

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1350

THE LEMOINE COMPANY, L.L.C.

VERSUS

MILITARY DEPARTMENT, STATE OF LOUISIANA

Judgment Rendered: MAY - 2 2012

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 547,625

Honorable Wilson Fields, Judge Presiding

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

*Pettigrew, J. concurs and assigns reasons
Welch, J. concurs*

McCLENDON, J.

This litigation involves a dispute over the award of a construction contract for a state military project following Hurricane Katrina. The plaintiff appeals a judgment dismissing all of its claims with prejudice. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On August 29, 2005, Hurricane Katrina made landfall causing immense flooding and property damage in Louisiana. Hard hit were several Louisiana Army National Guard (LAARNG) facilities throughout south Louisiana. When it was determined that the facilities should be repaired or replaced, the National Guard Bureau generated requests for funding. As a result, the U.S. Congress passed legislation that authorized funding of approximately \$500,000,000 for the reconstruction of LAARNG facilities. A major stipulation, however, was that the funds had to be obligated in the year of the appropriation, or by September 30, 2006 (the end of fiscal year 2006). In response to the need to quickly and efficiently obligate these funds and award contracts, the Louisiana legislature enacted LSA-R.S. 29:42, the design-build statute.¹ While in effect, this statute allowed architects and contractors to make proposals as one entity for construction projects undertaken by the Louisiana Military Department (LMD) in areas affected by Hurricanes Katrina or Rita.

The last of the fifteen projects undertaken by the LMD using the appropriated funds was the Army Aviation Support Facility, Hammond project (AASF), for the estimated cost of \$62,000,000. In accordance with LSA-R.S. 29:42, this new construction project was advanced to the 35% completion level. Thereafter, pursuant to the statute, a Notice of Intent (NOI) to select a design-builder and to request letters of interest and statements of qualifications was distributed. The Lemoine Company, LLC (Lemoine), the plaintiff herein, submitted a letter of interest for the AASF project and was selected, along with

¹ LSA-R.S. 29:42 was added by Acts 2006, 1st Ex. Sess., No. 38, § 1, eff. Feb. 23, 2006. The statute was amended by Acts 2008, No. 317, § 1, to change its termination date from June 30, 2008, to June 30, 2010.

Broadmoor, LLC (Broadmoor) and Walbridge Aldinger Company (Walbridge), as the short-listed entities. The short-listed entities were then provided a Request for Proposal (RFP) and invited to submit their detailed technical and cost proposals for the design-build project, pursuant to LSA-R.S. 29:42. Thereafter, as required by the statute, a technical review committee (TRC) was formed to review the design-build proposals and submit a technical score to be used in computing the adjusted score. The statute provided that the proposal with the lowest adjusted score, as established by a specific formula, determined the winning proposal. Broadmoor was ultimately selected and awarded the contract.

On September 21, 2006, Lemoine filed a petition for injunctive relief and declaratory judgment, naming the LMD as defendant, and seeking to prevent the award of the construction contract to anyone other than Lemoine. On September 25, 2006, after discovering that the contract with Broadmoor had already been executed, Lemoine filed amended pleadings seeking damages, in the alternative, including lost profits, costs, expenses, and attorney fees. In an October 12, 2006 order, the trial court concluded that Lemoine's prayer for injunctive relief was moot, but allowed it to proceed by ordinary proceedings on its alternate claim for damages.

Trial on the merits was held on February 23, 2011, and the court took the matter under advisement. In oral reasons on March 28, 2011, the trial court ruled in favor of the LMD and adopted the LMD's argument in its post-trial brief as reasons. Judgment in accordance with the trial court's ruling, dismissing Lemoine's claims with prejudice, was signed on April 19, 2011. Lemoine appealed, contending that the trial court erred in determining that an "acceptable" design was not a mandatory requirement of the bid proposal and in ruling that the LMD properly awarded the contract to Broadmoor.

