

GILBERT R. BURAS, JR.

Attorney at Law

710 Carondelet Street

New Orleans, Louisiana 70130

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email: [grburas@buras.com](mailto:grburas@buras.com)

**VIA FAX TRANSMISSION**  
15048278872

February 22, 2008

The Hon. Martin N. Gusman  
Criminal Sheriff of Orleans Parish  
% John P. Sens  
Director of Purchasing  
2614 Tulane Avenue  
New Orleans, LA 70119

Re: Request for Qualifications  
Project Management for Capital Projects

Dear Sheriff Gusman:

I have been retained by Gilbane Building Company and McTech Corporation relative to the above referenced consulting contract matter.

Attached is a draft Complaint that sets forth the issues in the matter for which I have been retained. I will forbear filing this Complaint until you, your counsel, and I have had a chance to discuss the matter this afternoon.

Please feel free to call me at the number above or on my cell phone, ~~REDACTED~~, after 1:00 p.m.

Sincerely,  
  
Gilbert R. Buras, Jr.

~~REDACTED~~

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

GILBANE BUILDING COMPANY \*  
and \*  
MCTECH CORPORATION \* CIVIL ACTION NO.

versus \*  
\*  
JUDGE

MARLIN N. GUSMAN, in his capacity \*  
as the Criminal Sheriff for the \*  
Parish of Orleans, and the OFFICE \* MAGISTRATE  
OF THE CRIMINAL SHERIFF, \*  
PARISH OF ORLEANS \*  
\* \* \* \* \*

COMPLAINT

The Complaint of Gilbane Building Company and McTech Corporation, both domiciled in the State of Ohio, respectfully represents:

**PARTIES**

REDACTED

1.

The plaintiffs, Gilbane Building Company and McTech Corporation, are both Ohio business corporations, domiciled in the State of Ohio. (hereafter, the "PLAINTIFFS").

2.

Made defendants in this matter are:

MARLIN N. GUSMAN a resident and domiciliary of the Parish of Orleans, who is sued herein in his official capacity as the Criminal Sheriff for the Parish of Orleans, and

THE OFFICE OF THE CRIMINAL SHERIFF, PARISH OF ORLEANS a political subdivision of the state of Louisiana having the power to sue and to be sued (hereafter, the

“OPCSO”).

**JURISDICTION**

3.

Subject matter jurisdiction in the matter is founded on:

- 1. 28 USC §1332. There is complete diversity of citizenship between the parties and the amount in controversy exceeds \$75,000, exclusive of interest and costs;
- 2. Deprivation of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

4. REDACTED

Personal jurisdiction in this matter is founded on the presence of the defendants within the Eastern District of Louisiana.

**VENUE**

5. REDACTED

Venue in this matter is proper in this court pursuant to 28 USC §1391 (a). All of the events giving rise to this claim occurred in the Parish of Orleans, State of Louisiana, which is within the jurisdiction of this Honorable Court.

**FACTS**

6. REDACTED

On or about July 16, 2007, OPCSO published a notice of “Request for Qualifications” requesting “sealed qualifications and proposals to provide Project Management for Capital Projects for new construction, renovation/restoration and demolition, of the Orleans Parish Criminal Detention Facilities.”

7. **REDACTED**

PLAINTIFFS are certified Federal 8(a) contractors with extensive successful government contracting records throughout the country.

8.

In response to this notice of Request for Qualifications the PLAINTIFFS obtained the Request for Qualifications which set forth the instructions to be followed in the submission of responses thereto.

9.

The Request for Qualifications stated that “[T]he selected vendor/contractor must have adequate experience in project management and have at his disposal consultants and electrical, structural, mechanical, environmental, and correctional engineering. Vendor must have at least five (5) years experience in the construction field and have managed consultation project (sic) valued at a minimum of five million dollars.”

10.

The qualifications of the PLAINTIFFS satisfied all the requirements set forth in the Request for Qualifications.

11.

On July 30, 2007, PLAINTIFFS submitted their qualifications in the format set forth in the Request for Qualifications published by the OPSCO.

12. Upon information and belief it is alleged that the OPSCO maintained a bidder elimination process and interview selection process in which the submissions of respondents to the Request for Qualifications were reviewed and which further called for interviews with representatives of the OPSCO.

13.

Gilbane and McTech successfully completed the bidder elimination process and interview selection process, meeting directly with OPSCO representatives in three (3) separate meetings for pre-award discussion.

14.

On January 8, 2008, PLAINTIFFS received a letter from the OPSCO advising, without explanation, that they were not selected.

15.

Upon and information and belief PLAINTIFFS allege [that they were the lowest and only responsive bidder, meeting the requirements for experience in constructing detention facilities in various areas of the United States.]

16.

Upon and information and belief PLAINTIFFS allege that the OPSCO has either selected or is about to select “ Ozanne Construction” and its affiliates, [none of which companies held, at the time of the response to the Request for Qualifications, appropriate Louisiana General Contractors licensing responsive to the Request for Qualifications.]

**COUNT 1**

17.

The Request for Qualifications required, by operation of law, specifically, L.R.S. 37:2150.1(4)(a), that respondents hold a Louisiana General Contractors license appropriate to the scope of work for which consulting services were required.

18.

By operation of law, specifically, L.R.S. 37:2163, only contractors who hold an active Louisiana license can be awarded public contracts either by bid or through negotiation.

19.

