

**Date**

October 20, 2021

Time

8:45 am – 10:20 am

Instructor

Jenifer Schaye, CFE,
General Counsel

Location

Virtual

Method of Delivery

Webinar

Learning Level

Basic

CPE Hours

1.0 Hours

CPA Subject Matter

Accounting and Auditing

Yellow Book Subject Matter

Governmental

Prerequisite

None

Public Bid Law and *Cabela*

Description

This course is intended to help participants understand the Constitution and statutes relating to public bid and public donations. The goal is accountability and transparency. Participants will be given an understanding of their fiduciary responsibilities.

Objectives

After this class participants will be able to:

- Better understand the basis and basics of Public Bid Law.
- Better understand how to draft cooperative endeavor agreements.


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-three 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*)**

Michael J. “Mike” Waguespack, CPA
Louisiana Legislative Auditor

Presented by: **Jenifer Schaye, CFE**
General Counsel

October 20, 2021

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
- NOT A NEGOTIATING TOOL

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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 equal to or exceeding **\$250,000** there must be a public bid process which will give notice to potential vendors and contractors;



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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 **\$250,000** – 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
 - ❖ **\$250,000+**
 - 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. 39:1557.1

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I. Public Bid Law



Public Works – Change Order (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. 38:1211(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. 38:1211(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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Acts of 2020 Legislative Session



- **Act 92** (Effective August 1, 2020) Address and authorize the withholding of liquidated damages by public entities for public works contracts for flood protection projects or integrated coastal protection projects, not withstanding any other law to the contrary (R.S. 38:2248(C)).
- **Act 111** (Effective July 1, 2020) Amended the contract limit to \$250,000 and delayed any further CPI modifications until February 1, 2025 for public works contracts (R.S. 38:2212(C)).
- **Act 265** (Effective August 1, 2020) Provides with respect to purchasing by school boards (R.S. 38:2212.1(N)(4)).

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Acts of 2021 Legislative Session



- **Act 102** (Effective August 1, 2021) Provides relative to state procurement of certain services (*consulting services*) by use of reverse auction technology (R.S. 38:2271(A)(1), (2)(b), and (C)).
- **Act 260** (Effective August 1, 2021) Provides relative to public works contracts to require awarding of a contract within a specified time.
- **Act 205** (Effective August 1, 2021) Provides for timely execution and approval of change orders.

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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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I. Public Bid Law



- **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**
 - **#13-0050** Bidders inclusion of annotation on bid form that price was subject to a 3.5% escalation per year, when bid documents clearly noted that bidders were to agree that all terms, conditions, and prices were to remain unchanged during the length of the contract, was proper grounds for rejecting bid as non-responsive.

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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.
 - **#10-0058** - Debris removal contract not subject to advertising and bidding requirements – Professional Services.
 - **#12-0066** - Public Bid Law is not applicable to a public works projects under \$152,400 (**now \$250,000**). 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.

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I. Public Bid Law




- **Piggy Backing/ Cooperative Purchasing**
 - **#21-0005** – Fire, police and EMS agencies may utilize **La. R.S. 33:1324**, under the Local Services Law, or **La. R.S. 38:321.1**, under the Louisiana Public Bid Law, as an additional procurement method, provided all relevant steps are followed. **HOWEVER**, under current legislation, they may not engage in qualified group purchasing organization methods that are solely available to hospitals or schools.
 - **#17-0152** – Parishes, municipalities, and political subdivisions may utilize **La. R.S. 33:1324**, under the Local Services Law, or **La. R.S. 38:321.1**, under the Louisiana Public Bid Law, as an additional procurement method, provided all relevant steps are followed.
 - **#12-0165** – A public entity may not “piggy-back” off of a contract, including those established by a national cooperative purchasing organization, that has not been competitively bid by another Louisiana public entity.

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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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Part II




CABELA



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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. 21-0060** – A public entity may provide free modestly priced coffee to its employees as a benefit of employment without violating Art. VII, §14, by demonstrating a reasonable and objective expectation that doing so will provide a real and substantial benefit to the public entity.
- **Op. No. 20-0112** – A parish council may purchase and erect signage encouraging citizens to donate to Parish programs for the needy instead of making in-person donations to panhandlers without violating Art. VII, §14.

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II. *Cabela*




Attorney General Opinions

- **Op. No. 20-0099** – Discusses the exception provided in Art. VII, §14(B) concerning the donation of the “use” of equipment and personnel between political subdivisions.
- **Op. No. 20-0095** – A museum board can transfer ownership of museum owned items to the parish’s historical association through a cooperative endeavor agreement where the museum retains custody and control of the items in return for the association undertaking the costs associated with insuring the items and obtaining collections maintenance software and storage space for when the items are not placed on exhibit.

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II. *Cabela*




Attorney General Opinions

- **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.
- **Op. No. 17-0060** - Hospital service district may contribute funds to a capital project by a local community college under a cooperative endeavor agreement for the purpose of construction of facilities to house a nursing and medical training program from which the hospital service district will gain an additional trained local employment pool.

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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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QUESTIONS



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