DISCUSSION

Louisiana Revised Statutes 29:42A provided:

Notwithstanding any law to the contrary, the adjutant general and the Military Department, with the approval of the commissioner of administration, may utilize the design-build

method on any infrastructure construction project in an area where a gubernatorial declared state of emergency exists due to Hurricane Katrina or Rita declared pursuant to the provisions of R.S. 29:721 et seq., including those areas where infrastructure is adversely impacted by permanent personnel or unit relocation.

In its initial argument, Lemoine, although recognizing that the design-build statute was enacted in response to Hurricane Katrina, nevertheless contends that the statute was subject to the public bid law. Lemoine also maintains that Broadmoor did not comply with the contract plans and specifications as required by the design-build statute. Particularly, Lemoine contends that because the TRC concluded that Broadmoor's roof design was unacceptable, Broadmoor's entire proposal should have been rejected.

The Applicability of the Public Bid Law

Louisiana's Public Bid Law, as set forth in LSA-R.S. 38:2211, *et seq.*, is a prohibitory law founded on public policy. **Hamp's Const., L.L.C. v. City of New Orleans**, 05-0489, p. 4 (La. 2/22/06), 924 So.2d 104, 107. The public bid law was enacted in the interest of the taxpaying citizens, and its purpose is to protect citizens against contracts of public officials entered into because of favoritism and involving exorbitant and extortionate prices. **Id.** A political entity has no authority to take any action that is inconsistent with the public bid law. **Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Authority**, 04-0211, p. 6 (La. 3/18/04), 867 So.2d 651, 656. In that regard, LSA-R.S. 38:2212A(1)(b)(i) provides that "[t]he provisions and requirement[s] of this Section, those stated in the advertisement for bids, and those required on the bid form shall not be waived by any entity." **Gibson & Associates, Inc. v. State, Dept. of Transp. & Development**, 10-1696, pp. 11-12 (La.App. 1 Cir. 5/18/11), 68 So.3d 1128, 1135.

In support of its argument that the public bid law is applicable herein, Lemoine points to Section I of LSA-R.S. 29:42, which provided, in relevant part:

Upon request by the adjutant general, the commissioner of administration is authorized to waive or suspend the provisions of R.S. 38:2181 et seq., R.S. 39:1481 et seq., and R.S. 39:1551 et seq. When procurements are made which would otherwise be subject to the provisions of R.S. 38:2181 et seq., R.S. 39:1481 et

seq., or R.S. 39:1551 et seq., procedures and requirements set forth in R.S. 38:2212(D)(2) shall be complied with.²

Lemoine contends that this language incorporates the requirements of the public bid law. Lemoine argues that, in accordance with the LSA-R.S. 38:2212A(1)(a) of the public bid law, it was "the lowest responsible bidder who had bid according to the contract, plans, and specifications as advertised." Lemoine further argues that because LSA-R.S. 38:2212A(1)(b)(i) prohibits the waiver of any provisions or requirements of the public bid law, the LMD could not have waived the barrel roof design requirement and cites several cases governed by the public bid law in support thereof. The LMD contends, however, that the public bid law is inapplicable and Lemoine's argument that the public bid law should be bootstrapped into the design-build statute is inconsistent with the fact that Lemoine willingly and without objection entered into the design-build process with the LMD.

Thus, the first issue to be determined in this case involves the interpretation of LSA-R.S. 29:42 and whether it incorporated the requirements of the public bid law. Accordingly, it is a question of law and is reviewed by this court under a *de novo* standard of review. **Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, Inc.**, 06-0582, p. 9 (La. 11/29/06), 943 So.2d 1037, 1045.