The PLAINTIFFS are entitled to have set aside the responses of any respondents to the Request for Qualifications who hold did not, at the time of submission of their responses, hold appropriate Louisiana General Contractors licensing.

**COUNT II**

20.

In Louisiana a low bidder on a public contract may sue to set aside the award of the contract to another bidder and the lowest responsible and responsive bidder has a statutory entitlement entailing the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution.

21.

The PLAINTIFFS are entitled to have set aside the responses of any respondents to the Request for Qualifications who did not, at the time of submission of their responses, hold appropriate Louisiana General Contractors licensing, or who were granted participation in the bid process, or awarded a contract by a process contrary to the due process requirements of the Fifth

and Fourteenth Amendments to the United States Constitution.

**COUNT III - INJUNCTIVE RELIEF**

22.

Louisiana law, L.R.S. 38:2220(B), recognizes the right of “any interested party” to bring suit through summary proceeding to enjoin the award of a contract, or to seek other appropriate injunctive relief to prevent the award of a contract, which would be in violation of the public bid laws of Louisiana.

23.

The plaintiffs are entitled to the entry of an Order of this Court enjoining the award of a contract, or to other appropriate injunctive relief to prevent the award of a contract, upon a prima facie showing that any response to the Request for Qualifications deemed acceptable by the OPCSO was not in compliance with Louisiana law governing the award of such a contract.

**PRAYER FOR RELIEF**

WHEREFORE plaintiffs, Gilbane Building Company and McTech Corporation, pray that this Complaint be filed and served upon the defendants Martin N. Gusman and the Office of the Criminal Sheriff, Parish of Orleans, and that after due proceedings:

1. That the defendants, Martin N. Gusman and the Office of the Criminal Sheriff, Parish of Orleans, be cited to appear and show cause in this Court on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_ o'clock why a Preliminary Injunction should not issue restraining and enjoining them from the awarding of a contract or preventing the award of a contract to Ozanne Construction and its affiliates, upon a prima facie showing by the plaintiffs that the response to the

Request for Qualifications deemed acceptable by the OPCSO was not in compliance with Louisiana law governing the award of such a contract; and,

2. That in the event that a prima facie showing is made by the plaintiffs that the response to the Request for Qualifications deemed acceptable by the OPCSO was not in compliance with Louisiana law governing the award of such a contract, the contract then be awarded to Gilbane Building Company and McTech Corporation as the lowest responsible and responsive bidder to the Request for Qualifications to provide Project Management for Capital Projects for new construction, renovation/restoration and demolition, of the Orleans Parish Criminal Detention Facilities; and,
3. For all other appropriate legal and equitable relief.

Respectfully Submitted,

---

Gilbert R. Burnas, Jr. (La Bar #3652)  
710 Carondelet Street  
New Orleans, Louisiana 70130  
Telephone (504) 581-4334  
Facsimile (866) 257-3697

Attorney for Gilbane Building Company and  
McTech Corporation



# USRY, WEEKS & MATTHEWS

A PROFESSIONAL LAW CORPORATION  
1615 POYDRAS STREET, SUITE 1250  
NEW ORLEANS, LOUISIANA 70112

T. ALLEN USRY  
JOHN F. WEEKS II  
FREDMAN R. MATTHEWS  
FRED SCHROEDER  
CANG E. FROSCHE  
TIMOTHY R. RICHARDSON

TELEPHONE: (504) 592-4666  
FACSIMILE: (504) 592-4664  
LA WATS: (800) 523-8795

February 22, 2008

VIA FACSIMILE 257-3697  
AND REGULAR MAIL

Gilbert R. Buras, Jr.  
Attorney at Law  
710 Carondelet Street  
New Orleans, LA 70130

Re: Orleans Parish Criminal Sheriff's Office  
Request for Qualifications  
Project Management for Capital Projects

Dear Mr. Buras:

This will confirm our telephone conversation of this afternoon, wherein we discussed the Sheriff's Office project management contract process and your proposed lawsuit. I have spoken to the Sheriff. No contract will be awarded for the subject project management services until after you and I have met and discussed the matters and concerns raised in your letter and proposed suit. I understand that based on this representation you will not file your suit prior to our meeting.

As we discussed, I am occupied for several days next week with the new sheriffs' seminar, but plan to meet with you on Wednesday morning. I will contact you on Monday to discuss possible times.

Thank you for your consideration in this regard.

Sincerely,



T. Allen Usry

cc: Sheriff Marlin Gusman

T. ALLEN USRY  
JOHN F. WEEKS II  
FREDMAN E. MATTHEWS  
FRED SCROEDER  
CRAIG E. PROSCH  
TIMOTHY R. RICHARDSON

**USRY, WEEKS & MATTHEWS**  
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1615 PONDRAZ STREET, SUITE 1250  
NEW ORLEANS, LOUISIANA 70112

TELEPHONE: (504) 592-4600  
FACSIMILE: (504) 592-4641  
LA WATS: (800) 523-5793

February 22, 2008

VIA FACSIMILE 257-3697  
AND REGULAR MAIL

Gilbert R. Buras, Jr.  
Attorney at Law  
710 Carondelet Street  
New Orleans, LA 70130

**Re: Orleans Parish Criminal Sheriff's Office  
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Project Management for Capital Projects**

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Thank you for your consideration in this regard.

