

IN THE SUPREME COURT OF MISSISSIPPI

WILLIE NELSON D/B/A
NELSON PLUMBING COMPANY

APPELLANT

VS.

CASE NO. 2006-TS-02122

CITY OF HORN LAKE BOARD OF
ALDERMAN ACTING BY AND
THROUGH ITS BOARD OF ALDERMAN

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Donnie White, Alderman-at-Large

Amy Lay, Alderman Ward 1

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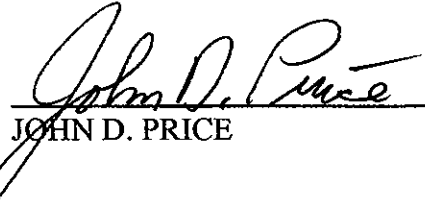
John E. Jones, Jr., Alderman Ward 6

This the 7th day of June, 2007.

Respectfully submitted,

City of Horn Lake

BY:



JOHN D. PRICE

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I. SUMMARY OF ARGUMENT

The law controlling this action is well settled. The Court of Appeals' recent unanimous en banc decision in *Burnett v. Pontotoc Board of Supervisors*, 940 So.2d 241 (Miss. App. 2006) *cert. denied*, 939 So. 2d 805 (Miss. 2006) and the long line of Mississippi Supreme Court decisions relied upon by the Court of Appeals dispatch the Appellant's arguments.

City of Horn Lake issued an advertisement for bids for the construction of the Goodman Road Sanitary Sewer Extension ("Goodman Road Project"). Five companies submitted bids for the Project. Willie Nelson submitted the lowest bid which was \$2,294,035.50. Freeland and Lemm Construction Company submitted the second lowest bid of \$2,298,761.62. The difference between the two bids is \$4,726.12 which is one-fifth of one-percent. In the Instructions to Bidders the City of Horn Lake retained the right to make such investigation as it deemed necessary to determine the ability of the bidder to perform the work. The City of Horn Lake reserved the right to reject any bid if its investigation failed to satisfy it that the bidder was properly qualified to complete the work. The City of Horn Lake had previously contracted with Nelson for a portion of the construction of the City Hall. Nelson failed to perform work under that contract in accordance with the design drawings which caused delay to the City. City of Horn Lake's investigation into Nelson's qualifications revealed seven (7) other businesses or municipalities which had complaints about Nelson's performance or payment. The Horn Lake City Engineer wrote to the Mayor and Board of Aldermen that "[a]fter some research on the various bidders, it appears that the City would be best served by awarding the contract to the second bidder." The Board of Aldermen determined that the second lowest bid was the best bid by a responsible bidder and awarded the contract to Freeland and Lemm Construction Company.

The Board of Aldermen had the authority under both the bid documents and Mississippi law to consider the past conduct of bidders in its determination of the “lowest and best bid.” The record reflects Nelson’s poor past performance under contracts with the City of Horn Lake and others. The board properly exercised its discretion when it concluded that a bid which was within 1/5th of 1% of the lowest bid was the best bid. Under the Instructions to Bidders, the Board of Aldermen was entitled to rely upon its investigation of Nelson and other bidders and the Minutes of the Board adequately explain the Board’s reasoning. Neither the Instructions to Bidders nor Mississippi law required that Nelson be afforded a hearing to challenge the Board’s findings regarding his past poor performance. A deferential standard of review applies to the judicial review of actions of municipal boards. Nelson has failed to meet his burden of clearly establishing that the board’s decision was arbitrary and capricious.

II. ARGUMENT

1. Standard of Review.

The Appellant incorrectly states that the Supreme Court should apply a *de novo* standard of review to the decision of the City of Horn Lake Board of Aldermen. *Canton Farm Equipment, Inc. v. Richardson*, 501 So.2d 1098 (Miss. 1987) (“Judicial review of such equipment purchase decisions is hardly *de novo*. Deference must be given the decisions. . . .”) *Id.* at 1104, fn5. There is a rebuttable presumption in favor of the decision rendered by the board. *Attala County Board of Supervisors v. Miss. State Dept. of Health*, 867 So.2d 1019 (Miss. 2004). The Court should not substitute its judgment or reweigh the facts of the case. *Id.* “[J]udicial intervention is wholly inappropriate merely because the Court, if it were considering the matter *ab initio*, would have accepted a different bid.” *Canton Farm Equipment, Inc. v. Richardson*, 501 So.2d 1098, 1104 fn5

