

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 2119

THE LEMOINE COMPANY, LLC

VERSUS

 CENTRAL COMMUNITY SCHOOL DISTRICT BOARD OF  
EDUCATION & THE CENTRAL COMMUNITY SCHOOL SYSTEM

Judgment Rendered: December 21, 2011

Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Docket Number 592,795

Honorable Kay Bates, Judge Presiding

\*\*\*\*\*

Murphy J. Foster, III  
Yvonne R. Olinde  
Steven B. Loeb  
Baton Rouge, LA

Counsel for Plaintiff/Appellee,  
The Lemoine Company, LLC

Kenneth F. Sills  
Baton Rouge, LA  
and  
Sheri M. Morris  
Baton Rouge, LA

Counsel for Defendants/Appellees,  
The Central Community School District  
Board of Education & The Central  
Community School System

R. Gray Sexton  
Todd A. Hebert  
Jennifer Jackson  
Baton Rouge, LA

Counsel for Intervenor/Appellant,  
MAPP Construction, LLC

G. Trippe Hawthorne  
Baton Rouge, LA

Counsel for Intervenor/Appellee  
Arkel Construction, Inc./Roy  
Anderson Corp., A Joint Venture  
d/b/a Arkel Anderson Joint Venture

\*\*\*\*\*

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

*Trinity, J. dissents and assigns reasons*

**WHIPPLE, J.**

This is an appeal from a judgment of the district court enjoining the defendant school system from awarding a public works contract to the appellant herein. The plaintiff herein has filed a motion to dismiss the appeal and an answer to the appeal, seeking damages for frivolous appeal. For the following reasons, we dismiss the appeal finding that no justiciable controversy exists and deny the answer to appeal seeking damages for frivolous appeal.

**FACTS AND PROCEDURAL HISTORY**

On July 15, 2010, the Central Community School System received bids for Project Numbers 09147 and 09148 for the construction of a new intermediate school and a new middle school (referred to herein as “the Project”). The bid documents requested bids on a base scope of work, namely, the construction of two schools with a capacity of 900 students each, and also on two separate alternates, with alternate number one adding six classrooms to each school to increase capacity to 1,050 students each and alternate number two adding an additional six classrooms to each school to increase capacity to 1,200 students each. Seven contractors submitted bids on the Project.

After the bids were tabulated, the Central Community School Board voted at a special meeting held on July 21, 2010, to go forward with the base project plus alternate number one and alternate number two. Additionally, having determined that the lowest bidder for the base project plus alternate number one and alternate number two was MAPP Construction, L.L.C. (“MAPP”), the School Board recognized MAPP as the low bidder at the special meeting that date.

On the following day, July 22, 2010, The Lemoine Company (“Lemoine”) filed a petition for injunctive relief, mandamus, and declaratory judgment, naming as defendants the Central Community School District Board of Education and the Central Community School System (hereinafter referred to collectively as “the School System”). In its petition, Lemoine contended that MAPP’s bid failed to comply with the mandatory requirements of the Bidding Documents as published by the School System. Specifically, Lemoine contended that MAPP’s bid contained a “scratch through” which had not been initialed as required by the Instructions to Bidders. Alternatively, Lemoine contended that the “scratch through” was not “properly initialed” by the signer or his “authorized representative,” as required by Section 4.1.4 of the Instructions to Bidders, which provided that any alterations to the bid shall be initialed by the signer or his “duly authorized representative.” In its petition, Lemoine contended that the scratch through had not been properly initialed by an “authorized representative” of MAPP in that it was allegedly initialed by an individual who was not named in the Company Resolution attached to MAPP’s bid, which listed the authorized signatories for the bid.