Sincerely,



T. Allen Usry

cc: Sheriff Marlin Gusman

FEB 27 2008

REDACTED

**Allen Usry - Gilbane/OPCSO**

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**From:** John Weeks  
**To:** Gilbert R Buras  
**Date:** 3/4/2008 9:41 AM  
**Subject:** Gilbane/OPCSO  
**CC:** AUsry@uwmlaw.com

---

I have been looking into this since we met last Thursday. I found two authorities you might want to look at concerning the status and licensing requirements for "construction managers":

La. State Licencing Board for Contractor v. Hospital Service District, etc., 723 So. 2d 1110.

Attorney General Opinion 02-0145 ( Nov. 7, 2002).

My general opinion is that the title of the appointee is irrelevant; what matters is whether his actual authorities include those of a contractor under the Licensing Law. Put another way, this is a fact specific inquiry and I haven't found a single document yet that assists in that inquiry here.

Also, it does seem clear that either way appointment of a construction manager is a services contract which, unlike a true construction contract, is exempt from the requirement of award to the lowest responsible bidder.

Note also that if this RFQ process is somehow deemed to result in award of a construction contract, then it violates the public contract prohibition on cost-plus contracts. All of the responses here contemplated a fee which was a percentage of some other amount-although I don't know more of the details of the responses than that yet.

Please call if you'd like to discuss this further.

John F. Weeks, II  
Usry, Weeks & Matthews, A PLC  
Suite 1250, 1615 Poydras Street  
New Orleans, LA 70112  
(504)592-4600  
FAX 592-4641  
[jweeks@uwmlaw.com](mailto:jweeks@uwmlaw.com)

## John Weeks - Re: OPCSO/Gilbane

---

**From:** "Gilbert R Buras Jr" <grburas@buras.com>  
**To:** "John Weeks" <JWeeks@uwmlaw.com>  
**Date:** 3/20/2008 11:41:12 AM  
**Subject:** Re: OPCSO/Gilbane

---

Dear John:

I thank you for the Criminal Sheriff's timely response to the request for public records. Having reviewed the records, I find that nothing contained in the production has convinced me that my client is without a cause of action.

In an earlier e-mail you queried whether the appointment of a construction manager is a services contract, unlike a true construction contract, and therefor exempt from the requirement of award to the lowest responsible bidder. It is my appreciation of the law that services contracts, even those subject to an RFP process, are not exempt from certain competitive negotiation procedures. LRS 39:1484. The documents produced to me indicate that my client's proposed fee was better than the competition's by not less than one half percent.

You also raise the question of whether the fee schedule quoted as a percentage violates the public contract prohibition on cost-plus contracts. As there is no base cost component of the contract, I do not think that it even falls within the definition of a cost-plus arrangement. However, both of the two finalists quoted percentage based compensation arrangements. If one is invalid, they are both invalid.

It is unclear from the documents produced as to whether a contract has, in fact, been awarded to Ozanne. There is a letter in the documents that indicates that they have been selected as the

successful bidder. Whether this amounts to an actual "award" of the contract, I cannot say.

It is my appreciation of the law that an action against the OPSCO would be mandatory in nature and that mandatory injunctions require a full-blown evidentiary hearing.

My client has authorized me to proceed. However, in the interest of expediting the matter so that we can reach as quick a resolution as possible I would like to discuss with you certain stipulations and procedural proposals to whichever judge draws this case on the allotment in order to help resolve the matter in the most expeditious manner possible.

My cell phone is REDACTED

Gilbert Buras

---

----- Original Message -----

**From:** John Weeks  
**To:** Gilbert R Buras, Jr  
**Sent:** 03/19/2008 11:33 AM  
**Subject:** Re: OPCSO/Gilbane

Thanks for your prompt response; I look forward to hearing from you. If I'm out of pocket try my cellphone:  
REDACTED

John F. Weeks, II  
Usry, Weeks & Matthews, A PLC  
Suite 1250, 1615 Poydras Street  
New Orleans, LA 70112  
(504)592-4600  
FAX 592-4641  
jweeks@uwmlaw.com

>>> "Gilbert R Buras Jr" <grburas@buras.com> 3/19/2008 11:07 AM >>>

Dear John:

I will be discussing the matter with my client shortly.

I will call you this afternoon.

## Gilbert Buras

----- Original Message -----

**From:** John Weeks

**To:** Gilbert R Buras, Jr

**Sent:** 03/19/2008 10:45 AM

**Subject:** Re: OPCSO/Gilbane

If you haven't already left for Pennsylvania, I'd appreciate a call to discuss the status of this claim. I would be interested to know if your evaluation has changed since you sent your original letter and draft Complaint after reviewing the documents we produced.

As I said in our last conversation, the Sheriff is under mounting pressure from FEMA to move forward with appointing a Project Manager at peril of losing FEMA's approved funding for those services.

John F. Weeks, II

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[jweeks@uwmlaw.com](mailto:jweeks@uwmlaw.com)

## John Weeks - Re: OPCSO/Gilbane

---

**From:** "Gilbert R Buras Jr" <grburas@buras.com>  
**To:** "John Weeks" <JWeeks@uwmlaw.com>  
**Date:** 3/21/2008 9:35:34 AM  
**Subject:** Re: OPCSO/Gilbane

---

Dear John:

In response to your e-mail, the scope of the services for which "qualifications" were requested is perhaps best stated in James Stark's May 1, 2007, letter to Col. Kilpatrick and included in Ozanne's final proposal package as its ostensible statement of the rate it would charge:

To clarify, FEMA public assistance recognizes project management as the **oversight** of an eligible project from the design phase (when necessary) to the completion of the work...includ[ing] direct management of projects in the concept and design stages, the procurement activities for architectural/engineering services and performance of work, and the review and approval of the project design... These tasks must no be confused with the tasks that are addressed by the subgrantee's sliding scale administrative allowance, or any other part of the scope of work not recognized as project management.