(Miss. 1987). The court is not at liberty to set aside the decisions of the Board of Aldermen unless it was unsupported by substantial evidence and was arbitrary and capricious. *Brandon v. Claiborne County*, 828 So.2d 202 (Miss. 2002). Substantial evidence has been defined as “more than a scintilla of evidence.” *Id.* The Mississippi Supreme Court has defined “arbitrary and capricious” as denoting an act “not done according to reason or judgment, but depending on the will alone” or “done without reason, in a whimsical manner.” *Watkins v. Mississippi Board of Bar Admissions*, 659 So.2d 561, 568 (Miss. 1995). The Appellant has the burden of clearly establishing that the action was arbitrary and capricious. *Hemphill Const. Co., Inc. v. City of Laurel*, 760 So.2d, 720, 723 (Miss. 2000); *Sunland Pub. Co. v. City of Jackson*, 710 So.2d 879, 881-82 (Miss. 1998). Decisions which one would consider to be “fairly debatable are not arbitrary or capricious.”

2. City of Horn Lake properly exercised its discretion in the award of the contract on the Goodman Road Project.

Nelson alleges that the City of Horn Lake violated Miss. Code Ann. § 31-7-13(d) by awarding the contract on the Goodman Road Project to the second lowest bidder. Section 31-7-13(d) provides that the municipality may award a construction contract to the “lowest *and* best bidder.” Emphasis added. The Mississippi Supreme Court has repeatedly held that the governing authority may consider factors other than price in its determination in the lowest and best bid. *Hemphill Construction Co. v. City of Laurel*, 760 So.2d 720, 723 (Miss. 2000); *Parker Brothers v. Crawford*, 219 Miss. 199, 209, 68 So.2d 281, 285 (1953). This point was recently reiterated in the Mississippi Court of Appeals’ decision in *Burnett v. Pontotoc Board of Supervisors*, 940 So.2d 241 (Miss. App. 2006) *cert. denied*, 939 So.2d 805 (Miss. 2006). The Court stated:

The Mississippi Supreme Court has recognized that public authorities may, in making a determination of whether a bid is the lowest and best, take into consideration factors such as the bidder’s honesty and

integrity, the bidder's skill and business judgment, the bidder's experience and facilities for carrying out the contract, the bidder's conduct under previous contracts and the quality of work previously done by the bidder. 940 So.2d at 243.

The City of Horn Lake exercised its authority to consider items other than simply price when it concluded that the second lowest bid was the best bid. The Minutes of the City of Horn Lake reflect the following:

WHEREAS, the Mayor and Board of Aldermen of the City of Horn Lake, Mississippi (the "Governing Body") advertised for bids for the construction of the Goodman Road Sanitary Sewer Extension Project (the "Project") and did receive and open bids at a public meeting held on July 1, 2005; and

WHEREAS, five (5) companies submitted bids for the Project, with Nelson Plumbing Co. submitting the lowest base bid with Alternative A in the total amount of \$2,294,035.50, and Freeland and Lemm Construction Company submitting the second lowest base bid with Alternative A in the total amount of \$2,298,761.62; and

WHEREAS, the City has received numerous complaints about Nelson Plumbing Co., including complaints from Peterson Concrete Tank Co. (Little Rock, AR); Memphis Road Boring Co., Inc.(Memphis, TN); Elliott & Britt Engineering, P.A. (Oxford, MS); Tencarva (Memphis, TN); Allen & Hoshall (Memphis, TN); Town of Walls, MS; and Meter Service and Supply Co. (Memphis, TN); and

WHEREAS, the City previously contracted with Nelson Plumbing Co. for a portion of the construction of the current City Hall (the "City Hall contract"); and

WHEREAS, Nelson Plumbing Co. failed to perform work under its City Hall contract in accordance with the contract documents and the design drawings, which resulted in delay and/or damages to the City and other City Hall contractors.

NOW, THEREFORE, BE IT RESOLVED BY THE GOVERNING BODY AS FOLLOWS:

SECTION 1. That all of the findings of fact made and set forth in the preamble to this resolution shall be and the same are hereby

found, declared and adjudicated to be true and correct.

SECTION 2. That under the power and authority granted by the Laws of the State of Mississippi and particularly under Title 31, Chapters 5 and 7 of the Mississippi Code of 1972, as amended, and particularly Section 31-7-13, as amended, and pursuant to the Contract Documents and Bid Specifications for the Project and based upon the findings of fact made and set forth above, the Governing Body hereby finds that Freeland and Lemm Construction Company's base bid with Alternate A in the total amount of \$2,298,761.62 for the Goodman Road Sanitary Sewer Extension Project is the lowest and best bid.

SECTION 3. That the complaints received and noted from the aforementioned entities are hereby incorporated into and made a part of this resolution and shall be maintained in the City's Minute file. That the City Hall construction documents of the City's architect on the City Hall project (Johnson, Bailey, Henderson, McNeel (Southaven, MS; Memphis, TN)), the City's construction manager on the City Hall project (Webb Building Corp. (Memphis, TN)), and the City's Attorney, relative to issues concerning Nelson Plumbing Co. on the City Hall project, but excluding any document protected by any "privilege" provided by law, are hereby incorporated into and made a part of this resolution.

SECTION 4. That the unit price construction contract for the Goodman Road Sanitary Sewer Extension Project with Additive Alternate A shall be, and it is hereby awarded to Freeland and Lemm Construction Company in the current estimated amount of \$2,298,761.62 with the final cost to be determined by the quantities necessary and actually used to comply with the plans and specifications of the unit price contract. That the contract shall be in substantially the same form as contained in the Contract Documents and Bid Specifications for the Project, and the Mayor shall be, and he hereby is authorized to execute such contract upon approval by the City Attorney's office.

The vote of the Board of Aldermen was unanimous. The Mississippi Supreme Court has held a city is vested with discretion in determining the responsibility of a bidder. *Parkers Brothers* 68 So.2d at 285. The City of Horn Lake properly exercised its discretion in making its determination that Nelson was not the "best" bidder.

The facts in the instant case are remarkably similar to those contained in *Burnett v. Pontotoc County Board of Supervisors*, 940 So.2d 241 (Miss. App. 2006) *cert. denied*, 939 So.2d 805 (Miss. 2006). In *Burnett*, the Board of Supervisors solicited and received four bids for a contract for the renovation of the Courthouse. The Board of Supervisors awarded the contract to the second lowest bidder on the basis that it submitted the best, though not the lowest bid. In *Burnett*, the record showed that the Board of Supervisors contacted Burnett's references and some of the references for the lowest bidder were "very negative" and that overall, the responses indicated that Burnett's work was mediocre. The Circuit Court denied Burnett's challenge of the award recognizing that the Board was entitled to take these factors into consideration in making its decision as to which company had submitted the lowest and best bid. The Mississippi Court of Appeals affirmed the decision of the Pontotoc County Board of Supervisors and the Circuit Court of Pontotoc County in finding that the Board of Supervisors did not act arbitrarily and capriciously and that the Board was free to consider the experience, skill and reputation of the competing firms in determining which bid was the "lowest and best."

Another factor the Court of Appeals relied upon was the fact that there was only a 2.35% difference between the lowest bid and the accepted bid. The Court of Appeals stated "especially in light of the fact that there was a mere 2.35% difference between the bids, we cannot find that the Board of Supervisors acted arbitrarily and capriciously. . . ." In the instant case, Nelson's bid was \$2,294,035.50. Freeland and Lemm's bid was \$2,298,761.62. The difference between the two bids was only \$4,726.12 which is 1/5 of 1%. If the Court of Appeals considered a difference of 2.35% difference to be de minimis a difference of 1/5 of 1% is also insignificant.

Nelson fails to cite the *Burnett* case which presents the most recent analysis of the law in this

area. The City of Horn Lake respectfully submits that application of the law discussed in the *Burnett* case to the record before the Court compels the affirmance of the Board of Aldermen's decision.

3. The City of Horn Lake had not only the authority but the responsibility to consider the Bidder's past conduct.

A. The authority to consider Bidder's qualifications is created by state law.

The Supreme Court has held that the governing authority not only *may* consider the contractor's reputation and past experience but *should* consider such factors. In *Parker Brothers v. Crawford*, 219 Miss. 199, 68 So.2d 281 (1953), the Mississippi Supreme Court stated that public authorities have "discretionary power to pass upon the honesty and integrity of the bidder necessary to a faithful performance of the contract-upon his skill and business judgment; his experience and his facilities for carrying out the contract; previous conduct under other contracts; and the quality of pervious work-as well as his pecuniary ability, and when that discretion is properly exercised the Courts will not interfere. All matters bearing upon the likelihood that the contract will be promptly and efficiently performed bear upon the question of responsibility of bidders and *may* and *should* be considered in determining who is the lowest responsible bidder." Emphasis added. *Id.* 285.

B. The authority to consider the Bidder's qualifications is also embodied in the Bid Documents.

Nelson argues that the City of Horn Lake considered criteria not included in the Instructions to Bidders in the determination of the "lowest and best" bid. Nelson ignores Paragraph 20 of the Instructions to Bidders which provides:

Qualifications of Bidder: Owner's Rights

The Owner may make such investigation as it deems necessary to determine the ability of the Bidder to perform the work, and the Bidder shall furnish to the Owner all such information and data for this purpose as the Owner may request. The Owner reserves the right

to reject any bid if the evidence submitted by or investigation of such Bidder fails to satisfy the Owner that such bidder is properly qualified to carry out the obligations of the Contract and to complete the work contemplated therein. R. at 76.

Both the Instructions to Bidders and the Mississippi case law granted the City of Horn Lake the authority to consider extrinsic evidence to determine the qualifications of the bidder. Nelson's argument that the City considered criteria not included in the Instructions to Bidders is without merit.

Next, Nelson argues that his past delinquency in payment of materialman are irrelevant because the City of Horn Lake would be protected by a payment bond. Again, Nelson's argument is exposed when illuminated in the light of Mississippi case law. In *Parker Brothers* the Mississippi Supreme Court stated:

The bidder to whom a contract for public work is to be awarded under a provision that such contracts shall be let to the "lowest responsible bidder" is one who is responsible and lowest in price on the advertised basis. Such a requirement does not compel the authorities to award a public contract to the lowest bidder who is financially responsible or who is able to produce responsible sureties. The term "responsible" as thus used is not limited in its meaning to financial resources and ability. What the public desires is a well-constructed work, for which a lawsuit even against a responsible defendant is a poor substitute; and authorizations of this kind are held to invest public authorities with discretionary power to pass upon the honesty and integrity of the bidder necessary to a faithful performance of the contract – upon *his* skill and business judgment; *his* experience and *his* facilities for carrying out the contract; *previous conduct under other contracts*; and the *quality of previous work* – as well as his pecuniary ability, and when that discretion is properly exercised the courts will not interfere. All matters bearing upon the likelihood that the contract will be promptly and efficiently performed bear upon the question of responsibility of bidders and may and should be considered in determining who is the lowest responsible bidder.

Parker 68 So.2d at 284-285. Emphasis added.

Just because Nelson is able to produce a payment bond (i.e. responsible sureties), does not mean he

is a responsible bidder. Moreover, Mr. Nelson's past deficiencies and irresponsibility was not limited to non-payment of materialman. The record contains a memorandum from the construction manager on the City Hall project to the Horn Lake's attorney which contains the following:

At this time, it is clearly evident that the Plumbing Design Consultant has determined that Nelson's Under Slab Plumbing Rough-In is not in accord with the Contract Documents and is therefore non-conforming. As you can see, we have made an effort to have this Trade Contractor correct this non-conforming work without success.
R. at 144.

More details regarding Nelson's default on the City Hall project are found in the Record at Pages 125 through 228. City of Horn Lake's reliance on its past experience with Nelson cannot be construed to be arbitrary or capricious.

The City of Horn Lake's experience with Mr. Nelson was not unique. Mr. Nelson was declared in default under a contract for Pine Bluff's sewer improvement in October 2004. The record contains a letter from the attorney for the City of Pine Bluff notifying Mr. Nelson of non-compliance with the specifications of that contract. R. at 118-119.

Nelson argues that the City of Horn Lake's past unfavorable experiences with Nelson are too remote in time to be relevant. The City Hall contract was awarded in December 1998 and Nelson's work was performed in 1999 and 2000. R. at 75 through 176. Nelson's time line is off by three to four years. The 1998 City Hall contract and the work Nelson performed in 1999 and 2000 under that contract was the City of Horn Lake's last experience with Nelson. The City's own experience with the contractor is the most relevant to its determination of Nelson's performance capabilities. Nelson seeks to rely upon a federal regulation which imposes a three year limitation for past performance evaluation. Obviously, such Federal regulations do not apply to the City of Horn Lake and no Mississippi courts have imposed such an arbitrary restriction on the review of past performance.

4. The Meeting Minutes of the Board of Aldermen adequately document the Board's rationale for exercising its discretionary authority to reject the lowest bid.

Nelson argues that Horn Lake's minutes do not provide adequate explanation to support its award of the contract. Again, the Court of Appeals' decision in *Burnett v. Pontotoc County Board of Supervisors* is illuminating. There the Court of Appeals upheld the award of the courthouse renovation contract based upon the narrative contained in the order adopted by the Board of Supervisors which revealed that an investigation into the lowest bidder's performance history indicated that his "work was mediocre." The Court of Appeals affirmed the Board of Supervisors' award to the second lowest bidder whose bid was 2.35% over the low bidder. Note that the Board of Supervisors order in the *Burnett* case did not explain how it was worth an extra \$22,000 to avoid the mediocrity of the lowest bidder. Nevertheless, the Court of Appeals found the acceptance of the second lowest bid and the explanation contained in the Board's minutes to be adequate.

Here, the City of Horn Lake's minutes reflect that the lowest bid was \$2,294,035.50 and the second lowest bid was \$2,298,761.62. The minutes reflect the numerous complaints about Willie Nelson from Peterson Concrete Tank Company, Memphis Road Boring Company, Inc., Elliott & Britt Engineering P.A., Tencarva, Allen & Hoshall, Town of Walls, and Meter Service and Supply Co. The minutes also reflect that Nelson Plumbing failed to perform work on the Horn Lake City Hall project in conformance with the design drawings which resulted in delay and damages to the City and the City Hall contractors. Obviously, the City Horn Lake found it worthwhile to pay an extra 1/5 of 1% to avoid further problems with Willie Nelson as experienced by the City Horn Lake and others in the past. The rationale as explained by the Horn Lake Board of Aldermen is more detailed than the Minutes of the Pontotoc County Board of Supervisors in the *Burnett* case. The City of Horn Lake's Board of Aldermen adequately explained why it chose to accept the second

lowest bid. In the circuit court's Order Affirming Decision of Board of Aldermen, the Court stated that "the incorporation of all of the Complaints against Nelson and the history of Nelson and Horn Lake in the minutes was sufficient to meet the requirements of the statute." R. 318.

Nelson seeks to impose a requirement of mathematical certainty in the determination of what is the "lowest and best bid." Nelson argues that the City of Horn Lake had to compute the additional cost which it would have incurred in the supervision of a less competent contractor. Nelson implicitly contends that if the additional cost of supervision would not have exceeded the difference between the lowest and the second lowest bid (in this case only \$4,726.12) the municipality would be required to award the contract to the less competent contractor. This argument ignores *Parker Brothers* and its progeny wherein this Court has repeatedly held that the governmental authority may exercise its discretion in determining which bid is "best" based upon its past experience with the bidders and the other factors discussed in the previous section above. Neither Section 31-7-13 or any of the cases interpreting it have required that a dollar value be assigned to the cost of the inconvenience, the disruption and the delay which may be caused by a less qualified contractor.

Nelson argues that the use of the words "detailed calculations" in § 31-7-13 imposes a requirement for a mathematical explanation for the determination of the lowest and best bid. One of the definitions of "calculate" is "to ascertain or determine by reasoning." Websters Unabridged Dictionary. The minutes of the Board of Aldermen do reflect the reasoning of the Board. There is no requirement that the Board of Aldermen explain the exercise of its discretion in purely mathematical terms.

5. The City of Horn Lake Board of Aldermen did not violate Nelson's due process rights.

Nelson's bid submission did not create a contractual property right to the Goodman Road

Project. In its Instructions to Bidders, the City of Horn Lake reserved the right to reject any bid if “investigation of such Bidder fails to satisfy the Owner that such Bidder is properly qualified” R. at 76. Being the low bidder, in and of itself, could not create a property right in Nelson when the City had reserved the discretionary authority to reject the bid of any unqualified bidder. The record contains substantial evidence relied upon by the Board of Aldermen to arrive at its decision. R. at 103, 138-141, 144, 147, 149, 151, 175- 176, 184, 188-189, 195, 223, 225-227.

Nelson argues that there was a denial of due process because Horn Lake did not conduct an investigation of other bidders. This argument is not supported in the record. The record contains a memo from the City Engineer which states: “[a]fter some research on the **various bidders**, it appears that the City would be best served by awarding the contract to the second bidder.” R. at 106. Emphasis added. The record reflects that the various bidders, not just Nelson, were researched.

Nelson argues that his past history of nonpayment of materialmen may have been justified and he was not afforded an opportunity to explain the delinquencies. Nelson’s undesirable past practices were not limited to nonpayment of materialmen. The City of Horn Lake’s recent history with Nelson on the City Hall Project show he failed to comply with the design drawings. R. at 141. Also, on the Pine Bluff Project he failed to comply with contract specifications. R. at 118-119. Under the Instruction to Bidders, the Board of Aldermen were entitled to rely upon the City’s investigation of Nelson and the other bidders.

Finally, Nelson cites the U.S. District Court’s opinion in *Shepard v. City of Batesville*, 2007 WL 108288 (N.D. Miss. 2007) to support his argument that he had a vested property interest in a contract for the Goodman Road Sanitary Sewer Extension. Brief of Appellant pp. 15-16. The Shepard case is not analogous. In *Shepard* the aggrieved contractor was actually awarded contracts

as the lowest and best bidder. The City of Batesville was found to have ignored the existing contracts and subsequently contracted with others to provide the work which was encompassed in the existing contract with Shepard. The district court noted that a bidder has a constitutionally protected property interest when it was actually awarded a contract and then deprived of it. The district court stated “there is absolutely no question that the Plaintiff was *awarded* the contracts. . . .” Emphasis added. In the instant case Nelson was never awarded a contract. Although his bid was the lowest by 1/5 of 1% it was not deemed to be the best bid due to his poor performance on past contracts with the City of Horn Lake and others. Since Nelson’s bid was not the best and since he was never awarded a contract, the mere fact that his bid was the lowest monetarily did not create a property interest. Recall that the City of Horn Lake’s Instructions to Bidders provided that the City reserved the right to reject any bid if the City was not satisfied that the bidder was properly qualified.

Nelson is seeking to create an entitlement based solely on the fact that his bid was the lowest by a fraction of 1%. Nelson either intentionally or unintentionally misapprehends both the Instructions to Bidders and Mississippi law. Under both the Instructions to Bidders and Mississippi law, the City of Horn Lake had the authority to consider Nelson’s poor past performance in reaching its decision to award the contract to the second lowest bidder. If Nelson wants to assign blame for his failure to be awarded the contract, he need look no farther than his own poor performance on past contracts.

Nelson cites dicta from an Idaho case. Horn Lake respectfully submits that the controlling law comes from Mississippi and not Idaho. Why scour cases from Idaho’s appellate courts while ignoring the recent pronouncement in *Burnett v. Pontotoc County Board of Supervisors*, 940 So.2d 241 (Miss. App., 2006) *cert. denied* 939 So.2d 805 (Miss. 2006). Either Nelson was unaware of the

Burnett case or chose to ignore it because the case exposes the frailty of his arguments.

6. Nelson Plumbing is not entitled to damages or attorneys' fees.

The City of Horn Lake had the authority and properly exercised its authority to select the bid of Freeland and Lemm as the lowest and best bid. Willie Nelson has failed to meet his burden of establishing that the award was arbitrary and capricious. The validity of the decision of the Board of Aldermen cannot be set aside and therefore there is no basis for awarding damages to Willie Nelson.

7. Circuit Court properly excluded evidence which appellant failed to include in Bill of Exceptions.

Nelson argues that the Circuit Court erred by refusing to include a press release from OSHA as a part of the record.¹ Under § 11-51-75 the Circuit Court was bound to consider this matter as an appellate court based upon the bill of exceptions. The Mississippi Supreme Court has held that on such appeals, the Circuit Court should not consider extraneous evidence outside of the bill of exceptions. *East Neshoba Vocational High School Bonds v. Board of Supervisors*, 213 Miss. 146, 56 So.2d 394 (1952). ("An appeal from a municipal board to a Circuit Court can be heard only on a bill of exceptions embodying the facts and decision of the board. ... It is jurisdictional under the statute.")

The bill of exceptions was prepared by counsel for Nelson. R.5-14. Counsel for Nelson did

¹As a preliminary matter, Appellant, mischaracterizes the OSHA document as a "Bulletin." The document on its face states that it is an "OSHA Regional News Release." R. 302. The News Release was found in OSHA's archive which contains the following caveat:

Notice: This is an OSHA Archive Document and no longer represents OSHA Policy. It is presented here as historical content, for research and review purposes only. R. 302.

not include the OSHA press release in its bill of exceptions. Moreover, the OSHA press release was not mentioned in Nelson's original Appellate brief to the circuit court. The press release, which was apparently printed off of the internet on July 28, 2006, was attached as an exhibit to Nelson's Rebuttal Brief filed on August 10, 2006. R. 282-305. A rebuttal appellate brief is not the appropriate place to interject for the first time a new factual allegation. Nelson never requested leave of court to amend his bill of exceptions and never undertook to amend his bill of exceptions to include the OSHA press release. Based upon § 11-51-75 and the cases interpreting it, the circuit court correctly concluded that it could "only consider the case made by the bill of exceptions. This is the only record before the Court as an appellate court." R. 318. Finally, the circuit court found that the OSHA press release would not affect the Court's conclusions that the decision of the City of Horn Lake Board of Aldermen was not arbitrary and capricious. R 318.

III. CONCLUSION

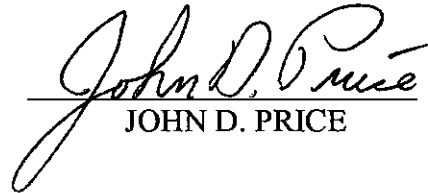
The City of Horn Lake had the discretionary authority to pass upon the honesty and integrity of the bidder necessary to a faithful performance of the contract and upon his skill and business judgment. Based upon the record, The City of Horn Lake's Board of Aldermen properly exercised its authority to consider the qualifications of Willie Nelson and to award the contract to the best bidder. The decision of the Board of Aldermen of the City of Horn Lake and the decision of the circuit court of Desoto County should be affirmed.

Dated this the 7th day of June, 2007.

Respectfully submitted,

City of Horn Lake

BY:


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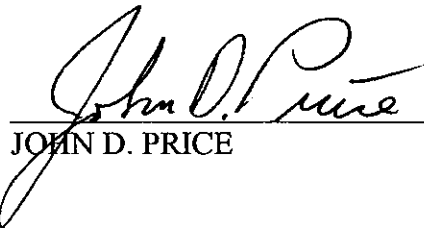
CERTIFICATE OF SERVICE

I, John D. Price, one of the attorneys for the City of Horn Lake, do hereby certify that I have this day, by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to following:

Christopher Solop
Joseph M. Gianola, Jr.
Robinson Biggs Ingram Solop & Farris, PLLC
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Jackson, Mississippi 39201

Honorable Robert P. Chamberlin
Circuit Court Judge
P. O. Box 280
Hernando, MS 38632

Dated this the 7th day of June, 2007.



JOHN D. PRICE