In **Durio v. Horace Mann Ins. Co.**, 11-0084, p. 15 (La. 10/25/11), 74 So.3d 1159, 1168-69, the supreme court quoted from **Sultana Corp. v. Jewelers Mutual Ins. Co.**, 03-0360 (La. 12/3/03), 860 So.2d 1112, for a detailed summary of guidelines for statutory interpretation:

The function of statutory interpretation and the construction given to legislative acts rests with the judicial branch of the government. Principles of judicial interpretation of statutes are designed to ascertain and enforce the intent of the Legislature in enacting the statute. The fundamental question in all cases of statutory construction is legislative intent and the reasons that

² Louisiana Revised Statutes 38:2212D(2) essentially provides that in cases of public emergency where the requirements of LSA-R.S. 38:2212 are not applicable, and when contract action is taken pursuant to telephone or other oral offers, written confirmation is required and a record shall be established, which shall be retained for six years following the purchase or completion of the public work.

prompted the Legislature to enact the law. When a law is clear and unambiguous and its application does not lead to absurd consequences, it shall be applied as written, with no further inquiry made in search of the legislative intent. The meaning and intent of a law is determined by considering the law in its entirety and all other laws concerning the same subject matter and construing the provision in a manner that is consistent with the express terms of the statute and with the obvious intent of the lawmaker in enacting it. The statute must therefore be applied and interpreted in a manner that is logical and consistent with the presumed fair purpose and intention the Legislature had in enacting it. Courts should give effect to all parts of a statute and should not adopt a statutory construction that makes any part superfluous or meaningless, if that result can be avoided. Furthermore, the object of the court in construing a statute is to ascertain the legislative intent and, where a literal interpretation would produce absurd consequences, the letter must give way to the spirit of the law and the statute construed so as to produce a reasonable result. The starting point in the interpretation of any statute is the language of the statute itself. (Citations omitted.)

Sultana Corp., 03-0360 at pp. 15-16, 860 So.2d at 1115-16.

Hurricanes Katrina and Rita were catastrophic events, resulting in the enactment of short-term legislation to address particular issues created by these disasters. One such statute was LSA-R.S. 29:42, enacted to allow the LMD to quickly address its infrastructure needs and use the design-build process as an alternate contract delivery process to expedite bidding and construction. Unlike the public bid law, the design-build statute was written in permissive and not prohibitory language. The statute provided for flexibility in designing and building a project that the public bid law does not. Plans and specifications were developed to the 35% level to allow a design-builder the freedom to propose design changes that would benefit the project from both design and cost perspectives. It was a separate and complete process.³

³ Louisiana Revised Statutes 29:42 provided in its entirety:

A. Notwithstanding any law to the contrary, the adjutant general and the Military Department, with the approval of the commissioner of administration, may utilize the design-build method on any infrastructure construction project in an area where a gubernatorial declared state of emergency exists due to Hurricane Katrina or Rita declared pursuant to the provisions of R.S. 29:721 et seq., including those areas where infrastructure is adversely impacted by permanent personnel or unit relocation.

B. Every design-builder shall be duly licensed and registered to do business in the state of Louisiana, if required by law, as either an architect, an engineer, or a general contractor. Each design-builder shall have the following rights and powers:

(1) The design-builder may sublet responsibility for professional design services to an individual, firm, or corporation duly licensed and registered in the state of Louisiana to provide professional design services.

(2) The design-builder may sublet responsibility for construction or other services requiring a contractor's or trade subcontractor's license to persons or entities duly registered, licensed, or otherwise qualified to provide those services as required by law.

(3) The design-builder may contract with the Military Department, state of Louisiana, as part of a design-build contract to provide professional services or construction services that the design-builder is not itself licensed, registered, or otherwise qualified in accordance with this Section.

C. (1) A notice of intent to select a design-builder for design-build services and to request letters of interest and statements of qualifications from qualified firms or teams shall be distributed by the department through advertisement in the Daily Journal of Commerce, the Baton Rouge Advocate, the New Orleans Times Picayune, the Shreveport Times, the Monroe News Star, the Lake Charles American Press, the St Bernard Voice, any additional newspaper in the state of Louisiana with a circulation of more than fifty thousand, by appearance on the Military Department's Internet home page, and by other means to ensure adequate response, including newspapers, trade journals, and other forms of media which may be appropriate for specialty services. All notices of intent shall be advertised a minimum of thirty days prior to the deadline for receipt of responses and shall contain a brief description of the project, the required scope of services, and sufficient information for design-build entities to determine their interest and to enable them to submit a letter of interest and statement of qualifications. The department may readvertise the notice of intent using additional media or publications in an attempt to solicit additional responses if the number of responses received by the department is inadequate.