(emphasis added)

The concept of exercising "oversight" of a construction project is specifically contemplated by L.R.S. 37:2150.1 (4)(a):

"Contractor" means any person who undertakes to, attempts to, or submits a price or bid or offers to construct, supervise, superintend, **oversee**, direct, or in any manner assume charge of the construction, alteration, repair, improvement, movement, demolition, putting up, tearing down...

(emphasis added)

The "RFQ" titled itself a request for "Project Management-**Construction** Consultant". The qualifications required were stated by OPCSO to be:

"... experience in project management and have at his disposal consultants in electrical, structural, mechanical, environmental, and correctional engineering. Then door must have at least five (5) years experience in the construction field and have managed consultation project valued at a minimum of five million dollars."

We must simply agree to disagree that what is sought by the RFQ is a "professional" service. What is contemplated is in the nature of an administrative service for which expertise and experience in construction is required, not a "professional service" as that term is understood in Louisiana law relative to contracts for accounting, legal, medical services, etc., the so-called "learned professions." See, e.g., New Orleans Rosenbush Claims Service, Inc. v. City of New Orleans, 653 So.2d 538, 547(La. 1995).

As for the proposed clause, I think it matters less what disclaimers are included in the contract than the actual services performed.

I will call you shortly to discuss the matter.

----- Original Message -----

**From:** John Weeks  
**To:** Gilbert R Buras Jr  
**Sent:** 03/20/2008 4:31 PM  
**Subject:** Re: OPCSO/Gilbane

I grow increasingly pessimistic we will reach an amicable resolution of this claim, but I do think it important to clarify the point of my earlier email.

As I read your draft Complaint, it seems fundamental to your position is that the *proposed* Project Manager-Construction Project agreement is a construction contract that must be bid out under the Public Works Act, that it must be awarded to a licensed general contractor under the Contractor Licensing Law, and that it must be awarded to the lowest qualified responsive bidder.

Your theory brings in all the provisions of the Public Works Act, not just the ones that suit your desires. The PWA also specifically prohibits cost plus percentage contracts.

My answer to this conundrum is that this does not involve a construction contract; one or more construction contracts will be let in the future to qualified contractors. All that is contemplated at this time is a preliminary contract to get to that point. I am aware of no provision of law that requires professional or consulting contracts be awarded to the lowest "bidder". Remember, the process your client was involved in was not a true public bid, nor even a request for *proposals*, it was simply a request for *qualifications*. (Incidentally, R.S. 39:1484 is a part of the La. Procurement Code, which applies only to executive offices of the State; see R.S. 39:1482.)

As far as the status of the contract, none has been awarded nor even negotiated. No one even knows if those negotiations will be successful, with anyone. I cannot see how you could expect a judge to "award" Gilbane a contract; first, he'd have to write it. That's another factor that separates all this from a true public bid, where the final contract forms are actually a part of the bid submittal process.

How difficult do you think it would be to put a clause into the Project Manager Agreement a clause that "nothing herein will require or authorize the Project Manager to perform any act for which a license under the Louisiana Contractor's Licensing Law is required"? When you came to my office, I pointed out to you your client's own laundry list of services it agreed to perform. Actual construction was not mentioned, though it did refer to assistance in formulating and reviewing bids.

John F. Weeks, II  
Usry, Weeks & Matthews, A PLC  
Suite 1250, 1615 Poydras Street  
New Orleans, LA 70112  
(504)592-4600  
FAX 592-4641  
jweeks@uwmlaw.com

>>> "Gilbert R Buras Jr" <gurburas@buras.com> 3/20/2008 12:36:12 PM >>>

Dear John:



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In an earlier e-mail you queried whether the appointment of a construction manager is a services contract, unlike a true construction contract, and therefor exempt from the requirement of award to the lowest responsible bidder. It is my appreciation of the law that services contracts, even those subject to an RFP process, are not exempt from certain competitive negotiation procedures. LRS 39:1484. The documents produced to me indicate that my client's proposed fee was better than the competition's by not less than one half percent.

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**Attorney at Law**

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email: [grburas@buras.com](mailto:grburas@buras.com)

**VIA E-MAIL TRANSMISSION**  
15045924641

Mr. John Weeks  
Usry, Weeks & Matthews  
1615 Poydras Street, Ste 1250  
New Orleans, Louisiana 70112

Re: Gilbane Building Company and McTech Corporation  
Request for Qualification

Dear John:

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Mr. John Weeks  
March 21, 2008  
Page 2

(emphasis added)

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“... experience in project management and have at his disposal consultants in electrical, structural, mechanical, environmental, and correctional engineering. Then door must have at least five (5) years experience in the construction field and have managed consultation project valued at a minimum of five million dollars.”

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I will call you shortly to discuss the matter.

Cordially,  
  
Gilbert R. Buras, Jr.

**From:** "Gilbert R Buras Jr" <grburas@buras.com>  
**To:** "John Weeks" <JWeeks@uwmnlaw.com>  
**Date:** 4/8/2008 4:02 PM  
**Subject:** McTech  
**Attachments:** Memorandum of Law - Draft.pdf; Weeks040808.pdf

Dear John:

I am forwarding a draft of the Memorandum of Law that will be filed contemporaneously with the Complaint in matter involving the "Project Management-Construction Consultant" RFQ.

Omitted from the draft is the conclusion of the due process discussion and the section relative to the law of Louisiana on mandatory injunctions, but enough of the memo is provided to give you an idea of where I am going with this.

Please give me a call after you have had a chance to digest the draft memo.

Gilbert R. Buras, Jr.

GILBERT R. BURAS, JR.

**Attorney at Law**

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New Orleans, Louisiana 70130

Telephone (504) 581-4334

Fax (866) 257-3697

email: [grburas@buras.com](mailto:grburas@buras.com)

**VIA E-MAIL TRANSMISSION**

5045924641

April 8, 2008

Mr. John Weeks

Ury, Weeks & Matthews

1615 Poydras Street, Ste 1250

New Orleans, Louisiana 70112

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Cordially,



Gilbert R. Buras, Jr.

**DRAFT - FOR DISCUSSION PURPOSES ONLY**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

GILBANE BUILDING COMPANY \*

and

MCTECH CORPORATION \*

CIVIL ACTION NO.

versus \*

JUDGE

MARLIN N. GUSMAN, in his capacity \*

as the Criminal Sheriff for the

Parish of Orleans, and the LAW \*

MAGISTRATE

ENFORCEMENT DISTRICT FOR THE  
OFFICE OF CRIMINAL SHERIFF, \*

PARISH OF ORLEANS \*

**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR MANDATORY INJUNCTION**

MAY IT PLEASE THE COURT:

This matter arises out of the presumptive award of a construction management contract by the Orleans Parish Criminal Sheriff's Office (OPCSO) in connection with its aspect of the "Justice Facilities Master Plan", a construction project to be implemented as a result of the devastation caused by Hurricane Katrina. Construction grants proposed to be made available to the OPCSO by FEMA amount to approximately \$150 million. Professional project management, and federal funding for that management, was deemed necessary by the OPCSO as a result of the lack of a staff qualified to administer such a undertaking.

On or about July 16, 2007, the OPCSO published a notice of "Request for Qualifications" requesting "sealed qualifications and proposals to provide Project Management for Capital Projects for new construction, renovation/restoration and demolition, of the Orleans Parish Criminal Detention Facilities." Exhibit No. 1



## **DRAFT - FOR DISCUSSION PURPOSES ONLY**

In response to this notice of Request for Qualifications Gilbane and its affiliate McTech Corporation (the PLAINTIFFS) obtained the Request for Qualifications (RFQ) which set forth the instructions to be followed in the submission of responses thereto. Exhibit No. 2

The RFQ was styled a request for "Project Management-Construction Consultant". The qualifications required of the respondents were stated by OPCSO to be:

"... experience in project management and have at his disposal consultants in electrical, structural, mechanical, environmental, and correctional engineering. The vendor must have at least five (5) years experience in the construction field and have managed consultation project valued at a minimum of five million dollars."

The RFQ listed 5 "evaluation criteria", but did not assign any relative importance to these criteria nor rank them in order of importance.

The PLAINTIFFS responded to the RFQ by timely submission of their qualifications.

The OPCSO received 13 responses to the RFQ and on August 31, 2007, notified all but four of the respondents that they had not been selected for "an interview in the second round of the selection process."

By mid-September 2007 the field of candidates had been reduced to two, the PLAINTIFFS and Ozanne Construction and its affiliates, Kwame Building Group, Inc., and MWH. These companies were advised that they would be subjected to a final interview on October 31, 2007.

On January 8, 2008, PLAINTIFFS received a letter from the OPCSO advising them that they had not been selected.

The PLAINTIFFS challenge the award of the contract to Ozanne and its affiliates on grounds that Ozanne and its affiliates did not hold the legally required Louisiana General Contractors License at the time of the submission of their response to the RFQ.

## DRAFT - FOR DISCUSSION PURPOSES ONLY

The PLAINTIFFS contend that they are entitled to have set aside the responses of any respondents to the Request for Qualifications who did not, at the time of submission of their responses, hold appropriate Louisiana General Contractors licenses.

Alternatively, the PLAINTIFFS seek a judgment declaring the process by which the contract was awarded as arbitrary and capricious and in violation of the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution.

### I. THE SCOPE OF SERVICES TO BE PERFORMED UNDER THE “PROJECT MANAGEMENT-CONSTRUCTION CONSULTANT” CONTRACT RENDERS THE PERFORMING PARTY A “CONTRACTOR” UNDER LOUISIANA LAW

The cover page of the RFQ seeks a “Project Management-Construction Consultant”. Louisiana law does not specifically define or license “construction management” or “project management”. The actions that a construction manager is called upon to perform determine the need for a contractor’s license.

In 2002 the Calcasieu Parish School Board requested the opinion of the Attorney General on the question of whether a public body could enter into a “construction management agreement” without publicly bidding the contract for services as a construction manager. The Attorney General responded:

The proposed contract with a Construction Manager is one for services. It has long been held by our courts that contracts for services are not subject to the Public Bid Law. *Wallace Stevens, Inc. v. LaFourche Parish Hospital District No. 3*, 323 So.2d 794 (La. 1975); *Browning-Ferris, Inc. v. City of Monroe*, 465 So.2d 882 (La.App. 2d Cir. 1985); *Lafourche Parish Water District No. 1 v. Carl Heck Engineers, Inc.*, 346 So.2d 769 (La.App 1st Cir. 1977). The proposed contract for Construction Management services falls within the ambit of these holdings and therefore need not be bid, although public bidding or a request for proposals may be used in the selection process.