Based on these alleged improprieties, Lemoine contended that MAPP’s failure to adhere to the Instructions to Bidders rendered its bid defective and, thus, that the School System was required to reject MAPP’s bid as a matter of law. Hence, Lemoine further contended that Lemoine was in fact the lowest responsive and responsible bidder and, thus, was entitled to an award of the contract as a matter of law. Accordingly, Lemoine sought: (1) preliminary and permanent injunctions, prohibiting the School Board from rejecting bids or from awarding the contract for the Project to anyone other than Lemoine; (2) a declaratory judgment, declaring that

Lemoine was the lowest responsive and responsible bidder and, as such, was entitled to the award of the contract for the Project; (3) the issuance of a writ of mandamus and/or mandatory injunction, ordering that the School Board award the contract to and sign the contract with Lemoine as the lowest responsive and responsible bidder; and (4) alternatively, damages for lost profits, bid preparation costs, attorney's fees, interest, and costs and expenses. By order signed on the date the petition was filed, a hearing was scheduled for July 28, 2010, on Lemoine's request for a preliminary injunction.<sup>1</sup> MAPP thereafter intervened in these proceedings, uniting with the School System in opposing Lemoine's petition.<sup>2</sup>

At the hearing on July 28, 2010, the parties stipulated to numerous facts and introduced various exhibits by stipulation. MAPP also offered the testimony of several witnesses, including three experts in the field of construction regarding custom and practice in submitting public bids.<sup>3</sup> Following the hearing conducted on that date, the district court issued written reasons for judgment, finding that: (1) MAPP's bid was signed by Michael Polito, the president and CEO of MAPP; (2) Polito sent Beau Wolfe, a MAPP employee, to submit MAPP's bid; (3) MAPP's bid contained a "scratch out" in that Wolfe scratched through a number on the bid form when he was completing the form for submission; and (4) Wolfe then initialed the scratch out on the bid form.

---

<sup>1</sup>Lemoine did not pursue a temporary restraining order because the School Board agreed that it would not execute any contract for the Project until after the district court ruled on the request for a preliminary injunction.

<sup>2</sup>Attached to MAPP's petition was a rule to show cause, which was signed by the district court, providing that Lemoine show cause on July 28, 2010, as to why its petition should not be dismissed with prejudice and as to why the contract should not be awarded to MAPP as the lowest bidder. While MAPP also sought to have the court consider on the date of the scheduled hearing the issue of whether Lemoine's claims for damages should be denied, the district court, by hand-written notation on the show cause order, ruled that if a hearing were needed on that issue, it would be set for a later date.

<sup>3</sup>The School System also called two witnesses who testified about the project and the need therefor.

The court noted the following portions of the Instructions to Bidders, which it found to be relevant herein:

4.1.4 Interlineations, alterations, and erasures of the filled in information shall be initialed by the signer of the Bid, or his duly authorized representative.

\* \* \*

4.1.7 The Bid form shall include the legal name of the Bidder. The Bid Form shall be signed by the person or persons legally authorized to bind the Bidder to the specified Contract. If someone other than a corporate officer signs for the Bidder/Contractor, a copy of a corporate resolution or other signature authorization shall be required for submission of bid. Failure to include a copy of the appropriate signature authorization, if required, may result in the rejection of the bid unless Bidder has complied with La. R.S. 38:2212A(A)(1)(c) or R.S. 38:2212(O).

Thus, the district court recognized that the issue before it was whether Wolfe was a “duly authorized representative” within the meaning of Section 4.1.4 of the Instructions to Bidders. While stating that it could find no cases interpreting the term “duly authorized representative” as used in Section 4.1.4, the court noted that there were numerous references in the Instructions to Bidders calling for bidding documents and substitutions to be made in writing. The court deemed it significant that the words “duly authorized” were used before “representative,” which the court concluded implied something more than simply the word “representative” with no qualifying words.

The district court further observed that the Company Resolution attached to MAPP’s bid provided that Michael Polito, Richard Setliff, Mark LaHaye, or J. Griffith McKowen, Jr. were “authorized, empowered and directed to execute on behalf of the company, any and all documents related to submitting a bid for any prospective project.” Thus, noting that the written Company Resolution submitted by MAPP did not list Wolfe as an

individual authorized to execute bidding documents, the district court concluded that Wolfe was not a “duly authorized representative” of MAPP within the meaning of Section 4.1.4 of the Instructions to Bidders and, thus, lacked the proper authority to initial alterations or erasures on MAPP’s bid form. Accordingly, after further noting that the requirements of the Public Bid Law and any requirements in the bidding documents shall not be waived by the public entity, the district court concluded that Lemoine was entitled to a preliminary injunction.

