

STATE OF LOUISIANA

OFFICE OF STATE INSPECTOR GENERAL



SABINE RIVER AUTHORITY

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STATE OF LOUISIANA
OFFICE OF
STATE INSPECTOR GENERAL



SABINE RIVER AUTHORITY

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State Inspector General

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KIK
1/11/05

Approved by:
Governor Kathleen Babineaux Blanco

August 17, 2005

File No. 1-05-0028



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KATHLEEN BABINEAUX BLANCO
GOVERNOR

November 3, 2005

Honorable Kathleen Babineaux Blanco
Governor of the State of Louisiana
P.O. Box 94004
Baton Rouge, LA 70804-9004

Re: Case No. 1-05-0028

Dear Governor Blanco:

This report addresses concerns raised about land leasing activities of the Sabine River Authority. The report includes three recommendations for the Authority that, if implemented, could help improve its operations. The report also includes a recommendation, for your consideration, regarding the Authority's enabling legislation.

We provided a draft of the report to the Authority's executive director and his response is included as Appendix A.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sharon B. Robinson".

Sharon B. Robinson, CPA
State Inspector General

SBR/GL

Enclosure

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Executive Summary

Audit Initiation

On June 7, 2005, the Office of State Inspector General received a complaint alleging the Sabine River Authority (SRA) did not give a Louisiana-based telecommunications company proper consideration when it awarded a lease of state land under its jurisdiction to a Mississippi-based company. On June 9, 2005, the Office of State Inspector General began an investigation of the allegation.

Our objective was to determine if the allegation was valid. In addition, we reviewed the RFP process used by SRA to determine if it complied with applicable laws, and to determine if the RFP process was the proper process to use for the leasing of state land.

Summary of Findings

SRA awarded an Option and Ground Lease Agreement to the Mississippi-based company for the construction of a telecommunications tower to increase cellular reception in the Toledo Bend area. SRA used a Request for Proposal (RFP) process for the bidding of the lease. SRA began the RFP process on February 7, 2005 and made an award to the successful contractor on March 28, 2005. The resulting agreement was executed on September 22, 2005.

During our review, we found that the Louisiana company received proper consideration. In addition, Louisiana law gives preference to a Louisiana company only if an out-of-state company's state preference law gives preference to in-state companies. Mississippi and Louisiana have reciprocating contract preference laws under the existing circumstances, negating any competitive advantage to a domestic company.

We also found that:

- SRA used the wrong process for the bidding of a state land lease.
- SRA did not obtain proper approvals from the Director of State Purchasing and the Commissioner of Administration prior to using the RFP process. However, state law requires these approvals.

Background

Act 261 of the 1950 Regular Legislative Session (LSA-R.S. 38:2321, et seq.) established SRA as a conservation and reclamation district. SRA is a state agency and instrumentality with the authority to conserve, store, control, preserve, utilize, and distribute land and waterways lying within the watershed of the Sabine River. The Sabine River's watershed includes territory in De Soto, Sabine, Vernon, Beauregard, Calcasieu, and Cameron parishes.

SRA is organizationally located under the Department of Transportation and Development, but is governed by a 13-member board of commissioners, who are all appointed by the Governor. SRA has the power to enter into contracts, conveyances, mortgages, deeds, trusts, bonds and leases necessary to carry out its purpose.

Scope and Methodology

The procedures performed during this investigation consisted of (1) interviewing pertinent SRA employees; (2) examining selected SRA records; (3) interviewing officials from other state agencies; and (4) reviewing applicable state laws and regulations.

The investigation was primarily limited to SRA activities from January 2005 through September 22, 2005. We selected January 2005 because correspondence we reviewed indicated that SRA began considering the lease of its land in this month.

Inappropriate Process Used

SRA used the wrong process for the bidding of a state land lease.

SRA used RFP guidelines as specified in the Louisiana Procurement Code, LSA-R.S. 39:1551 et seq. However, SRA's use of the Procurement Code is not applicable for this venture since the proposed lease of its property is a situation where SRA seeks to generate revenue. The Procurement Code is intended for use by state agencies for the buying, purchasing, renting, leasing, or the obtaining of supplies, services, or major repairs. In other words, the Procurement Code is used when state entities expend funds.

SRA should have used the bidding process detailed in the Public Lease Law, LSA-R.S. 41:1211 et seq., which specifically addresses bids related to the leasing of state lands. The Public Lease Law includes sections covering advertisement of bids, opening of bids, and the execution of leases.

SRA officials stated that the Office of State Purchasing and State Land Office officials advised them that the RFP process would be applicable for the leasing of state land. However, officials from both offices stated that they gave no such advice because the RFP process would not apply to leases of state property. SRA officials could not supply any specifics or any documentation regarding their conversations with officials from State Purchasing or the State Land Office.

