

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-02122

**WILLIE NELSON d/b/a
NELSON PLUMBING COMPANY**

APPELLANT

V.

**CITY OF HORN LAKE BOARD OF
ALDERMEN ACTING BY AND THROUGH
ITS BOARD OF ALDERMEN**

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

**REBUTTAL BRIEF OF THE APPELLANT,
WILLIE NELSON d/b/a NELSON PLUMBING COMPANY**

ORAL ARGUMENT REQUESTED

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I. Clarification of Standard of Review

The City of Horn Lake ("City" or "Horn Lake") argues for application of a single standard of review to the issues in this appeal. That is incorrect. This appeal involves multiple issues, including statutory application and the admissibility of evidence. A single standard of review does not control.

This appeal puts the City's compliance with *Miss. Code Ann.* § 31-7-13 (d)(i) squarely at issue. This appeal therefore presents an issue of law, to which this Court always applies a *de novo* standard of review. *A&F Props., LLC v. Madison County Bd. of Supervisors*, 933 So.2d 296, 300 (Miss. 2006). Further, to the extent the City's compliance with *Miss. Code Ann.* § 31-7-13 (d)(i) involves statutory interpretation, this Court's review is also *de novo*. "Matters regarding statutory interpretation are reviewed *de novo*." *Weiner v. Meredith*, 943 So.2d 692, 694. (Miss. 2006). Finally, this appeal also puts at issue whether the Circuit Court properly excluded evidence which is also an issue of law subject to *de novo* review.

The only issue on appeal to which a deferential standard of review applies is the issue of whether the City's purported investigation of "various bidders" prior to rejection of Appellant's low bid was arbitrary or capricious. Only to that issue does the deferential standard of review asserted by the City apply.

II. A Public Authority's Discretion to Consider Non-Price Factors in Determining the "Lowest and Best Bidder" Must Comply with *Miss. Code Ann.* § 31-7-13 (d)(i), and the City of Horn Lake's Indisputably Does Not

Much of the City of Horn Lake's argument in favor of the award to the higher bidder, Freeland and Lemm Construction Co. ("Freeland"), focuses on the right of public authorities to make award to other than the lowest bidder and to take non-price factors into consideration when making an award decision. Appellant Nelson Plumbing

Company ("Nelson") has never disputed their authority to do so. Nelson does not dispute that award can be made to other than the lowest actual bidder. Nelson does not dispute that in determining who the "lowest and best bidder" is that non-price factors can be considered. What Nelson disputes is how Horn Lake exercised that authority when it rejected Nelson's lowest bid. Nelson disputes that City complied with the express requirements of *Miss. Code Ann. § 31-7-13 (d)(i)*:

. . . If any governing authority accepts a bid other than the lowest bid actually submitted it shall place on its Minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid, including the dollar amount of the accepted bid and the dollar amount of the lowest bid.

The City's arguments miss the critical point. Even if the City had the right to make award to other than Nelson as the lowest actual bidder, its award to Freeland must still be determined to be the lowest and best.

Merely showing, on the basis of a tainted and results-oriented "research of various bidders" that Freeland's bid was allegedly "the best" does not show that it was also the lowest. The statutory requirement for making award—if award is made—to the lowest and best bidder is not relaxed in any way merely because the public authority decides it does not want to do business with the lowest actual bidder and seeks to discredit its reputation and skills so that it can award to a higher bidder. *The awardee (Freeland here) must still be the lowest in addition to the best bidder.*

The statute required Horn Lake to demonstrate that Freeland was the true "lowest bid" even though Nelson's bid, on its face, was the lowest-dollar bid actually submitted. This is the purpose of the "detailed calculations" requirement of § 31-7-13(d)(i) which is required for "...showing that the accepted bid was determined to be the lowest and best bid...." § 31-7-13(d)(i). Indisputably, the record shows that no such

calculations were made by the City. Indisputably, then, the City did not demonstrate it made award to the lowest and best bidder when it picked Freeland.

In its brief, the City presents *Billy E. Burnette, Inc. vs. Pontotoc County Board of Supervisors*, 940 So.2d 241 (Miss. Ct. App. 2006), *cert den.* 939 So.2d 805 (Miss. 2006) as controlling authority, arguing that *Burnette* establishes what satisfies the “detailed calculations” requirement. However, in that appeal, what is required in the way of “detailed calculations” specified in § 31-7-13(d)(i) was not the issue before the Court. It is not and should not control here, as the appellant in that case apparently did not challenge Pontotoc County’s compliance with the statute that Nelson requests this Court apply.

In *Burnette*, Pontotoc County received bids for a construction project. A non-resident contractor, Billy E. Burnette, Inc. (“Burnette”) submitted the lowest bid. The next-lowest bid was submitted by Hooker Construction Company, Inc. (“Hooker”), a resident Mississippi contractor, and it was \$22,000.00 higher. Pontotoc County’s Board of Supervisors determined that both bids were substantially equal and therefore Hooker would be entitled to award under Mississippi’s “resident contractor” statute. However, the Board also directed the Project Architect to contact references for both Burnette and Hooker. Burnette’s references were not as good as Hooker’s. Award was made to Hooker. Burnette appealed to the Circuit Court, which upheld the award.