(2)(a) The department may use a private design professional to develop the description of the project and the required scope of services; however, if the department uses a private design professional, the private design professional shall be selected in accordance with the rules and regulations of the Office of Contractual Review and R.S. 39:1481 et seq.

(b) The description of the project and the required scope of services shall include design criteria, analyses, reports, and cost estimates for the design-build project as prepared by a private design professional or the department.

(c) The design-build entity shall include a registered design professional who shall be independent from the department's private design professional and shall be named in the design-build entity's proposal.

D. The department shall identify all required information in the notice of intent and in the standard response forms provided by the department. The notice of intent shall include statements of qualification by credentials and experience of design component members for the areas of expertise specific to the project and statements of qualification by experience and resources of the construction team component. The completed response form and any other required information shall be transmitted to the department by the responding entity prior to the deadline to submit such forms and information as provided in the notice of intent. Any response failing to meet all of the requirements contained in the notice of intent shall not be considered by the department. False or misrepresented information furnished in response to a notice of intent shall be grounds for rejection by the department.

E. (1) A primary design-build evaluation committee shall evaluate the responses to the notice of intent received by the department. The following general criteria used by the primary evaluation committee in evaluating responses to the notice of intent for design-build services shall apply to both the design and construction components of any responding entity:

(a) Experience of both the design and construction entity components and of key personnel as related to the project under construction.

(b) Past performance of department projects.

(c) Any project-specific criteria as may apply to project needs.

(2) The primary evaluation committee shall evaluate the letters of interest from responding entities on the basis of the criteria set forth in this Subsection and shall select a short list of not fewer than three and no more than five of the highest rated entities. However, if fewer than three letters of interest from responding entities are received by the Military Department, the division of administration shall have discretion to approve proceeding with the design-build process. The primary evaluation committee may, at its discretion, be assisted by other department personnel in its evaluation of an entity's qualifications. The primary design-build evaluation committee shall present its short list to the construction facilities management officer for recommendation to the adjutant general. The short-listed entities shall be invited by the adjutant general to submit a detailed technical and cost proposal for the design-build project. The invitation from the adjutant general to the short-listed entities shall specify a deadline for submission of such proposals.

F. (1) Depending upon the complexity of the project and the degree of flexibility in the approach to design and construction methods, the specific requirements of the technical proposal shall be identified by the department to the entities making the short list by means of a "scope of services package". Generally, the technical proposal shall include discussions of design strategy and preliminary design concepts, construction sequencing, techniques, materials, and methods, the schedule for commencement and completion of all phases of work, and a lump sum cost for all services in fulfillment of the requirements and within the constraints of the "scope of services package".

(2) For more complex projects and projects with scopes which permit flexibility and innovation in the design and construction approach, the department shall compensate all short-listed entities for the expense of preparing the technical proposal. The amount of compensation paid for the technical proposal shall be predetermined by the department and shall be revealed to the entity at the time the entity is notified of its selection to the short list. The department may use concepts submitted by any paid short-listed entity to design and construct the project.

G. The construction and facilities management officer (CFMO), with the concurrence of the adjutant general, shall establish a technical review committee for evaluation of design-build proposals. The technical review committee shall include representatives from the construction, building design, and planning sections of the department. The CFMO, with the concurrence of the adjutant general, shall assign a project manager, who shall become chairman of the technical review committee for the project. The technical review committee, including the project manager, shall identify specific technical elements of the project, depending upon the characteristics of the project, to be included in the technical score. Additionally, the CFMO, with the concurrence of the adjutant general, may select additional department engineering and technical experts, and nationally recognized design-build experts to serve as committee members to score each technical element of the project. Members of the technical review committee shall not have served as members of the primary evaluation committee. Each member of the technical review committee shall make his scoring of assigned elements available for public review. Such scores shall be considered public record.

