

# Wetland Mitigation Banks: Louisiana Appellate Court Addresses Whether Public Bid Law Applies to the Sale of Credits



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The Court of Appeal of Louisiana (“Court”) was asked to consider whether the Louisiana public bid law applied to the sale of wetland mitigation bank credits. See *Zachary Mitigation Area, LLC v. Tangipahoa Parish Council*, 2017 WL 4215896 (Sept. 21, 2017).

The Tangipahoa Parish Council (“TPC”) argued the public bid law was inapplicable because the wetland mitigation credits constituted intangible property representing a service.

Section 404 of the Clean Water Act 33 U.S.C. § 1344 requires that a permit be obtained from the United States Army Corps of Engineers (“Corps”) for certain activities in jurisdictional waters. A frequent condition of such permits is mitigation of environmental impacts to rivers, streams, or wetlands. The Corps may require that the party proposing the project purchase credits from a mitigation bank or an in-lieu fee program in the same area to compensate for such impacts.

A mitigation bank is generally a wetland, stream or other aquatic resource area that has been restored, established, enhanced or (in certain circumstances) preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under Section 404 of the Clean Water Act. The value of a bank is defined in compensation mitigation credits. The bank’s instrument identifies the number of credits available for sale and an assessment is typically undertaken to certify that the credits provide the required ecological functions. Many banks operate as commercial enterprises selling their credits to permit applicants needing to provide required mitigation.

TPC advertised for bids in May of 2016 in connection with the purchase of wetland mitigation credits needed to expand the Tangipahoa Parish landfill. Plaintiff-Appellant, Zachary Mitigation Area, LLC (“Zachary”) alleged that it was the lowest responsive bidder. Nevertheless, TPC accepted Jamestown Mitigation Bank, LLC (“Jamestown”) alleging it was the lowest bidder.

Zachary subsequently filed a petition seeking a temporary restraining order (“TRO”) preliminary injunction, permanent and mandatory injunction, declaratory judgment, writ of mandamus, and damages.

The lower court granted the TRO prohibiting TPC from awarding a contract or signing a contract with any other bidder other than Zachary.

TPC later filed a Rule to Dissolve the TRO. It alleged that the public bid law did not apply. This was based on the argument that:

“ . . . wetland mitigation credits are intangible property representing a ‘service’ to be performed by the mitigation bank to offset the ecological impact that the development . . . would have to the environment.”

The lower court dissolved Zachary’s TRO and denied its petition for preliminary, permanent, and mandatory injunctive relief, declaratory judgment, writ of mandamus, and damages.

Zachary appealed the lower court’s reasons for judgment.

The Court required that the lower court supplement the record with a final judgment. After the lower court did so, Zachary assigned as errors on appeals:

1. The denial of requested relief and dismissal of Zachary’s suit is erroneous and contrary to law because the public bid law does not allow a public entity to waive requirements for bids after all bids have been received.
2. The ruling of the trial court in determining that public bid law does not apply to mitigation credits is erroneous and contrary to law because there was no evidence to be considered and the parties only had notice of a hearing on Zachary’s preliminary injunction and TPC’s rule to dissolve restraining order.

TPC argued that the Louisiana public bid law does not apply in this instance because the contract at issue is a public service contract.

The Court noted that the Louisiana Supreme Court previously held that the public bid law is intended to apply to “public works” as opposed to public service contracts. It further stated that a public work is defined as the “erection, construction, alteration, improvement or repair of any public facility or immovable property owned, used or leased by a public entity.” As a result, TPC argued that the bid law was meant to regulate the purchase of materials and supplies, or contracts for the construction of public works (to which the contract is stated to not include). The credits were argued to be a service to which the public bid law was inapplicable.

The Court found that the lower court did not abuse its discretion in denying Zachary’s request for preliminary injunction. It further stated that the determination of whether the contract falls under Louisiana bid law would have to be made at the trial on the merits of the permanent injunction and declaratory judgment. Consequently, the potential application of the public bid law to bank credits was not resolved.

The court found that the lower court did not abuse its discretion in denying a preliminary injunction and finding that Zachary failed to carry its burden of proving that it was entitled to relief as a matter of law or that it would likely prevail on the merits.

The Court also addressed a notice issue involving the TRO.

The Court ultimately affirmed the lower court’s denial of Zachary’s request for a preliminary injunction and did not consider the lower court’s granting of TPC’s Rule to Dissolve the TRO. Otherwise, the judgment was vacated and the matter remanded to the trial court for further proceedings.

[A copy of the opinion can be found here.](#)