In accordance with its reasons, the district court rendered judgment, dated August 16, 2010, granting Lemoine’s request for a preliminary injunction and enjoining the School System from awarding the contract for the Project to MAPP. From this judgment, MAPP appeals, listing five assignments of error through which it challenges the district court’s determination that Lemoine had made a prima facie showing that it was entitled to a preliminary injunction.

Lemoine answered MAPP’s appeal, contending that due to a discovery in the discrepancies in the bid amounts, neither MAPP nor Lemoine were the lowest bidder on the Project and that, in fact, Arkel Constructors, Inc./Roy Anderson Corp., A Joint Venture #2, d/b/a Arkel Anderson Joint Venture (“Arkel Anderson”) had been the low bidder all along. Lemoine further contended that subsequent to the district court’s granting of the preliminary injunction herein, the School System learned of the discrepancy and, in fact, awarded the contract to Arkel Anderson as the lowest bidder. Thus, Lemoine asserted, inasmuch as neither MAPP nor Lemoine was ever entitled to be awarded the contract, no justiciable issue remains before this court and MAPP’s appeal is moot because any opinion by this court reversing the preliminary injunction would not afford any

practical relief. Accordingly, in its answer to the appeal, Lemoine sought sanctions for frivolous appeal. Lemoine also filed with this court a motion to dismiss MAPP's appeal and a request for sanctions, based on the same assertions as those in its answer to appeal.

In response, MAPP filed a motion to strike Lemoine's motion to dismiss MAPP's appeal as well as a motion to strike portions of Lemoine's original brief. In its motion to strike Lemoine's motion to dismiss MAPP's appeal, MAPP requested that certain paragraphs of Lemoine's motion to dismiss and request for sanctions be stricken on the basis that those paragraphs made representations and attempted to incorporate exhibits that are not part of the district court record, specifically with regard to the School System's subsequent award of the contract for the Project at issue to Arkel Anderson. MAPP also sought to strike the entirety of Lemoine's memorandum in support of its motion to dismiss and request for sanctions on the same basis. In its motion to strike, MAPP also sought an award of damages for Lemoine's attempt to present "evidence" to this court which is not a part of the district court record.

Also, in opposition to Lemoine's motion to dismiss MAPP's appeal, MAPP contended that a justiciable controversy remained or, alternatively, this court should nonetheless hear MAPP's appeal under an exception to the mootness doctrine.

Both Lemoine's motion to dismiss MAPP's appeal and request for sanctions and MAPP's motion to strike Lemoine's motion to dismiss MAPP's appeal were referred to the merits of this appeal. Accordingly, we will address these matters first.

## MAPP'S MOTIONS TO STRIKE

Rule 2-12.13 of the Uniform Rules of the Louisiana Courts of Appeal provides that appellate briefs that fail to comply with the Uniform Rules “may be stricken in whole or in part by the court.” Rules 2-12.4 and 2-12.5 require the parties to give “accurate citations of the pages of the record” and also provide that the appellate court may disregard the argument of any party on any assignment of error “in the event suitable reference to the record is not made.” Boquet v. SWDI, LLC, 2007-0738 (La. App. 1<sup>st</sup> Cir. 6/6/08), 992 So. 2d 1059, 1062, writ denied, 2008-2086 (La. 9/4/09), 17 So. 3d 958.