## **DRAFT - FOR DISCUSSION PURPOSES ONLY**

### **CONSTRUCTION MANAGER'S RESPONSIBILITIES**

Your opinion request details extensive responsibilities which the Board, as owner, would delegate to the Construction Manager as the authorized agent of the Board to carry out these responsibilities. We find no problem with this arrangement, except to point out that many of the delegated responsibilities fall within the definition of "contractor" set forth in R.S. 37:2150.1 and therefore would require that the Construction Manager contracted by the Board be a licensed general contractor as required by the Contractors Licensing Law.

Op.Atty.Gen., No. 02-0145, November 7, 2002.

It is noteworthy that the attorney general's opinion states that the construction manager's duties were "...to oversee construction projects...oversee separate trade contracts which would be competitively awarded... assist the Board and its agents in developing bid documents, evaluation of bids and overseeing, directing and coordinating the individual duly licensed and bonded trade contractors selected and awarded contracts by the Board."

"Oversight" of a construction project is specifically included in the definition of a "contractor" under Louisiana law.

L.R.S. 37:2150.1(4)(a) defines a "contractor" as follows:

"Contractor" means any person who undertakes to, attempts to, or submits a price or bid or offers to construct, supervise, superintend, **oversee, direct, or in any manner assume charge of the construction, alteration, repair, improvement, movement, demolition, putting up, tearing down...**

(emphasis added)

In a May 1, 2007, letter to Col. Thomas Kilpatrick, the State Coordinating Officer, FEMA's Transitional Recovery Office Director James Stark specified the services of the OPCSO "project

## DRAFT - FOR DISCUSSION PURPOSES ONLY

manager” for which FEMA funds could be used.<sup>1</sup>

To clarify, FEMA public assistance recognizes project management as the **oversight** of an eligible project from the design phase (when necessary) to the completion of the work...includ[ing] **direct management** of projects in the concept and design stages, the **procurement activities** for architectural/engineering services and **performance of work**, and the **review and approval of the project design**... These tasks must not be confused with the tasks that are addressed by the subgrantee’s sliding scale administrative allowance, or any other part of the scope of work not recognized as project management.

The RFQ stated that the selected vendor would be compensated “on the current compensation curve based on the F.E.M.A. Guide for Project Management and that:

The selected vendor/contractor must have adequate experience in project management and have at his disposal consultants in electrical, structural, mechanical, environmental, and correctional engineering. Vendor must have at least five (5) years experience in the construction field and have managed consultation project valued at a minimum of five million dollars.

The scope of activities for the “Project Management-Construction Consultant” clearly contemplates responsibilities falling within the definition of “contractor” set forth in R.S. 37:2150.1 and requires that the “vendors” be licensed general contractors as required by the Contractors Licensing Law.

### II. ONLY HOLDERS OF VALID LOUISIANA GENERAL CONTRACTORS LICENSE WERE QUALIFIED TO SUBMIT A RESPONSES TO THE REQUEST FOR QUALIFICATIONS

Both Gilbane and McTech Corporation held, at the time of the submission of the response to the RFQ, Louisiana contractors licenses in the areas of “Heavy Construction” and “Building Construction”. Neither Ozanne nor Kwame held any Louisiana contractors licenses.

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<sup>1</sup> This letter is included in Ozanne’s final proposal package as its statement of the rate it would charge for project management services.

## DRAFT - FOR DISCUSSION PURPOSES ONLY

The holding of a license prior to bidding is specifically provided for by the regulations of the Louisiana Board of Licensing for Contractors. Section 1107 of Title 46, Part XXIX, of the Louisiana Administrative Code provides:

### SECTION 1107. Federal Projects

A. A license shall not be required to bid on any projects funded in part by the federal government designated for a particular project by an agency of the federal government where a federal regulation or law prohibits such requirement, provided said agency presents specific evidence of a federal regulation or law prohibiting same in the bid documents. **Should the agency fail to present such evidence, the bidder shall be required to have a license before bidding.** Any successful bidder on any exempt project funded in part by the federal government shall submit an application for license completed in its entirety and pay the fee prior to commencement of work on federal jobs. After meeting said requirements, a letter shall be issued to said successful bidder authorizing the commencement of work. Thereafter, the application shall be presented to the board at its next regular meeting and following compliance with all remaining requirements including delay periods, a license shall be issued.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:2150-2164.

HISTORICAL NOTE: Promulgated by the Department of Commerce, Licensing Board for Contractors, November 1974, amended LR 8:137 (March 1982), LR 12:761 (November 1986), amended by the Department of Economic Development, Licensing Board for Contractors, LR 19:1128 (September 1993).

(emphasis added)<sup>2</sup>

The requirement that a license be held in order to legitimately participate in bidding is implicit in L.R.S. 37:2163(A)(1) relative to procedures for the award of public contracts:

§ 2163. Bid procedures; penalty

A. (1) It is the intent of this Section that only contractors who hold an active license be awarded contracts either by bid **or through negotiation.** All architects,

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<sup>2</sup> See also, §903 of Title 46, Part XXIX, of the Louisiana Administrative Code which requires an “awarding authority” to ensure that subcontractors are “...duly licensed by the board as of the final date fixed for the submission of bids on said work from the primary contractor to the owner or awarding authority.”