By using the RFP process, SRA may not have received the highest bid possible for the state land lease. RFP guidelines require state agencies to evaluate other factors of a bid besides cost of the item/service being procured. For example, some factors to be considered include quality of the proposal, bidders understanding of the project, how soon the service/work can begin, and past performance of the bidder. State agencies must score the received bids based on the established criteria. The bidder with the highest score receives the bid.

In contrast, the Public Lease Law (LSA-R.S. 41:1215) would have required SRA to accept only the highest bid submitted by a person or persons who meet certain conditions.

Some potential bidders may have been discouraged from bidding on this lease since preparing a proposal for the multiple factors of an RFP would require more company time and resources than submitting a simple bid.

Also, SRA did not follow LSA-R.S. 39:11 and make the Commissioner of Administration an essential party to the lease transaction. LSA-R.S. 39:11 designates the commissioner as the supervisor of lands owned or leased by the State of Louisiana. It also provides that no property shall be acquired, transferred, leased, or encumbered without the Commissioner being a party to the transaction.

Recommendations:

1. For future leases of state land, SRA officials should use the provisions as set forth in the Public Lease Law, and ensure that the Commissioner of Administration is a party to all state land transactions.
2. SRA officials should seek proper legal counsel before bidding and entering into any future contracts.

Unapproved RFP

SRA did not obtain proper approvals from the Director of State Purchasing and the Commissioner of Administration prior to using the RFP process. However, state law requires these approvals.

LSA-R.S. 39:1593.C. provides that an agency may use an RFP process with the approval of the Commissioner and the written determination by the Director of State Purchasing that the best interests of the state would be served. In addition, State Purchasing's "Request for Proposal Manual" specifically states that each request for use of the RFP selection must be approved by the Director of State Purchasing. Through this approval process, State Purchasing evaluates whether the RFP process is applicable for the situation presented.

SRA used the RFP "boilerplate" format found in the State Purchasing guidance manual to prepare its RFP. This RFP specifically references LSA-R.S. 39:1593.C, although the agency did not comply with this provision. Also, SRA supporting documents for the RFP in question contained a State Purchasing "RFP Order of Events" document. Event number 2 in the document requires the agency to submit justification for using an RFP format versus an invitation to bid (ITB) format to the Director of State Purchasing for consideration and approval.

SRA officials stated that they did not get the RFP approved by State Purchasing because they believed SRA's enabling statutes exempted SRA from State Purchasing oversight. However, a State Purchasing official confirmed that any agency that uses the RFP process under the State Procurement Code must get the RFP approved by State Purchasing.

Had SRA sought State Purchasing approval for the RFP, it is likely it would have been advised the Procurement Code was not the proper process to use for the leasing of public land.

Recommendation:

3. SRA officials should always obtain the approvals of the Commissioner of Administration and Director of State Purchasing, as required by law, for any future RFP's when the SRA uses the Procurement Code.

Recommendation to the Governor

The SRA states in its response that it has sole authority to enter into any leases for use of its lands and does not have to comply with the Public Lease Law. This position is based on an interpretation of SRA's broad enabling legislation (LSA-R.S. 38:2321 et seq.) and a 1978 Louisiana Supreme Court case. Since the Office of State Inspector General interprets this statute differently than SRA does, we recommend that the Governor consider introducing legislation that would clarify legislative intent with respect to competitive bidding when leasing public land under SRA control.

APPENDIX A

Response



Sabine River Authority

October 18, 2005



KATHLEEN BABINEAUX BLANCO
GOVERNOR

Ms. Sharon B. Robinson
CPA, State Inspector General
State of Louisiana
Division of Administration
Office of State Inspector General
P. O. Box 94095
Baton Rouge, LA 70804-9095

RE: Case No. 1-05-0026, Sabine River Authority
Lease of Owned Lands

Dear Ms. Robinson:

We wish to respond to your "draft audit report" forwarded to us under your letter of September 30, 2005. We feel that it is always informative to provide the history of the Sabine River Authority ("SRA") when responding to these audits.

Your audit was initiated by a complaint that SRA did not give a vendor proper consideration when it responded to a solicitation. We are very cognizant of maintaining a level playing field among vendors when selecting a contractor, and we are not surprised that you found that the Louisiana company did receive proper consideration by the SRA in this instance.

I. Issue Under Consideration by the State Inspector General

A land lease to a Mississippi-based company for the construction of a cell phone tower to increase cellular reception in the Toledo Bend area on lands owned by SRA pursuant to a request for proposal (RFP) process.

II. Plenary Powers of the SRA to Lease its Real Property

SRA was established by Act 261 of the 1950 Louisiana Legislature, and its statutory authority is set forth in Chapter 11 of Title 38 of the Louisiana Revised Statutes, consisting of R.S. 38:2321 through 2337.¹ Section 2337 states with respect to Chapter 11 that Chapter 11 is a "full, complete and independent authority for the performance of all acts" authorized by said Chapter

¹ In 1960, an amendment to the Louisiana Constitution of 1921 (adding Article XIV, Section 45) was adopted, which amendment ratified and confirmed the SRA. These provisions are now also statutory by virtue of Article XIV, Section 16(A) of the Louisiana Constitution of 1974. Pursuant to LSA-R.S. 36:509(0), SRA was placed within the Department of Transportation and Development. Although the SRA was transferred within the executive branch to the DOTD it can continue to perform and administer its functions and exercise the powers as provided by the Constitution and by law and implement its programs authorized by any provisions of law independently of the Secretary of the DOTD. R.S. 36:801.1.

11 and that “no other statute or legislative act shall be construed to be applicable to the carrying out of the powers herein granted unless herein expressly so made applicable.”

Section 2325(2) grants the SRA the power:

“To acquire by purchase, gift, devise, lease, expropriation or other mode of acquisition, to hold, pledge, encumber, lease and dispose of real and personal property of every kind within its territorial jurisdiction, whether or not subject to mortgage or any other lien.” LSA R.S. 38:2325(2)

Under such power SRA is authorized to enter into leases without compliance with any other law, having full control over the disposition of its property pursuant to its statutory powers.

Our opinion is based on our literal reading of Chapter 11 and, particularly Section 2337, and a Louisiana Supreme Court case addressing a similar situation that we believe provides support for our reading of the statutes.

In Arnold v. Board of Levee Commissioners of the Orleans Levee District, 366 So.2d 1321 (La. 1978), the court held that the public lease law did not apply to leases granted by the Orleans Levee Board. The court observed that the law special to the Orleans Levee Board granted the Board the power to sell and lease lands under such terms and conditions and by such methods as the Board deemed proper. The court held that such provision operates as an exemption from the public lease law, and in reaching its conclusion, the court cited several Louisiana Court of Appeal decisions which also support our opinion.

The Arnold case reaffirms the legal principle that a public entity may be exempt from the operation of general regulatory laws when that entity is granted broad and sweeping discretion and authority within its special statutes. The express and special statutory language contained in La. R.S. 38:2325, 2327 grants SRA the plenary power to dispose of its property within its territorial jurisdiction.

In addition, Attorney General Opinion No. 97-287, addressing contracts by public bid, supports our conclusion that SRA has the plenary power to enter into contracts, referring to R.S. 38:2325(3), (4), and (9), concluding:

“As if those powers were not sweeping enough, R.S. 38:2337 provides:

This Chapter shall be full, complete and independent authority for the performance of all acts herein authorized, and no other statute or legislative act shall be construed to be applicable to the carrying out of the powers herein granted unless herein expressly so made applicable. . . . This Chapter being intended to carry out a function of the state to protect the health and welfare of the

inhabitants of the portion of the stated to be affected hereby, shall be liberally construed (sic) by the courts to effect its purposes. Rarely in our law do we find such a sweeping grant of independent authority to an agency of the state." (AG Opinion No. 97-287).

III. Utilization of an RFP Process for the Lease of SRA Lands

- A. State Inspector General Finding: "SRA used the wrong process for the bidding of a state land lease."

Response: We concur that it was inappropriate to utilize the Louisiana Procurement Code, LSA-R.S. 39:1551 et seq. The Louisiana Procurement Code is applicable to the contracts whereby the agency expends public funds. The cell tower contract is a revenue generating contract, whereby the contractor pays SRA for the right to erect and operate the tower. The Louisiana Procurement Code has no applicability to this situation.

Corrective Action Plan: SRA will consult with its legal counsel before utilizing the RFP process under the Louisiana Procurement Code, LSA-R.S. 39:1551, et seq.

- B. State Inspector General Finding: "SRA should have used the bidding process detailed in the Public Lease Law, LSA-R.S. 41:1211 et seq., which specifically addresses bids related to the leasing of State lands.

Response: We do not concur. As set forth in Section II above, SRA has the plenary power to dispose of its property within its territorial jurisdiction which power operates as an exemption from the Public Lease Law.

Corrective Action Plan. We do not deem that a correction action plan is necessary. However, we shall consult with our legal counsel before entering into any future contracts.

- C. State Inspector General Finding: "SRA did not follow LSA-R.S. 39:11 and make the Commissioner of Administration an essential party to the lease transaction."

Response: SRA is of the opinion that its plenary powers affords it the right to administer its lands within its territorial jurisdiction.

Corrective Action Plan: We do not deem that a correction action plan is necessary; however, we shall consult with our legal counsel before entering into any future contracts.

IV. **Approval of the RFP.**

- A. State Inspector General Finding: "SRA did not obtain proper approvals from the Director of State Purchasing and the Commissioner of Administration prior to using the RFP process. However, state law requires these approvals."

Response: The Louisiana Procurement Code was not applicable to the cell tower project, and therefore, in the instant matter, it was not necessary to obtain the approvals cited under LSA-R.S. 39:1593C(1). Although SRA is placed within the Department of Transportation and Development, it continues to exercise procurement functions on its own. A history can assist in following to this conclusion:

1. **History of the Sabine River Authority**

(a) **1977 to 1990**

Under **Article XIV, Section 16(A)(10), of the 1974 Constitution**, the provisions of the 1921 Constitution applicable to the Authority were made statutory, and the Authority was placed within the **Department of Transportation and Development** by Acts 1977, No. 83, Section 1, effective June 22, 1977 [(R.S. 36:509B(1))], where it remained until its transfer to the **Department of Culture, Recreation and Tourism** by Acts 1987, No. 205, Section 1 (R.S. 36:509J).

2. **1990 – date**

(a) **R.S. 36:509.0 (Acts 1990)**

The Authority was placed within the **Department of Transportation and Development** [Acts 1990, No. 272, Section 1, effective September 1, 1990 (R.S. 36:509.O)].

However, this transfer provided that the Authority "shall perform and exercise its powers" in the manner provided in R.S. 36:801.1.

(b) **R.S. 36:801.1**

R.S. 38:801.1.E specifically provides that the agencies transferred to DOTD (which include SRA) would exercise their powers provided by the Constitution and laws of this State independently of the Secretary of the Department of Transportation and Development.

E. The agencies transferred as provided in this Section (which include the Authority) shall exercise the powers, duties, functions and responsibilities as provided by the Constitution and by law and shall administer and implement the

programs authorized in this Section or any other provision of law independently of the Secretary, the Undersecretary and any Assistant Secretary.

Attorney General Opinion No. 97-287 issued October 28, 1997, interprets R.S. 36:801.1, to read that SRA can exercise its powers independently of the Secretary of DOTD:

Act 272 of 1990 transferred the Sabine River Authority (SRA) to the Department of Transportation and Development (DOTD) with the mandate that SRA:

... perform and exercise its powers, duties, functions, and responsibilities in the manner provided for agencies transferred in accordance with the provisions of R.S. 36:801.1.

R.S. 36:801.1B. also provides that SRA:

... shall continue to exercise all powers, duties, functions, and responsibilities provided or authorized ... by the constitution or laws which are in the nature of policy making, rulemaking, licensing, regulation, enforcement, or adjudication and also shall continue to exercise all advisory powers, duties, and functions provided by law, and ... shall continue to administer and implement all programs provided or authorized ... by law ...

(c) R.S. 36:801.1D

R.S. 36:801.D (Acts 1998) was amended in the 1998 First Extraordinary Session by Act No. 144, Section 1, effective July 1, 1998, to incorporate reference to R.S. 36:511. R.S. 36:801.1D provides that, except as provided in R.S. 36:511, each agency shall continue to perform and administer its functions which are in the nature of ... **procurement** and contract management.

(d) R.S. 36:511 (Acts 1998) provides that the SRA shall be subject to the provisions of the Public Contract Law referenced as Part II for Chapter 10 of Title 38, being R.S. 38:2211 through 2226 as these provisions are applicable to the department. (Part II of Chapter 10 of Title 38 is the Section of the public contracts law dealing with the letting of contracts, R.S. 38:2211 through 2226. The "department" is the Department of Transportation and Development.)

(e) Corrective Action Plan: SRA does not deem that a corrective action plan is necessary; however, SRA shall consult with its legal counsel.

V. Conclusion

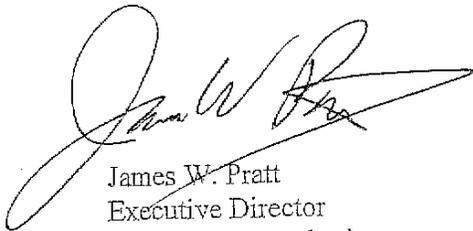
R.S. 38:2325(2) grants SRA the power to lease its lands. SRA opted to do so through the RFP process, in order to afford prospective proposers the opportunity to be considered. There is

Ms. Sharon B. Robinson
October 18, 2005
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no requirement within the SRA statutes or its bylaws that SRA use such a process. However, SRA finds that it is in its best interest to open a bidding process to as many vendors as possible and at the same time obtain responsive and responsible vendors.

Very truly yours

SABINE RIVER AUTHORITY

A handwritten signature in black ink, appearing to read 'James W. Pratt', with a long, sweeping horizontal stroke extending to the right.

James W. Pratt
Executive Director
Sabine River Authority