Moreover, as an appellate court, we have no jurisdiction to receive new evidence. Rather, an appellate court must render its judgment **upon the record on appeal**. LSA-C.C.P. art. 2164; Hudson v. East Baton Rouge Parish School Board, 2002-0987 (La. App. 1<sup>st</sup> Cir. 3/28/03), 844 So. 2d 282, 284

The references by Lemoine in its motion to dismiss MAPP's appeal and in its memorandum in support thereof to events occurring after the preliminary injunction was granted by the district court clearly are not part of the record in this matter. As such, Lemoine's reference to these events in its motion and memorandum was improper. Therefore, we grant MAPP's motion to strike those portions of Lemoine's motion and memorandum referring to events and evidence that are not part of the record on appeal. See Boquet, 992 So. 2d at 1063. For these same reasons, we likewise grant MAPP's motion to strike portions of Lemoine's original brief. However, given the posture of the case, we decline to award MAPP damages in connection with these issues.



**LEMOINE'S MOTION TO DISMISS MAPP'S APPEAL AND  
REQUEST FOR SANCTIONS**

Turning to Lemoine's motion to dismiss MAPP's appeal and request for sanctions, as stated above, Lemoine contends that the preliminary injunction rendered below and, as such, MAPP's appeal on that preliminary injunction, became moot when the School System discovered that due to a discrepancy in Arkel Anderson's bid, Arkel Anderson was in fact the lowest bidder and, accordingly, awarded the contract for the Project to Arkel Anderson.

If a case is moot, there is no subject matter on which the judgment of the court can operate. Council of City of New Orleans v. Sewerage and Water Board of New Orleans, 2006-1989 (La. 4/11/07), 953 So. 2d 798, 801. Moreover, as a reviewing court, we are obligated to recognize our lack of jurisdiction if it exists. Starnes v. Asplundh Tree Expert Company, 94-1647 (La. App. 1<sup>st</sup> Cir. 10/6/95), 670 So. 2d 1242, 1245. Thus, it is well settled that courts will not decide abstract, hypothetical, or moot controversies, or render advisory opinions with respect to controversies. In the Matter of E.W., 2009-1589 (La. App. 1<sup>st</sup> Cir. 5/7/10), 38 So. 3d 1033, 1036. Cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely. A "justiciable controversy" is one presenting an existing actual and substantial dispute involving the legal relations of parties who have real adverse interests and upon whom the judgment of the court may effectively operate through a decree of conclusive character. Women's Health Clinic v. State, 2002-0016 (La. App. 1<sup>st</sup> Cir. 5/10/02), 825 So. 2d 1208, 1210, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

Even though the requirements of justiciability are satisfied when the suit is initially filed, when the fulfillment of these requirements lapses at some point during the course of the litigation before the moment of final disposition, mootness occurs. In such a case, there may no longer be an actual controversy for the court to address, and any judicial pronouncement on the matter would be an impermissible advisory opinion. Thus, jurisdiction, although perhaps once established, may abate if the case becomes moot. In the Matter of E.W., 38 So. 3d at 1037.

The record before us contains all seven bids submitted in connection with the Project herein. A review of Arkel Anderson's bid reveals that while the numeric portion of its bid for the base proposal was listed as \$31,788,000.00, the written number for that portion of the bid was thirty-one million seven hundred eighty-eight dollars (i.e., \$31,000,788.00), a discrepancy of seven hundred eighty-seven thousand two hundred twelve dollars (\$787,212.00). Pursuant to Section 4.1.3 of the Instructions for Bidders, where the Bid Form provides for the sum to be expressed in both words and figures and a discrepancy exists between the two, "the written words shall govern." Accordingly, the written representation of Arkel Anderson's bid for the base proposal prevails, bringing its total bid for the base proposal plus alternate number one and alternate number two to thirty-two million nine hundred eighty thousand seven hundred eighty-eight dollars (\$32,980,788.00), the lowest of all seven bids submitted. Accordingly, despite the stipulation by the parties below that MAPP submitted the lowest numeric or monetary bid, the record before us clearly reflects that, in fact, Arkel Anderson's bid was numerically lower from the outset than both MAPP's bid and Lemoine's bid, and, indeed, than all other bidders.

Additionally, while we have stricken those portions of Lemoine's motion and supporting memorandum referring to events that are not a part of this record, at the oral argument of this matter, counsel for MAPP conceded when questioned by this court that Arkel Anderson was in fact the lowest numeric or monetary bidder, as evidenced by the bids in the appellate record, and that, upon discovering that Arkel Anderson was indeed the lowest bidder, the School System had awarded the contract for the Project to Arkel Anderson.

The failure to award a public contract to the lowest responsive and responsible bidder is a violation of the Public Bid Law. State Machinery & Equipment Sales, Inc. v. Iberville Parish Council, 2005-2240 (La. App. 1<sup>st</sup> Cir. 12/28/06), 952 So. 2d 77, 84. Thus, to be entitled to the award of a public contract, a bidder must not only have bid according to the contract, plans, and specifications as advertised, i.e., must have submitted a **responsive** bid, but the bidder must also submit the **lowest** monetary bid. LSA-R.S. 38:2212(A)(1)(a); see also State Machinery & Equipment Sales, Inc., 952 So. 2d at 85. In the instant case, the merits of this appeal are addressed to the issue of the **responsiveness** of MAPP's bid (i.e., whether an alteration in the bid was initialed by a "duly authorized representative" of the signer). However, if MAPP was never in fact the **lowest** bidder, the mere fact that its bid may be determined through this appeal to have been **responsive** would in no way entitle MAPP to an award of the contract for the Project. Thus, the question of whether the School System was properly enjoined from awarding the contract to MAPP would be moot in that the School System would have been in violation of the Public Bid Law if it awarded the contract to a bidder which, although submitting a responsive bid, did not submit the **lowest** responsive bid.

Nonetheless, in opposition to the motion to dismiss its appeal, MAPP contends that, while Arkel Anderson was indeed the lowest **numeric or monetary** bidder, Arkel Anderson's bid was not responsive and, thus, invalid. Thus, MAPP contends, although MAPP did not have the lowest monetary bid, it was still the **lowest responsive** bidder. As such, MAPP contends that the issue of whether the preliminary injunction was properly granted is still a justiciable controversy with regard to MAPP's claim for damages for wrongful issuance of the preliminary injunction.<sup>4</sup>

---

<sup>4</sup>At the outset, we note that while MAPP now strenuously contends that its appeal remains viable in that it is entitled to damages if it proves that the preliminary injunction was wrongfully issued, a reading of its petition for intervention reveals that it did not make such a claim for damages. Rather, in its petition, MAPP sought to show that the School Board should award the Project to MAPP in that the School Board had no legal basis to refuse to award the Project to MAPP, and that Lemoine had other potential relief available to it through ordinary process, averring, in pertinent part, as follows:

16.

If Lemoine is not awarded the contract for the Project, it may seek, by ordinary process, damages for lost profits which it would have earned had it been awarded the contract on the Project.

17.

There is no legal basis for the School Board not to award the contract on the Project to MAPP because the Public Bid Law requires the School Board to award the "contract to the lowest responsible bidder who had bid according to the contract, plans, and specifications as advertised." MAPP is the lowest responsive and responsible bidder.

**WHEREFORE**, MAPP CONSTRUCTION, LLC prays that this *Petition and Restated and Amended Motion for Intervention* be deemed proper and sufficient and that MAPP CONSTRUCTION, LLC be permitted to intervene in this matter.

**WHEREFORE**, MAPP CONSTRUCTION, LLC further prays that THE LEMOINE COMPANY, L.L.C. be ordered to show cause, if any it can, ... as to why its *Petition for Injunctive Relief, Mandamus and Declaratory Judgment and Motion for Temporary Restraining Order and Preliminary Injunction* should not be dismissed, with prejudice, and at its cost.

**WHEREFORE**, MAPP CONSTRUCTION, LLC further prays that THE LEMOINE COMPANY, L.L.C. be ordered to show cause, if any it can, ... as to why [Lemoine] is not entitled to seek, by ordinary process, damages for lost profits, bid preparation costs, attorney fees, interest, and all costs and expenses incurred in bringing this action if it is not awarded the contract ... .

**WHEREFORE**, MAPP CONSTRUCTION, LLC further prays that the CENTRAL COMMUNITY SCHOOL DISTRICT BOARD OF EDUCATION be ordered to show cause, if any it can, ... as to why it

In maintaining its position that it was the lowest **responsive** bidder, MAPP contends that Arkel Anderson's bid was not responsive because it contained an uninitialed alteration. However, for the reasons which follow, we conclude that MAPP is precluded from now raising the issue of the responsiveness of Arkel Anderson's bid in these proceedings.

Pursuant to LSA-R.S. 38:2220(B), "any interested person may bring suit in the district court 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 this Part, or through ordinary proceeding to seek appropriate remedy to nullify a contract" entered into in violation of the Public Bid Law. However, at the oral argument of this matter, MAPP, through counsel, conceded that after the School System determined Arkel Anderson to be the lowest bidder and, therefore, awarded the contract to Arkel Anderson, MAPP did not avail itself of the remedies available pursuant to LSA-R.S. 38:2220(B) to enjoin the award of the contract to Arkel Anderson or seek its nullification. Thus, MAPP did not challenge, through the legal remedies provided, the School System's determination that Arkel Anderson's bid was the lowest responsive bid on the basis that Arkel Anderson's bid contained an uninitialed alteration, or on any other basis.

---

should not award the contract ... to MAPP CONSTRUCTION, LLC as it was the lowest bidder. [Footnotes omitted].

Thus, a reading of MAPP's intervention reveals that while MAPP clearly sought, through its intervention, to challenge **Lemoine's** claim for injunctive relief and damages in the event Lemoine was not ultimately awarded the contract for the Project, MAPP did not in its petition assert any claim for damages on its own behalf in the event an injunction was wrongfully issued to prevent the School System from awarding the contract for the Project to MAPP. As such, MAPP has no pending claim for damages which would necessitate a ruling on the issue of whether the preliminary injunction was wrongfully issued. However, assuming that MAPP could later attempt to plead a claim for damages for wrongful issuance of the preliminary injunction and pursue Lemoine's bond, we will address MAPP's arguments as to whether a justiciable controversy still exists.

In D & O Contractors, Inc. v. St. Charles Parish, 00-882 (La. App. 5<sup>th</sup> Cir. 2/28/01), 778 So. 2d 1285, writ denied, 2001-1213 (La. 6/29/01), 794 So. 2d 812, an unsuccessful bidder filed a petition for writ of mandamus and damages against the public entity approximately two weeks after the contract at issue had been awarded to the lowest bidder. In affirming the dismissal of the unsuccessful bidder's claim for damages, the appellate court relied upon the Louisiana Supreme Court's holding in Airline Construction Company, Inc. v. Ascension Parish School Board, 568 So. 2d 1029, 1033 (La. 1990), that an aggrieved bidder that does not timely seek injunctive relief to prevent the public body from awarding the contract to a rival bidder has waived any right it may have to claim damages against the public body or the successful bidder. D & O Contractors, Inc., 778 So. 2d at 1290-1292.

In the instant case, by declining to avail itself of the remedies available to it in LSA-R.S. 38:2220(B) to challenge the School System's determination that Arkel Anderson was in fact the lowest responsive bidder and thus enjoin the award of the contract for the Project to Arkel Anderson, MAPP would be precluded from seeking damages from either the School System or Arkel Anderson, the successful bidder, on the basis that MAPP was indeed the lowest responsive bidder. D & O Contractors, Inc., 778 So. 2d at 1290-1292.

Similarly, we conclude that because MAPP did not seek to challenge or enjoin the award of the contract for the Project to Arkel Anderson through the legal channels available to it pursuant to LSA-R.S. 38:2220(B), MAPP should not now be allowed via these proceedings to have this court make the determination that Arkel Anderson was not the lowest responsive bidder to enable MAPP to now pursue a claim for damages against Lemoine, the third lowest bidder. Because MAPP was in fact the second lowest numeric or

monetary bidder, any claim it would have for damages against the third lowest monetary bidder, i.e., Lemoine, for wrongful issuance of the preliminary injunction would obviously be dependent upon a determination that, despite the fact that MAPP was the second lowest monetary bidder, it was nonetheless the lowest **responsive** bidder. However, MAPP has simply waived its right to seek such a determination by failing to pursue the established remedies in LSA-R.S. 38:2220(B) to prevent the award of the contract to the lowest monetary bidder, Arkel Anderson, based on an after-the-fact determination that Arkel Anderson's bid was not responsive.

