of the Public Bid Law nor whether there had been any violations thereof in deciding that the trial court erred in declaring the contract an absolute nullity. Similarly, the trial court's decision to deny Hamp's Petition for Mandamus and Amended and Restated Petition for Mandamus was not predicated on any substantive determination that the Public Bid Law had been violated. Therefore, because our findings were not contingent upon the applicability of or a violation of the Public Bid Law, the trial court properly denied the City's and Metro Durr's exceptions and their request for attorney's fees.

As referenced, this opinion takes no position as to whether or not there has been any violation of the Public Bid Law by any party; and although we conclude that the trial court erred in declaring the contract an absolute nullity, we also take no position as to whether or not the contract had expired. We do take judicial notice that Hamp's mandamus action contends that Public Bid Law violations may have occurred. Accordingly, in light of those contentions, we remand this matter to the trial court to allow Hamp's the right to amend its petition to seek declaratory relief against the City and Metro/Durr for any Public Bid Law violation; and concomitantly, allow the City and Metro/Durr to assert any and all defenses, including that La. R.S. 38:2220.3 requires complainants to first place the Attorney General on notice prior to initiating a civil action alleging a Public Bid Law violation.

For the foregoing reasons, we reverse the trial court's decision that found the contract between the City and Metro/Durr to be an absolute nullity and awarded attorney's fees and costs to Hamp's. We affirm the trial court's judgment that denied the City's and Metro/Durr's exceptions of no cause/right of action and prematurity and their request for attorney's fees on the basis that the Public Bid Law was not applied in reaching the judgment. We further remand to the trial court to allow Hamp's the right to amend its complaint to seek declaratory relief against the City and Metro/Durr for any Public Bid Law violation and to afford the City and Metro/Durr the right to assert any defenses to such an action.

**AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED**