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SHAPING SPECIFIC PROCEDURAL REQUIREMENTS FOR
DISQUALIFICATION UNDER LOUISIANA'S PUBLIC BID LAW

The Louisiana Division of Administration disqualified Haughton Elevator Division, the lowest bidder on nine elevator maintenance contracts, as not being a "responsible" bidder under Louisiana Revised Statutes 38:2211 (the public bid law).¹ The Division of Administration's conclusion was based upon Haughton's allegedly unsatisfactory performance under an earlier elevator maintenance contract with the state. Haughton sued to enjoin the letting of the contracts to other bidders claiming that it was entitled to adequate notice and a fair chance to disprove charges of irresponsibility prior to the rejection of its bid. The trial court's dissolution of a temporary restraining order and its denial of a preliminary injunction were upheld by the court of appeal.² The Louisiana Supreme Court, in determining that Haughton was entitled to temporary injunctive relief, reversed the lower courts' decisions and *held* that the lowest responsible bidder has a right to receive the advertised contract if any is let and such right is entitled to the protection of procedural due process. *Haughton Elevator Division v. State Division of Administration*, 367 So. 2d 1161 (La. 1979).

The basic statutory law at issue in *Haughton* is contained in Louisiana Revised Statutes 38:2211,³ which requires that all public work exceeding a certain sum be advertised and let by contract to the lowest responsible bidder. Louisiana jurisprudence has recognized that the public bid law is a prohibitory law founded on public

1. LA. R.S. 38:2211 (1950) (as it appeared prior to 1977 La. Acts, No. 103) provided in pertinent part:

All public work exceeding the sum of five thousand dollars including both labor and materials to be done by the state of Louisiana, any public corporation or political corporation or political subdivision of the state and all purchases of materials or supplies exceeding the sum of two thousand five hundred dollars to be paid out of public funds shall be advertised and let by contract to the lowest responsible bidder who had bid according to the contract, plans and specifications as advertised, and no such public work shall be done and no such purchase shall be made except as provided in this Part.

Former Revised Statutes 38:2211 was reenacted by the legislature in 1977 and currently appears as Revised Statutes 38:2212. 1977 La. Acts, No. 103, *amending* LA. R.S. 38:2211 (1950). A 1978 amendment raised the threshold amount to \$10,000. 1978 La. Acts, No. 670, *amending* LA. R.S. 38:2212 (Supp. 1977).

2. *Haughton Elevator Div. v. State Div. of Administration*, 359 So. 2d 693 (La. App. 1st Cir. 1978), *rev'd*, 367 So. 2d 1161 (La. 1979).

3. Although this statute was renumbered by the legislature in 1977, see note 1, *supra*, the pre-1977 version was applicable in *Haughton*. Thus, subsequent references will be to the section number of the statute prior to the 1977 reenactment.

policy.⁴ It was enacted to protect taxpaying citizens against contracts of public officials entered into because of favoritism and possibly involving exorbitant and extortionate prices.⁵ The public bid law represents an attempt to strike a balance between two often competing public interests, the interest in having the work completed economically and the interest in quality performance.⁶ In endeavoring to achieve this balance, the awarding authority is often confronted with a dilemma: if the contract is not awarded to the lowest bidder, the public's interest in having the project completed with minimum expense is thwarted; if the contract is awarded to the lowest bidder and he is irresponsible, the public's interest in a quality job is frustrated.

Even after the bids have been received, the awarding authority has no legal obligation to accept any bid; it may determine that no contract will be let and reject all bids.⁷ But if the contract is awarded, it must be to the "lowest responsible bidder"⁸ who "bid according to

4. *Smith v. Town of Vinton*, 216 La. 9, 43 So. 2d 18 (1949); *Boxwell v. Department of Highways*, 203 La. 760, 14 So. 2d 627 (1943).

5. In *Boxwell v. Department of Highways*, 203 La. 760, 14 So. 2d 627 (1943), the court quoted the following passage from *American Jurisprudence*:

"These provisions exist to protect citizen taxpayers from unjust, ill-considered or extortionate contracts, or those showing favoritism, and if the public body is suffered to disregard them and the other party permitted to recover upon an implied contract, such provisions can always be evaded and set at naught. To depart from these principles would be to open the door to abuses and practices fraught with danger to the welfare of the citizens and taxpayers of municipalities and political subdivisions of the state."

Id. at 771, 14 So. 2d at 631, quoting 43 AM. JUR. *Public Works and Contracts* § 95 (1942).

6. See LA. R.S. 38:2211 (1950) (as it appeared prior to 1977 La. Acts, No. 103). The public bid statute seeks to insure that the work is performed economically by requiring the awarding authority to let the contract to the lowest bidder. The statute also attempts to assure a quality performance by requiring that the award be made to a "responsible" bidder.

7. LA. R.S. 38:2214 (Supp. 1977). Due to the right of the awarding authority to reject all bids, the courts have been unwilling to require the acceptance of a bid. In *D.J. Talley & Son, Inc. v. City of New Orleans*, 303 So. 2d 195 (La. App. 4th Cir. 1974), the court stated that "to require the governing authority to enter a contract simply because it has advertised for bids would certainly destroy its ability to achieve a fair price within the budgeted amount of that project." *Id.* at 197. The fifth circuit in *Housing Authority of Opelousas, La. v. Pittman Construction Co.*, 264 F.2d 695 (5th Cir. 1959), asserted that "a court should not compel a public body to make a discretionary award to a bidder not chosen by that body." *Id.* at 704.

8. LA. R.S. 38:2211 (1950) (as it appeared prior to 1977 La. Acts, No. 103). In *Pittman* the court characterized "responsibility" as more than a question of financial ability to perform the work; it includes other considerations such as skill, integrity, judgment, experience, reputation, previous conduct on contracts, and any other factors bearing on a bidder's successful performance of his contract. 264 F.2d at 698.

the contract, plans, and specifications as advertised.”⁹ When the awarding authority enters into a contract in violation of the public bid law, an unsuccessful bidder may sue to set aside and enjoin the award.¹⁰

The jurisprudence interpreting Louisiana's public bid law has conferred certain pre-disqualification rights upon the lowest bidder. In *Housing Authority of Opelousas, La. v. Pittman Construction Co.*,¹¹ the low bidder was not afforded an opportunity to be present at a meeting at which evidence against it was to be considered. The awarding authority did not inform Pittman of a subcontractor's affidavit expressing an unwillingness to work for it or of hearsay charges that it was irresponsible until after the contract was awarded to the next lowest bidder.¹² The court stated that *before* being disqualified as irresponsible, “the lowest bidder has the right to be heard and the Board has the duty to listen on the subject of responsibility.”¹³ This “right” to a hearing prior to disqualification is not expressly authorized by the public bid law;¹⁴ rather, as the fifth circuit seemed to infer, it is impliedly afforded by the statute.¹⁵

9. LA. R.S. 38:2211 (1950) (as it appeared prior to 1977 La. Acts, No. 103).

10. See *Sternberg v. Board of Comm'rs*, 159 La. 360, 105 So. 372 (1925); *St. Landry Lumber Co. v. Mayor and Board of Alderman*, 155 La. 892, 99 So. 687 (1924). In *Pittman* the court declared in a footnote that “it is well established in Louisiana that an unsuccessful bidder on a contract advertised by a public board to be let to the lowest bidder or lowest responsible bidder may sue to set aside the award.” 264 F.2d at 696 n.7.

11. 264 F.2d 695 (5th Cir. 1959).

12. As the court expressed it:

This case can be sliced down to the Board's deciding that the low bidder was not a responsible bidder—without giving the low bidder a fair chance to disprove the charges of irresponsibility. By any reasonable standards, such action offends one's sense of fair play and is an arbitrary abuse of discretion inconsistent with the letter and the spirit of the Louisiana Public Works Law.

Id. at 703.

13. *Id.* at 704. The First Circuit Court of Appeal in *Haughton* found that the Louisiana Supreme Court had recognized as early as 1924 that the lowest bidder should be given an opportunity to respond to charges of irresponsibility before disqualification. 359 So. 2d at 695, citing *St. Landry Lumber Co. v. Mayor and Board of Alderman*, 155 La. 892, 99 So. 687 (1924). In *St. Landry Lumber* the court held that the lowest responsible bidder had a cause of action when it was willing to give satisfactory security for the performance of the work, it was experienced and qualified to do the work, and the municipal authorities arbitrarily and without hearing or investigation rejected its bid for a higher one.

14. For the pertinent part of the statute, see note 1, *supra*.

15. See note 12, *supra*, and accompanying text. It should be noted that this “right” to a hearing has its foundation in the public bid law and not in procedural due process. In *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), a government contractor was debarred from participating in certain contracts with the Commodity Credit Corporation. The court of appeals held that, absent procedural regulations promulgated in accordance with the Administrative Procedure Act, § 3(a)(b), 5 U.S.C.

Although the *Pittman* court based its decision on statutory interpretation, a possible alternative ground is suggested by the constitutional mandate of procedural due process,¹⁶ which protects individuals from arbitrary deprivations by government of "life, liberty, or property."¹⁷ Traditionally, the contours of the due process clause were molded by reliance on a right/privilege distinction, procedural due process protection being triggered by governmental deprivations of an individual's legal rights and property interests.¹⁸ However, if the individual laid claim to no legal right, but rather to a mere gratuity¹⁹ or privilege afforded by the government, he would not be heard to complain that procedural safeguards were not respected prior to the termination of this largess.

In recent years the Supreme Court has forsaken this right/privilege distinction²⁰ in favor of a considerable broadening of the liberty and property interests protected by procedural due process.²¹ In *Goldberg v. Kelly*,²² the Court recognized that it is often more realistic to regard "entitlements" as property than as a gratuity.²³

§ 1002(a)(b) (1976), and absent notice, hearing, and findings, the debarment was invalid. The court refused to consider whether the debarment violated due process standards since its interpretation of the Act made it unnecessary to reach any constitutional contentions.

16. In recent years the United States Supreme Court has used procedural due process in order to expand the hearing requirement into new areas of government action. See Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1268 (1975). Judge Friendly states that since *Goldberg v. Kelly*, 397 U.S. 254 (1970), was decided in 1970, we have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution. Friendly, *supra*, at 1273.

17. U.S. CONST. amends. V & XIV, § 1.

18. The traditional position was "that one who has no 'right' at stake should not be entitled to a hearing," and that "in [the] absence of a 'right' one should not even be entitled to judicial review of an administrative denial of the gratuity or privilege." K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.12 at 176 (3d ed. 1972). If the holder of a franchise had a "right," he might be entitled to a hearing before the franchise could be revoked; a "mere privilege" might be revoked without notice or hearing.

19. The gratuity theory was much like that applied to a privilege; the government could withhold, grant, or revoke a gratuity at its pleasure. Reich, *The New Property*, 73 YALE L.J. 733, 740 (1964).

20. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), Justice Stewart stated that the Court had "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of the due process rights." *Id.* at 571.

21. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 514 (1978). See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (teacher's continued employment at state university pursuant to "implied" tenure); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (conditional freedom following parole); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits).

22. 397 U.S. 254 (1970).

23. *Id.* at 262 n.8.

Subsequently, in *Board of Regents v. Roth*,²⁴ the Court acknowledged as entitlements, and thus protected by procedural due process, interests founded only on a state-fostered expectation derived from a source independent of the Constitution, such as state law.²⁵ These new statutory entitlements depend on construction of the relevant statutes and recognition of the understandings between government and individuals.²⁶

Once it is determined that the interest at stake is within the fourteenth amendment's protection of liberty and property, the procedural requisites are determined by assessing and balancing the particular interests involved. Although "a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process,"²⁷ the Court has recently come to rely principally on a utilitarian interest-balancing approach.²⁸ The Court in *Mathews v. Eldridge*,²⁹ using this approach, announced a general formula for the determination of what process is due.³⁰ The identification of the specific dictates of due process generally requires consideration of three distinct factors:

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³¹

This balancing approach has resulted in varying procedures³²

24. 408 U.S. 564 (1972).

25. *Id.* at 577. In *Roth* the Court stated that property interests are not created by the Constitution; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Id.*

26. See L. TRIBE, *supra* note 21, at 515.

27. *Board of Regents v. Roth*, 408 U.S. at 570. The Court adds that to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake. *Id.*

28. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 478 (1978) [hereinafter cited as J. NOWAK]; L. TRIBE, *supra* note 21, at 540. See generally Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

29. 424 U.S. 319 (1976).

30. See L. TRIBE, *supra* note 21, at 540.

31. 424 U.S. at 335.

32. Nowak, Rotunda, and Young have identified seven different elements of the adversary process which may be required as part of the "due process" which must be

whereby some deprivations can only be accomplished with very detailed hearings while others can be summarily carried out.³³

In the instant case, Houghton Elevator Division was the lowest bidder on numerous elevator maintenance contracts, but was disqualified as not "responsible" based on its past performance under an elevator maintenance contract with the state. Houghton sued to enjoin the letting of the contracts to other bidders, contending that it was not given adequate notice and a fair opportunity to disprove charges of irresponsibility prior to the rejection of its bid. In reversing the trial court and the court of appeal, the Louisiana Supreme Court held that the public bid law creates a right in the lowest responsible bidder to receive the advertised contract if any is let as a consequence of the biddings and such right is entitled to the protection of the due process clause of the fourteenth amendment. The court also announced specific procedural safeguards which are required before a low bidder is disqualified as not responsible.³⁴

afforded to an individual when the government deprives him of life, liberty, or property. The essential elements are: (1) adequate notice of the charges or basis for government action; (2) a neutral decision maker; (3) an opportunity to make an oral presentation to the decision maker; (4) an opportunity to present evidence or witnesses to the decision maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision maker; (7) a decision based on the record with a statement of reasons for the decision. J. NOWAK, *supra* note 28, at 499.

33. See generally J. NOWAK, *supra* note 28, at 509. The Court in *Goldberg* required that a welfare beneficiary be granted a trial-type hearing before welfare payments could be discontinued. The hearing was to include: (1) adequate notice, (2) an opportunity for oral argument to the adjudicator, (3) a chance to present evidence in his behalf, (4) an opportunity to confront any witness who is adverse to his claim, (5) an opportunity to cross-examine those witnesses, (6) disclosure of all evidence against him, (7) a right to have an attorney present his case, (8) a decision based solely on the evidence produced at the hearing, (9) a statement by the decision maker of the reasons for his determination and the evidence he relied on, and (10) the making of a decision which is, in fact, unbiased and impartial. 397 U.S. at 267-70.

In *Bell v. Burson*, 402 U.S. 535 (1971), and *Goss v. Lopez*, 419 U.S. 565 (1975), the Court found the interests involved to lie somewhere in the middle of the continuum of interests. The Court in *Bell* invalidated a statute which suspended the license of drivers involved in an accident unless the driver furnished security to satisfy a judgment or gave proof of financial responsibility. Although the Court did not delineate all of the rights involved, it found that a prior hearing was required with procedures somewhat less than that required in *Goldberg*. In *Goss* the Court required that a student be given oral or written notice of the charges and an opportunity to explain his position to the school authorities prior to suspension. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court found less procedural protection required. The *Mathews* Court held that termination of social security disability benefits did not require a prior evidentiary hearing. The Court upheld the discharge of a federal employee without a prior hearing in *Arnett*. See generally J. NOWAK, *supra* note 28, at 511 (discussing the emerging concept that in some instances due process is fulfilled by a "post deprivation" hearing or suit).

34. For the specific procedural safeguards required, see text at notes 46-49, *infra*.

As a prerequisite to finding that procedural due process applied, the court made a determination as to whether the deprivation was one of liberty or property,³⁵ concluding that the public bid statute provides a "statutory entitlement."³⁶ The court stated that "La. R.S. 38:2211 creates a right in the lowest responsible bidder to receive the advertised contract, if any is let as a consequence of the bid-dings."³⁷ Where did this "right" originate? According to the court, this claim of entitlement evolves from the "Louisiana jurisprudential interpretations"³⁸ of the public bid statute; but the court cited no authority for its statement. Prior jurisprudence has recognized that if a contract is awarded, it must be awarded to the lowest responsible bidder;³⁹ however, there are no prior cases which state that the lowest responsible bidder has an entitlement to receive the contract. Rather than rely on jurisprudential interpretations which did not exist, the court could have inferred from the language of the public bid statute a state-fostered expectation of entitlement.

Once the court determined that a statutory entitlement was involved, it focused its attention upon resolving the issue of what type of hearing was required by a balancing of interests.⁴⁰ The interests to be balanced, concluded the court, "are the interest of a particular bidder in receiving the contract versus the public interest in having the contract awarded expeditiously to the bidder who can most economically perform the work in a responsible manner."⁴¹ A third consideration—the risk of an erroneous deprivation through the procedures used and the probable value of additional or substitute procedures—should always form a part of any determination of what process is due.⁴² Although this consideration was not expressly recognized in *Haughton*, it is likely that the court was influenced by the rather haphazard manner in which *Haughton* was determined to be irresponsible, which manner created an unacceptable risk of an erroneous determination by the Division of Administration.⁴³

35. For a discussion of when due process requirements apply, see text at notes 17-26, *supra*.

36. For a discussion of statutory entitlements as property rights, see text at notes 21-26, *supra*.

37. 367 So. 2d at 1165. The court also stated that if "the awarding authority determines that no contract will be let, under the terms of the statute, the bidders have no protected interest in the award of a contract that requires notice, hearing, and reasons for rejection." *Id.* at 1165 n.3.

38. *Id.* at 1165.

39. See note 8, *supra*, and accompanying text.

40. For a discussion of the balancing process, see text at notes 27-33, *supra*.

41. 367 So. 2d at 1166.

42. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). For the United State Supreme Court's formula for determining what process is due, see text at notes 29-31, *supra*.

43. *Haughton's* disqualification was based upon an inspection conducted for the Department of Health and Human Resources by a consulting engineer. A represen-

After reconciling the interests of the bidder and the public, the court proceeded to outline specific procedural requirements which must be met before a low bidder is disqualified as irresponsible. The court concluded that the governing authority must, prior to awarding the contract, give the bidder formal notice in writing indicating that the authority is contemplating disqualifying the bidder.⁴⁴ The bidder must be given an opportunity to respond to the charges in writing and, whenever feasible, the bidder should have an opportunity for an informal hearing.⁴⁵ After the bidder has been provided this informal hearing, but before the award of the contract, the bidder must be given formal written notice by the authority that he has been disqualified.⁴⁶ The records of this disqualification proceeding must be preserved in order to form the basis for any subsequent judicial review.⁴⁷

After concluding that Haughton was not afforded the procedural due process required to protect its property rights, the court observed that "the petition might be supplemented to claim damages from the awarding authority, if it wrongfully awarded the contract to another bidder, or even perhaps from a higher bidder

tative of Otis Elevator Company, a *competing bidder*, accompanied the consulting engineer in order to assist in the investigation of possible irregularities in the service provided by Haughton. There is no evidence to indicate that Haughton ever received a copy of the consulting engineer's report from the Division of Administration; however, Haughton did get notice of the report's unfavorable evaluation by pure happenstance when an Otis employee who was on the inspection team gave a copy to the Director of Traffic at Charity Hospital who in turn gave Haughton a copy of the report. Haughton responded by sending a letter of rebuttal to the Director of Traffic at Charity, but there is no evidence that this letter was ever forwarded to the Division of Administration, the agency which disqualified Haughton. There is also no indication in the record that Haughton ever received any formal response regarding its letter. At a meeting held by the Division of Administration to discuss awarding the contracts, Haughton was disqualified on all nine of the contracts based on its poor service of the Charity elevators. Although a representative of Haughton was present at the meeting, he had no prior notice of the meeting or its purpose and no opportunity to rebut the allegations against Haughton prior to the disqualification.

44. 367 So. 2d at 1166.

45. *Id.*

46. *Id.*

47. *Id.* Compare the procedures required to disqualify a low bidder with those required in *Goldberg* to discontinue welfare benefits. See note 33, *supra*. The procedures required in *Haughton* are somewhat less extensive than those required in *Goldberg*; however, this should be anticipated since in *Goldberg* the welfare recipient is often denied the means of obtaining a subsistence when payments are discontinued and, therefore, has a much stronger interest than does a contractor who bids on a contract. Compare the procedures required in *Haughton* with those required in *Mathews* and *Arnett*. See note 33, *supra*. *Haughton* requires an informal hearing prior to the award of the contract whereas in both *Mathews* and *Arnett* the Court concluded that no prior hearing is required.

who wrongfully received the contract."⁴⁸ The court indicated that Louisiana Civil Code articles 1934⁴⁹ and 2315⁵⁰ would provide the basis for such damages.

The court left unresolved an important issue concerning the rights of a low bidder who is disqualified for not bidding "according to the contract, plans, and specifications as advertised."⁵¹ Is a low bidder who is disqualified for failure to submit a responsive bid entitled to the same specified procedural safeguards as a low bidder who is disqualified as not responsible? Bidders relying on the protections of the *Haughton* decision may find that there is a loophole in the application of the safeguards established by the court if the specified procedural requirements are not so extended. Nevertheless, it is submitted that different procedures based on the reason for disqualification may be consistent with the balancing approach enunciated in *Mathews*.⁵² Whereas the low bidder would serve as a good source of information in a determination of whether a bidder is irresponsible, its helpfulness would be minimal in determining whether the bid is responsive. All the information the authority needs is contained in the bid and is preserved in a form suitable for later judicial review.

The result reached by the court in *Haughton* was obtainable under prior federal jurisprudence interpreting state law.⁵³ Why,

48. 367 So. 2d at 1169. The court added in a footnote that the 1974 constitution permits governmental entities to be sued and to be held liable for damages. *Id.* at 1169 n.8, citing LA. CONST. art. XII, § 10. As to the liability of the higher bidder, the court stated in another footnote that "it appears doubtful . . . that a high bidder should be held liable for damages, if the contract is improperly awarded to it by a governmental agency (unless perhaps it participated in the commission of the wrongful act, La. Civ. C. art. 2324)." 367 So. at 1169 n.9.

49. LA. CIV. CODE art. 1934 provides in pertinent part: "Where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived."

50. LA. CIV. CODE art. 2315 provides in pertinent part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

51. LA. R.S. 38:2211 (1950) (as it appeared prior to 1977 La. Acts, No. 103). For the pertinent part of the public bid statute, see note 1, *supra*. A low bidder can be disqualified for two reasons: (1) irresponsibility; and (2) failure to bid according to the contract, plans, and specifications. However, the low bidder has a statutory entitlement regardless of the reason for his disqualification.

52. See text at notes 29-31, *supra*.

53. See text at notes 11-15, *supra*. The court could have rested its decision on a statutory ground as was done in *Pittman*. In that case, the fifth circuit had stated that before the lowest bidder can be disqualified as irresponsible he has the right to be heard and the awarding authority has the duty to listen on the subject of responsibility. 264 F.2d at 704.

then, did the court choose to rest its decision upon constitutional grounds? The court's preference is consistent with a larger movement toward requiring government to operate more openly⁵⁴—openness being a deterrent to arbitrary government action. Due process provides the court with a flexible instrument by which it can shape and mold procedural requirements to a greater extent than is possible by statutory interpretation of the public bid law.⁵⁵ By enunciating specific procedural safeguards, the court not only requires the awarding agency to conduct its business in the "sunshine," but it more rigidly defines the limits within which the agency's discretion must be exercised. Additionally, the purpose of the public bid law is promoted since the required procedure reduces the risk of an erroneous determination.⁵⁶ However, a constitutional approach is not without negative aspects. Constitutional interpretation tends toward judicial legislation and lessened legislative influence; whereas, an approach based upon the interpretation of state statutes allows for legislative input reflective of the balance of interests involved in a particular context. The latter approach acknowledges the legislature as the principal source of positive law and is thus more consistent with the proper role of the judiciary in a democratic society.

Despite the tendency of the *Haughton* decision to reduce the likelihood of arbitrary government action, several unfavorable ramifications are foreseeable. The bidding process will necessarily be delayed to some extent as a result of the more extensive procedures now required. It can also be anticipated that public entities will

54. *Haughton* may be viewed as part of an overall trend toward opening government to the public's view and making it more accountable to the public. The notion of government operating in an open manner is illustrated by the due process explosion and the court's carrying the hearing requirement from one new area of government action to another. See note 16, *supra*. It is also illustrated by Louisiana's Public Meeting Law, LA. R.S. 42:4.1 to 12 (Supp. 1976 & 79), and Administrative Procedure Act, LA. R.S. 49:951-68 (Supp. 1974).

55. For some examples of the flexibility provided by due process, see note 33, *supra*. When employing due process, the court is permitted to enunciate specific procedural requirements which it determines are necessary as a result of a balancing process. These requirements may range anywhere from very detailed trial-like hearings to no hearing at all. However, when the court bases procedural requirements upon statutory interpretation, the court's latitude is restricted by the precise terms of the relevant statute.

56. For a discussion of the purpose of the public bid law, see text at notes 4-6, *supra*. The public is protected against contracts awarded on the basis of favoritism and contracts involving exorbitant and extortionate prices whenever the awarding agency is prevented from making an erroneous disqualification. Likewise, the balance between the public's interest in having the work completed economically and the interest in quality performance is achieved.

become more hesitant to reject the lowest bid⁵⁷ due to the burden of performing each of the specified procedures and the risk of exposure to liability.⁵⁸

Traditionally, the role of property has been viewed as that of protecting certain private rights in wealth, thus establishing a boundary between public and private power.⁵⁹ When a private individual acts within this area defined as "property," he has a great deal of freedom, and any interference by the government must be justified. It is in this manner that "property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner."⁶⁰ Modern society has witnessed a rapid expansion of the public sector of the economy in which government has emerged as a major source of wealth. The government's distribution of wealth is no longer inconsequential, but constitutes a major source of employment, contracts, and welfare benefits.⁶¹ These valuables dispensed by the government are steadily taking the place of traditional forms of wealth.⁶²

It is only through added safeguards that individuals can be protected against the arbitrary withdrawal of these new forms of wealth at the discretion of awarding authorities, examiners, boards of control, or character committees. If independence, dignity, and pluralism are to find any sanctuary, these new forms of wealth must be recognized as property and protected as such. The Louisiana Supreme Court has taken such a stand in favor of protecting individualism against the whim and caprice of government by shaping specific procedural requirements for disqualification under the public bid law.

Richard Zimmerman, Jr.

57. This may not necessarily hold true since the second lowest bidder can sue the public entity for its failure to disqualify an irresponsible bidder.

58. Judge Friendly stated that the due process explosion has given rise to many questions of major importance to our society. Friendly, *supra* note 16, at 1268. One of the questions he asks may seem particularly appropriate after *Haughton*: "Should the executive be placed in a position where it can take no action affecting a citizen without a hearing?" *Id.*

59. Reich, *supra* note 19, at 771.

60. *Id.*

61. Charles Reich identifies eight forms of government-created wealth: (1) income and benefits; (2) jobs; (3) occupational licenses; (4) franchises; (5) contracts; (6) subsidies; (7) use of public resources; and (8) services. *Id.* at 734-37.

62. *Id.* at 733.