Moreover, even if we were to consider MAPP's contention that a justiciable controversy still exists because Arkel Anderson's bid was not responsive and, thus, invalid, we find no merit to this argument. MAPP contends that Arkel Anderson's bid is not responsive because it contains an uninitialed alteration to the second "8" in the number "\$31,788,000.00" on its bid form. However, our review of the bid form of record demonstrates that while the second "8" appears to be darker or more boldly written or emphasized than the other hand written numbers on the bid form, possibly in an effort to complete the figure, the number, as shown in the bid form of record, does not appear to have been altered in any way.

Accordingly, on the record before us and considering the admissions and acknowledgements by counsel for the parties at the oral argument of this matter, neither MAPP nor Lemoine was the lowest responsive bidder on the Project. Accordingly, neither was entitled to be awarded the contract. Further, even if this court were to determine that MAPP's bid was responsive (in that the alteration was initialed by a duly authorized representative), the issue of whether or not the preliminary injunction was properly granted would nonetheless be moot in that MAPP was not the

**lowest** responsive bidder. Also, given that MAPP was not the lowest responsive bidder and, thus, never entitled to be awarded the contract, under the precepts noted above, MAPP could not establish any entitlement to damages for wrongful issuance of a preliminary injunction preventing the School System from awarding the contract for the Project to it. For these reasons, we conclude that no justiciable controversy remains, and MAPP's appeal is moot.

However, MAPP has alternatively argued in opposition to Lemoine's motion to dismiss MAPP's appeal as moot that this court should find that this appeal falls under an exception to the mootness doctrine. Specifically, MAPP argues that its appeal involves a substantial public interest, the question presented is of a public nature, the complained-of conduct is likely to recur, and an authoritative resolution is desirable to guide public officers.

Various exceptions to the mootness doctrine have been established to prevent either party from creating a technical mootness as a sham to deprive the court of jurisdiction, such as where the defendant voluntarily ceases the allegedly wrongful conduct. Cat's Meow, Inc. v. City of New Orleans through Department of Finance, 98-0601 (La. 10/20/98), 720 So. 2d 1186, 1194. Moreover, this court has held that a substantial public interest can also provide an exception to mootness where the question presented is of a public nature, the complained-of conduct is likely to recur, and an authoritative resolution is desirable to guide public officers. In the Matter of E.W., 38 So. 3d at 1038.

In the instant case, however, we note that the issue before the district court at the scheduled hearing, as evidenced by the show cause order signed on July 22, 2010, and the only issue decided in the August 16, 2010 judgment, was whether Lemoine was entitled to a **preliminary** injunction



prohibiting the School System from awarding the Project to MAPP.<sup>5</sup> The only issue to be considered at a hearing on a preliminary injunction is whether the moving party has met its burden of proving that it is entitled to the preliminary injunction. Women's Health Clinic v. State, 2001-2645 (La. 11/9/01), 804 So. 2d 625, 626.

Because the judgment under review herein granted only a preliminary injunction and did not address any request for declaratory judgment or make any specific declarations or pronouncements as to what constitutes a "duly authorized representative" within the meaning of Section 4.1.4 of the Instructions to Bidders, any review of the now-moot preliminary injunction would not afford MAPP the "authoritative resolution" of this issue that it seeks.<sup>6</sup> Accordingly, we grant Lemoine's motion to dismiss MAPP's appeal on the basis that a justiciable controversy no longer exists and, thus, the appeal is moot.