## DRAFT - FOR DISCUSSION PURPOSES ONLY

engineers, and awarding authorities shall place in their bid specifications the requirement that a contractor shall certify that he holds an active license under the provisions of this Chapter and **show his license number on the bid envelope**. In the case of an electronic bid proposal, a contractor may submit an authentic digital signature on the electronic bid proposal accompanied by the contractor's license number in order to meet the requirements of this Paragraph. Except as otherwise provided herein, if the bid does not contain the contractor's certification and show the contractor's license number on the bid envelope, the bid shall be automatically rejected, shall be returned to the bidder marked "Rejected", and shall not be read aloud.

(emphasis added)

It is significant that the statute states that the license requirement is applicable regardless of whether the contract is to be let by public bid *or* through negotiation. The OPSCO has insisted that its RFQ process and the award of the contract as a "services" contract places it outside the scope of the public bid requirements of Louisiana law.<sup>3</sup> L.R.S. 37:2163(A)(1) demonstrates that insofar as the holding of a valid license is concerned, it is immaterial whether the contract is bid or negotiated. What is critical to the analysis is whether the scope of services demands a "contractor". If so, the contractor must hold a license at the time of the submission.

### III. THE PROCESS BY WHICH THE CONTRACT WAS AWARDED WAS ARBITRARY AND CAPRICIOUS AND IN VIOLATION OF THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to 2004 construction management services contracts were clearly required to be publicly bid. L.R.S. 38:2212(g) then read:

(g) Contracts providing construction management services to a public entity for public work shall be duly advertised by the public entity in accordance with the

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<sup>3</sup> See, Op. Atty. Gen., No. 02-0152, August 21, 2002, to the effect that contracts for services are not required to be bid under the Public Bid Law, and that a "request for proposals" is a valid method to evaluate potential contractors to consider relevant factors in addition to cost.

## DRAFT - FOR DISCUSSION PURPOSES ONLY

provisions of this Section and shall be awarded through competitive bidding pursuant to this Part."

Acts 2004, No. 445, § 1, rewrote subpar. (A)(3)(g), which *now* reads:

(g) No construction manager or any other third-party consultant employed by a public entity may manage a construction project as a general contractor or act in the role of the general contractor to oversee, direct, or coordinate individual trade contractors on behalf of the public entity, or accept bids or itself bid on the public work or components of the public work with respect to which the manager or consultant is employed or contracted to manage or consult.

The OPSCO has asserted that it could write the contract it solicited in such a manner as to eliminate any job duties for which a contractor's license would be required, ostensibly converting the job to one of pure "consultation". This would not, however, leave the OPSCO free to choose a construction manager at its whim.

It is firmly established in Louisiana that a low bidder on a public contract may sue to set aside the award of the contract to another bidder. Haughton Elevator Division v. State, Division of Administration, 367 So.2d 1161, 1164 (La.1979) Williams v. Board of Sup'rs, Etc., 388 So.2d 438, 441 (La.App. 2d Cir.1980). In this regard, Louisiana recognizes that the lowest responsible and responsive bidder has a statutory entitlement entailing the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution. Williams, supra. Housing Authority of the City of Opelousas v. Pitman Construction Company, 264 F.2d 695 (5th Cir.1959). The awarding agency is thus held to the Constitutional requirement that, in the exercise of its discretion, it must not act unfairly, arbitrarily or irrationally in the award of a public contract. Haughton, supra. Ted Hicks & Associates, Inc. v. Stroud, 434 So.2d 1157 (La.App. 1st Cir.1983).

Nolan Contracting v. Regional Transit Authority, 651 F. Supp. 23 (EDLA, 1986)

Although considered in the context of a "public bid" contract, the Nolan constraints on discretion are equally applicable in the context of an award of a no-bid "consulting" contract.

## DRAFT - FOR DISCUSSION PURPOSES ONLY

Louisiana has, in fact, codified the process of awarding “consulting” contracts. Chapter 16 of Title 39 of the Revised Statutes regulates “Professional, Personal, Consulting, and Social Services Procurement” and applies “to every expenditure of public funds in excess of two thousand dollars by the executive branch of this state.”<sup>4</sup>

The L.R.S. 39:1481 defines “consulting” services and “professional services”

(4)(a) “Consulting service” means work, other than professional, personal, or social service, rendered by either individuals or firms who possess specialized knowledge, experience, and expertise to investigate assigned problems or 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 management, personnel, finance, accounting, planning, data processing, and advertising contracts, except for printing associated therewith.

...  
(18) “Professional service” means work rendered by an independent contractor who has a 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 lawyers, doctors, dentists, psychologists, certified advanced practice nurses, veterinarians, architects, engineers, land surveyors, landscape architects, accountants, actuaries, and claims adjusters. A profession is a vocation founded upon prolonged and specialized intellectual training which enables a particular service to be rendered. The word “professional” implies professed attainments in special knowledge as distinguished from mere skill. For contracts with a total amount of compensation of fifty thousand

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<sup>4</sup> L.R.S. 33:9001, which created the defendant OPSCO “law enforcement district”, provides that the “criminal sheriff or his successor shall be ex officio the chief executive officer of the district.” “Thus”, says the Louisiana Supreme Court, “the sheriff is obviously a member of the executive branch”. State v. Miller, 857 So.2d 423, 428 2003-0206 La. 10/21/03, (La. 2003). Admittedly the Louisiana Supreme Court was not addressing the issue of the OPSCO’s place in Louisiana’s tripartite system of government and the Miller dicta is perplexing given the placement of the criminal sheriff in Louisiana Constitution of 1974 Article V relative to the Judicial Branch. Nevertheless, the “Professional, Personal, Consulting, and Social Services Procurement” law is illustrative of the hallmarks of a rational, non-arbitrary selection procedure.