H. (1) An adjusted score approach shall be used by the department in determining the winning proposal. An adjusted score shall be determined using the following three components:

(a)(i) The technical score determined by the technical review committee. Weighing factors may be assigned to each element depending on its relative magnitude or significance to the overall project. Each technical review committee member shall rate his assigned element of the proposal from each of the entities on the short list and shall submit such scores to the chairman of the technical review committee. The schedule and price bid shall not be made known to the technical review committee during the scoring process. The chairman of the technical review committee shall adjust the scores for any applicable weighing factors and shall determine the total technical score for each proposal.

Our supreme court has previously recognized the legislative power to deviate from the public bid law in certain instances. In **Louisiana Associated General Contractors, Inc. v. Louisiana Dept. of Agriculture and Forestry**, 05-0131 (La. 2/22/06), 924 So.2d 90, the court considered whether LSA-R.S. 3:266, *et seq.*, allows the Louisiana Agricultural Finance Authority (Lafa) to pursue construction projects outside the public bid law. The supreme court held Lafa exempt from the requirements of the public bid law and stated:

The legislature, which adopted the public bidding statutes, indisputably has the power to create exceptions to or exemptions

(ii) Prior to determining the adjusted score, the chairman of the technical review committee shall notify each design-build proposer, in writing, of each proposer's final technical score. A proposer may request, in writing, no later than ten business days from the date of the chairman's notice, a review of its final technical score by the CFMO or his designated representative. If any proposer requests a review of its total technical score, the CFMO shall hold a hearing to review such within a reasonable time after the request has been received by the CFMO. The CFMO shall give the requesting proposer reasonable notice of the time and place of such hearing. The requesting proposer may appear at the hearing and present facts and arguments in support of the request for review of its final total technical score.

(iii) The CFMO shall present his findings from the hearing to the adjutant general. The adjutant general shall determine what action shall be taken regarding the proposer's request to review its final technical score. Except as provided for in R.S. 48:250.2(D), the adjutant general's decision shall be final and not subject to appeal by any legal process.

(b) The time value, consisting of the product of the proposed contract time expressed in calendar days multiplied by the value-per-calendar-day expressed in dollars established by the department and included in the "scope of services package".

(c) The price proposal.

(2) The winning proposal shall be the proposal with the lowest adjusted score. The adjusted score for each entity's design-build proposal shall be determined by the following formula: adjusted score = (price bid time value) divided by the technical score. If the time value is not used, the adjusted score shall be determined by the following formula: adjusted score = price bid divided by technical score.

I. Upon request by the adjutant general, the commissioner of administration is authorized to waive or suspend the provisions of R.S. 38:2181 et seq., R.S. 39:1481 et seq., and R.S. 39:1551 et seq. When procurements are made which would otherwise be subject to the provisions of R.S. 38:2181 et seq., R.S. 39:1481 et seq., or R.S. 39:1551 et seq., procedures and requirements set forth in R.S. 38:2212(D)(2) shall be complied with. Additionally, the Military Department shall at a minimum:

(1) Establish a centralized point of contact that monitors all transactions conducted without strict statutory compliance and maintains copies of all documentation.

(2) Solicit competitive quotes and/or offers from at least three potential offerers, whenever possible, and take the necessary steps to assess that fair and equitable pricing is being offered.

(3) Only issue payments of contractors, suppliers, or vendors after verification that all goods, services, and repairs meet contract requirements.

from those statutes. As this Court has stated, "in the exercise of legislative power, the legislature may enact any legislation that the state constitution does not prohibit." **Unwired Telecom Corp. v. Parish of Calcasieu**, 03-0732 (La. 1/19/05), 903 So.2d 392, 403. The Louisiana Revised Statutes are replete with statutes that appear to allow a multitude of public bodies to take various actions without public bidding or utilizing public bidding processes that differ from that set forth in La. R.S. 38:2211 *et seq.* by allowing public bodies to carry out certain public works with their own workers, or waiving advertising requirements, or that otherwise appear to provide an exemption from public bidding laws generally or the Public Bid Law specifically under certain circumstances. The Public Bid Law itself contains numerous exemptions. (Footnotes omitted.)