Turning to Lemoine's request for sanctions for frivolous appeal, we deny the request. MAPP has made a good-faith argument herein that its appeal was not moot and, alternatively, as to why its appeal, while moot, should nonetheless be considered by this court under one of the exceptions

---

<sup>5</sup>While the district court stated at the beginning of the hearing that the issues before it were Lemoine's requests for a preliminary injunction, mandamus, and declaratory judgment, this statement does not comport with the show cause order rendered in the proceedings below, setting the hearing only on the request for preliminary injunction. Moreover, counsel for the School System sought clarification at the hearing on the issues before the court, stating, "it was my understanding but I just want clarification for the record, that what is before you today is only the request for a preliminary injunction." At that time, the district court responded, "That is what I understand too." However, the court then went on to state that it "read the order and it did not have the language concerning the mandamus when I signed it" and that the matter "was set this morning for hearing on the preliminary injunction and declaratory judgment."

Nonetheless, the judgment at issue herein ultimately addressed only the request for a preliminary injunction and did not render any declaratory judgment.

<sup>6</sup>Moreover, we are unpersuaded by MAPP's assertion that the preliminary injunction granted by the district court below, which is now clearly moot, will have the chilling effect on the construction industry that it claims such that we should nonetheless hear this appeal despite the fact that a justiciable controversy no longer exists.

to the mootness doctrine. Thus, we conclude that sanctions for frivolous appeal are not warranted. See Daisey v. Time Warner, 98-2199 (La. App. 1<sup>st</sup> Cir. 11/5/99), 761 So. 2d 564, 568-569.

### CONCLUSION

For the above and foregoing reasons, we grant MAPP's Motion to Strike as to those portions of Lemoine's Motion to Dismiss and Request for Sanctions and those portions of its memorandum in support thereof that refer to facts not supported by the evidence contained in the record before us. However, we deny MAPP's request for damages sought in connection with its Motion to Strike. We further grant Lemoine's Motion to Dismiss MAPP's appeal on the basis that the matter is moot, inasmuch as a justiciable controversy no longer exists. We deny Lemoine's Request for Sanctions. Each party shall bear its own costs.

**MAPP'S MOTIONS TO STRIKE GRANTED; MAPP'S REQUESTS FOR DAMAGES DENIED; LEMOINE'S MOTION TO DISMISS APPEAL GRANTED; LEMOINE'S REQUEST FOR SANCTIONS DENIED; APPEAL DISMISSED WITH REASONS FOR JUDGMENT.**

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 2119

THE LEMOINE COMPANY, LLC

VERSUS

CENTRAL COMMUNITY SCHOOL DISTRICT BOARD OF EDUCATION &  
THE CENTRAL COMMUNITY SCHOOL SYSTEM

**GUIDRY, J., dissents and assigns reasons.**

 **GUIDRY, J., dissenting.**

I respectfully disagree with the majority opinion, which amounts to a *de novo* review that backs into a mootness holding. This matter should be remanded to allow the trial court to address the collateral consequences of the monetary damages MAPP sought and to address an important public policy issue, all of which exempts this appeal from being moot.

There remains an actual and substantial dispute involving the damages MAPP alleges it is owed with respect to the improperly obtained injunction. The parties have a real, adverse interest that a court decree could operate to bring to a conclusion. There is a \$2,265,000.00 security bond that Lemoine posted to protect the School Board, if MAPP can show it was damaged by issuance of the injunction.

Without even allowing for supplemental briefing, the majority takes great pains to make merit-based determinations never passed upon by the trial court in order to conclude that MAPP either admitted it was not entitled to injunctive relief, waived its right to seek relief, or will not be able to prove damages. Thus avoiding appropriately remanding that inquiry to the trial court to allow a complete record to

be developed by the parties and have a decision made by the trial court that can then be reviewed by this court. Instead, this court jumps the gun and decides the issue of MAPP's entitlement to damages, which according to its ultimate conclusion, it does not have subject matter jurisdiction to do, because it concludes the case is moot.

Additionally, there is an important issue of public policy regarding the public bid law that exempts this appeal from being moot. Authoritative guidance needs to be given to public officers on the question of whether a corporate resolution is required to demonstrate the authority of a "duly authorized representative" to initial a strikethrough on the bid form on behalf of the person signing the bid.

Therefore, I respectfully dissent from the majority opinion.