## DRAFT - FOR DISCUSSION PURPOSES ONLY

dollars or more, the definition of "professional service" shall be limited to lawyers, doctors, dentists, psychologists, certified advanced practice nurses, veterinarians, architects, engineers, land surveyors, landscape architects, accountants, actuaries, claims adjusters, and any other profession that may be added by regulations adopted by the office of contractual review of the division of administration.

Under these definitions, "construction management" would, if stripped of the job functions of a "contractor", be considered a "consulting service".

L.R.S. 39:1485 grants authority to the "Office of Contractual Review" to regulate the procurement process for professional, personal, consulting, and social services. Its regulations with respect to consulting service contracts in excess of \$50,000 state that any RFP for such services must

inform the potential contractors of the criteria and selection methodology and the weight which will be applied to each significant evaluation criteria to be used in evaluating the proposal's responsiveness to the RFP.

Louisiana Administrative Code, Title 34, Part V, Subchapter B, §145(A)(6)(f).

L.R.S. 39:1671, et seq., provides a procedural remedy for anyone aggrieved in connection with the solicitation or award of a professional, personal, consulting, or social services contract including several levels of administrative and, finally, judicial, review. See, e.g., Republic Fire and Cas. Ins. Co. v. State of Louisiana Div. of Admin., Office of State Purchasing, App. 1 Cir.2006, 952 So.2d 89, 2005-2001 (La. App. 1 Cir. 12/28/06).

Nowhere in the RFQ is any reference made to an applicants qualifications as a "project manager" under an objective set of criteria. Wholly ignored is certification by the Project Management Institute or reference to the standard work in the area, the "Project Management Institute"'s *PMBOOK Guide - Third Edition*, an internationally recognized standard (IEEE Std 1490-

## DRAFT - FOR DISCUSSION PURPOSES ONLY

2003) that provides the fundamentals of project management as they apply to a wide range of projects, including construction, software, engineering, automotive, etc.

The 5 “evaluation criteria” stated on page four of the OPSCO’s RFP did not accord any weights or statements of “relative importance” to the 5 factors mentioned.<sup>5</sup>

More troubling, however, is the OPCSO’s lack of reference to the procedural remedies available to a prospective contractor. The State Procurement Code provides for its own procedural mechanism for challenging the award of a contract and these procedures are different from those available under the Louisiana Administrative Procedures Act. See, e.g., Republic Fire and Cas. Ins. Co. v. State of Louisiana Div. of Admin.. Office of State Purchasing, App. 1 Cir.2006, 952 So.2d 89, 2005-2001 (La. App. 1 Cir. 12/28/06).

Assuming there is any legitimacy to the argument that it is exempt from the application of state laws on the matter of consulting services procurement the OPCSO has not provided for any procedural remedy for an aggrieved RFQ respondent. This failure to provide for procedural

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<sup>5</sup> Cf. the following state statutes that specifically require a statement of the relative importance of evaluation criteria: L.R.S. 38:2237(7) , relative to telecommunications and data processing procurement by political subdivisions requiring a statement of the “relative importance of price and other evaluation factors”; L.R.S. 38:2238-2, relative to the procurement of used fire and emergency response vehicle procurement by political subdivisions requiring that a request for proposals indicate “the relative importance of price, warranties, and other evaluation factors” and “clearly define the tasks to be performed.”; L.R.S. 39:1503, relative to professional, personal, consulting, and social services procurement requiring that requests for proposals “indicate the relative importance of price and other evaluation factors, ... clearly define the tasks to be performed under the contract, the criteria to be used in evaluating the proposals and the time frames within which the work must be completed”; and L.R.S. 39:1754(2)(a) , relative to telecommunications procurement requiring that “request for proposals ... indicate the relative importance of all evaluation factors and ... clearly define the work, service, or solution to be provided under the contract.

**DRAFT - FOR DISCUSSION PURPOSES ONLY**

remedy, coupled with the lack of specificity for qualifications stated in the RFQ itself, open it to a charge of arbitrariness and capriciousness in the award of the contract.

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**VIA E-MAIL TRANSMISSION**  
15045924641

Mr. John Weeks  
Usty, Weeks & Matthews  
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New Orleans, Louisiana 70112

Re: Gilbane Building Company and McTech Corporation  
Request for Qualification

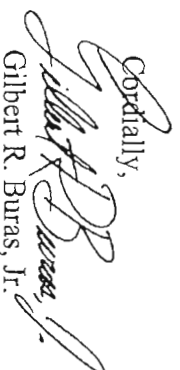
Dear John:

My instructions from my client are to continue to monitor this matter and to see if the Sheriff intends to or does move forward on the award of the project management contract.

News reports indicate that the City of New Orleans has hired its own project management consultant in order to move forward on its myriad projects. Surely, the Sheriff must be facing deadlines and pressures in undertaking his own construction projects.

My client has asked me to explore the possibility of coming to some rapprochement with the Sheriff regarding the matter. My client has made a significant investment of time and money in getting to this stage and certainly the Sheriff cannot gainsay their expertise, which may prove very useful to the project in some of its aspects, if not in all.

Please give me your thoughts on whether the Sheriff would be willing to meet and discuss the possibility of my client participating in the project management in some capacity.

Sincerely,  
  
Gilbert R. Buras, Jr.