Louisiana Associated General Contractors, Inc., 05-0131 at pp. 14-15, 924 So.2d at 100.

In this matter, incorporating into LSA-R.S. 29:42 all the requirements of the public bid law would have rendered the design-build statute superfluous and would have negated any reason for enacting the statute. Clearly, that was not the intent of the legislature.⁴ Furthermore, even were we to adopt Lemoine's argument that Section I of LSA-R.S. 29:42 incorporated all the requirements of the public bid law into the design-build statute, the LMD had the authority under the clear language of the statute to opt out the public bid law and did so by utilizing the procedure authorized in the design-build statute. Specifically, Section A of LSA-R.S. 29:42 provided that, notwithstanding any law to the contrary, the adjutant general and the LMD, with the approval of the commissioner of administration, were authorized to use the design-build method under the emergency circumstances created by Hurricanes Katrina and Rita.⁵ While we recognize the important public policy of transparency in government that underlies the public bid law, because the design-build statute must be

⁴ Jerry Jones, Director of the Office of Facility Planning and Control in the Division of Administration, also testified by deposition that it was his opinion that the design-build statute was an exception to public bid laws. He stated that he testified before a legislative committee in support of the statute and, in his opinion, "the design build bill ... was an exception to the Public Work's Act. I mean, it's outside low bid altogether." He further testified, "We're doing away with low bid because we're going to design build. And I think ... that the authorization for design build waived the Public Works provisions of low bid."

⁵ The record reflects that in September 2007, the adjutant general, as a procedural formality, requested the commissioner of administration to ratify all of the LMD's projects undertaken as a result of Hurricanes Katrina and Rita pursuant to LSA-R.S. 29:42. The commissioner of administration, by letter dated December 4, 2007, approved the LMD's use of the design-build concept in accordance with the statute and retroactively waived the public bid law provisions.

applied and interpreted in a manner that is logical and consistent with the presumed fair purpose and intention the legislature had in enacting it under our general rules of statutory construction, we can only conclude that the legislature chose to exempt the design-build process from the public bid law. Accordingly, Lemoine's argument is without merit.

Compliance with the design-build statute

Lemoine also argues that because the TRC found Broadmoor's design proposal "unacceptable," the entire bid proposal should have been rejected. Particularly, Lemoine asserts that the 35% Design Submittal included a barrel roof. Lemoine requested clarification regarding the barrel roof design, and in response the LMD issued Addenda #14.⁶ Lemoine contends that the LMD's use of the term "must" in Addenda #14 made an "acceptable" roof design a mandatory requirement of the RFP, and consistent with the mandate, Lemoine's proposal included the barrel roof design. Therefore, according to Lemoine, when Broadmoor submitted a proposal that included a gable roof, as opposed to the barrel roof specified in the 35% Design Submittal, and received a score of 52 by the TRC, a score defined as "unacceptable" on the grading scale, the entire proposal should have been rejected as nonresponsive.

The LMD contends, however, that although the design portion of Broadmoor's proposal was considered "unacceptable," Broadmoor's proposal gave the LMD the best value and had the lowest adjusted score. The LMD

⁶ Addenda #14 included the following questions and answers:

Question Number 1: Is the "Barrel Roof" design of the AASF hangars part of the site Master Plan that the National Guard requested from 35% architects? If significant enhancements could be realized by changing this design, would these enhancements be acceptable?

Answer: The [Design-Builder] is allowed liberties with the roof system. However, the general look and feel must be acceptable to the owner. Therefore the façade must be aesthetically acceptable to the owner.

Question Number 2: If enhancements are made to the building design, by what factors would these enhancements be judged "acceptable" or "not acceptable"? Could an enhancement made by the [Design-Builder] Team be found unacceptable based on aesthetics alone?

Answer: The [Design-Builder] is allowed liberties with the roof system. However, the general look and feel must be acceptable to the owner. Therefore, the façade must be aesthetically acceptable to the owner.

maintains that it followed the requirements of the design-build statute and properly awarded the project to Broadmoor. Further, the LMD contends that Lemoine failed to meet its burden, offering no evidence that the LMD deviated from the requirements of the statute.

Vincent Van Champagne and Colonel Douglas Mouton testified at trial. Mr. Champagne testified that in 2006, he was the vice-president of pre-construction services and the chief estimator for Lemoine. He recognized that the design-build process is an integrated delivery process where the owner contracts with a single entity for both design and construction. Mr. Champagne agreed that this typically was a quicker delivery method than that required under the public bid laws. Mr. Champagne continued that, under the design-build method, with a single point of contact, there is usually better cost management and schedule management.

With regard to the AASF project, Mr. Champagne recognized that the LMD was looking for the best value. He also understood that the design guide must be followed although Lemoine was not precluded from changing the design to a better solution that added value. However, he stated that meeting minutes and answers were included in the RFP, and the addenda, which were answers to requests for information by contractors, were incorporated into the contract documents. Therefore, Lemoine submitted questions to the LMD to confirm and be clear regarding the requirement of a barrel roof design. In response to Lemoine's questions, the LMD issued Addenda #14. Mr. Champagne testified that he thought the answers meant Lemoine had no latitude in changing the barrel roof design. It was part of the 35% Design Submittal and the intent, although more costly. Mr. Champagne stated that, accordingly, Lemoine stayed with the barrel roof design and in line with what was required in the RFP.

As to Broadmoor's bid, Mr. Champagne testified that Broadmoor submitted a design with a gable roof for both hangars, which is a much less costly type of roof. Broadmoor received a score of 52 on the design program and architectural intent part of the design. The grading scale stated that

anything less than 54 was unacceptable. Mr. Champagne testified that Lemoine received no unacceptable scores. He also stated that that TRC's report showed that Lemoine's design proposal was by far the most sound and complete proposal reviewed by the TRC, whereas, Broadmoor's design disregarded the architectural intent of the 35% Design Submittal and, although functional, was not the best value.⁷

On cross examination, Mr. Champagne admitted that Addenda #14 did not say that that a bidder would be disqualified if its design score was unacceptable, nor did it say that a barrel roof was required. He emphasized however that the addenda stated that it had to be acceptable. Mr. Champagne testified that although the technical review score was merged with the cost proposal, he still believed that the technical score had to be acceptable. Thus, it was Mr. Champagne's opinion that Lemoine could be creative, but had to provide what was requested, which was a barrel roof.

Initially called on cross-examination, Col. Mouton, the Construction Facilities Maintenance Officer for the State of Louisiana, testified that he was involved with the drafting of LSA-R.S. 29:42. He stated that the intent of the process was to restore to readiness the National Guard facilities and to protect the public. He admitted that there was some subjectivity with the design-build process.

Col. Mouton further testified that the role of the TRC was one part of a multi-part process. He stated that "best value" was a formulaic solution pursuant to the design-build statute between a technical score and the price. He testified that under the statute it could also include a time value, but because the LMD was more interested in getting the work under contract faster, it did not want to pressure the selection with the time component. Therefore, according to Col. Mouton, the charge of the TRC was solely to look at one-half of the best value equation, which was the design. He testified that the design element was

⁷ Mr. Champagne also testified that a barrel roof was actually constructed by Broadmoor, and although it was not the same as the one in the design plan, it is a barrel roof.

valued at 200 points out of 3700 overall points. Col. Mouton admitted that Major Brocato came to him concerned because Broadmoor changed its design to a gable roof, which deviated from the intent established in the 35% Design Submittal. Major Brocato indicated to him that he was unsure if Broadmoor should move forward because it ignored the requested design. Col. Mouton stated that their charge was to protect the public interest and restore readiness in Louisiana. Therefore, although he had aesthetic concerns about the roof design chosen by Broadmoor, the design met the functional requirements as set forth in National Guard regulations.

Additionally, Col. Mouton testified that Lemoine's proposal, while brilliant and adhering to the design intent, only delivered the hangar itself. Because of the price, Lemoine was unable to provide any of the Alternate Bid Items (ABIs). Col. Mouton stated that this project was the last to be awarded, and with money and time constraints, the ABI's were added. Broadmoor's proposal allowed for the addition of a connecting taxiway and apron and a C-12 hangar. Therefore, according to Col. Mouton, the best value and the public's interest were not met with the Lemoine proposal. Broadmoor had the lowest adjusted best value score for both the base bid and the base bid with the two ABIs. Accordingly, he recommended to the adjutant general that the contract be awarded to Broadmoor, and the adjutant general concurred.

Col. Mouton also testified that the statute, the RFP, and addenda did not provide that if the design aspect of the project was graded unsatisfactory, the entire proposal would be thrown out. He further stated that it was not the TRC's purpose to determine best value, and the TRC could not have made a best value determination. Instead, their charge was to evaluate the technical qualifications and assign a numeric value to all of the criteria.

In its oral reasons, the trial court, stated:

The court finds that the unacceptable portion of the bid that the TRC gave Broadmoor in which the Military Department argues that the TRC is not the final decision maker, they are only on one portion of the whole project, looked at the entirety of the project and made its decision that Broadmoor had the best value for the

military, for their budget, and for the citizens of this state. ... So the court finds in favor of the Military Department, that the military going with the best overall value of the project does not mean that they had to award the project to Lemoine even though one portion they considered unacceptable.

It is well settled that an appellate court cannot set aside the trial court's findings unless it determines there is no reasonable factual basis for the findings and the findings are clearly wrong. **Stobart v. State, Through Dep't of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993). Thus, if the findings are reasonable in light of the record reviewed in its entirety, this court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989).

After a thorough review of the record and the design-build statute, we cannot say that the trial court's findings regarding compliance were manifestly erroneous. The design-build statute clearly set forth the method for determining the winning proposal. Col. Mouton explained how the scores were calculated pursuant to the statute. He testified that in accordance with the statute, the best value was determined using the technical score and the price proposal. See LSA-R.S. 29:42H. The statute, as well as Col. Mouton's testimony, clearly established that the TRC was unable to determine the best value. The TRC only scored one half of the equation, as the price element was not part of the technical score. See LSA-29:42H(1)(a)(i). Further, Lemoine's argument focused on only one element of the technical score, i.e., the design. However, the design score accounted for only 200 of 3700 possible points. Thus, a low score in one category could have been overcome with a higher score in another category.

The trial court agreed with Col. Mouton that the LMD followed the statutory requirements and that Broadmoor's proposal was the best overall value for the AASF project. There is a reasonable factual basis in the record to support the trial court's finding, and we cannot say that the trial court was clearly wrong.

CONCLUSION

For the above and foregoing reasons, the April 19, 2011 judgment of the trial court is affirmed. All costs of this appeal are assessed to The Lemoine Company, LLC.

AFFIRMED.

THE LEMOINE COMPANY, L.L.C.

NUMBER 2011 CA 1350

VERSUS

COURT OF APPEAL

MILITARY DEPARTMENT, STATE OF
LOUISIANA

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

 PETTIGREW, J., CONCURS, AND ASSIGNS REASONS.

I will respectfully concur with the majority, but I do note the following.

The commissioner of administration, by letter dated December 4, 2007, approved the LMD's use of the design-build concept in accordance with the statute and retroactively waived the public bid law provisions.

Further, Addenda #14 does not say a barrel roof design was required. It allowed flexibility.