Burnette appealed again. The decision by the Court of Appeals states: “The primary thrust of Burnette’s argument ... is that the board of supervisors awarded the contract to Hooker for the sole reason that Hooker was a resident contractor.” *Id.* at 244. Thus, the issue in *Burnette* was *not* the issue before this Court in the instant appeal. Whether the Pontotoc County Board of Supervisors complied with § 31-7-

13(d)(i) was apparently not presented or preserved for appeal. The Court of Appeals upheld the Board's decision as "not arbitrary and capricious" even though Hooker's bid was \$22,000.00 higher than Burnette's, but that is not the same as a determination on the issue, as presented in this appeal, of what constitutes "detailed calculations" as part of the decision to make award to a higher bidder as the "lowest and best bidder".

The City argues that Nelson seeks to impose a "mathematical certainty in the determination of what is the 'lowest and best bid.'" Appellee's Brief at p. 12. Nelson does not seek that certainty; the law does: "[i]f [the] governing authority accepts a bid other than the lowest bid actually submitted it shall place on its Minutes detailed calculations and narrative summary showing that **the accepted bid was determined to be the lowest and best.**" *Miss. Code Ann.* § 31-7-13 (d)(i) (emphasis added).

Whether the difference between bidders is one cent or ten thousand dollars, there is only one lowest bidder. While there may be subjective elements in determining why a bidder is "best", e.g., consideration of non-price factors, there must still be a quantification of "the lowest" before award can properly be made. In fact, determining whether a bidder is the lowest is a determination of mathematical certainty. Thus, there is no merit to the assertion that no mathematical certainty in determining "the lowest and best" bidder is required by § 31-7-13(d)(i)—it says so in the statute.

Also, by offering a Webster's definition of "calculate" the City suggests that § 31-7- 13(d)(i) is subject to construction. However, looking at the plain and unambiguous words of the statute as well as its clear and unambiguous meaning, there should be no resort to statutory construction, and courts are bound to enforce the statutes as written. As recognized in *City of Durant v. Laws Constr. Co., Inc.*, 721 So.2d 598 (Miss. 1998), "It is well settled law in Mississippi that when a statute is clear and

unambiguous then there is no room for construction.” [Citation omitted]. “When the language used by the legislature is plain and unambiguous, such as the language here, and where the statute conveys a clear and definite meaning, as here, the Court will have no occasion to resort to the rules of statutory interpretation. [Citation omitted]. The courts cannot restrict or enlarge the meaning of an unambiguous statute.” *Id.* at 602

“Detailed calculations” as used by the Legislature in § 31-7-13(d)(i) require mathematical computations, and such mathematical computations must include, as set forth in the statute, “the dollar amount of the accepted bid and the dollar amount of the lowest bid.” That math—as opposed to narrative reasons, as the City opines—is required cannot seriously be questioned, as the entire purpose of the exercise under § 31-7-13(d)(i) is to show that the accepted bid was determined to be not only the best but also the lowest.

The Legislature also says that more calculations are required than simply showing the arithmetical difference between the actual lowest bid submitted and the amount of the bid on which award was made. Requiring that calculation alone would only show how much more was paid to the awardee over the lowest-dollar bidder, and that is not what the Legislature wanted. The Legislature wrote § 31-7-13(d)(i) so that those who spend public money have discretion to determine who is lowest and best but must show who is lowest and best by applying math to their non-price considerations.

The City knows it fudged. It chose to ignore the requirement for award to the lowest and best bidder by making up a long record of old, unconfirmed allegations against Nelson and passing off any need to show that Freeland was actually the lowest bidder by saying the difference in their bids was so *de minimus* as to exempt them from performing the “detailed calculations” required by § 31-7-13(d)(i).

The City also wants this Court to hold that what they put in their minutes—(that litany of old, unconfirmed allegations) satisfies the requirement for “detailed calculations” because their conduct would satisfy a Webster’s Dictionary definition of “calculate”. It is the statute, not Webster’s, that must be satisfied. The City did not comply with the statute. If all that is required under § 31-7-13(d)(i) were the narrative summary of why one bidder is preferred over another bidder, then there would be no requirement that award still be made to the “lowest and best bidder”. Without making a quantitative connection between the non-price considerations and the bid prices as submitted, there is no way to demonstrate that a public entity has made award to the lowest and best bidder.

III. The City of Horn Lake’s Purported “Research of Various Bidders” Cannot Be Found Anywhere in the Record – The Record Only Shows A One-Sided Witchhunt by the City Engineer of Nelson

The only applicable benefit that can be gleaned from *Burnette, supra*, is the fact that the Pontotoc County Board of Supervisor’s investigation included inquiries by the Project Architect into the responsibility of *both* Burnette’s and Hooker’s past work performance. Unlike Horn Lake’s Board of Aldermen, the Pontotoc County Board of Supervisors investigated *both* bidders and placed its findings in the minutes.

Although Horn Lake claims the facts of *Burnette* are “remarkably similar” to the facts in the instant appeal, they are not. This factual distinction is crucial in determining whether a public authority abused its discretion in awarding the contract to the next lowest bidder. Here, there is no evidence whatsoever of any “research of various bidders” in the record. The only “evidence” is the statement of the City’s own Engineer—not the Project Architect hired by the City of Horn Lake and otherwise responsible for administering the Project—that research was performed. The research

and responses to whatever inquiries were allegedly made, however, are not found in the record.

In the very authority cited by Horn Lake and in older authorities like *Parker Bros. v. Crawford*, So.2d 281 (Miss.1953), the awarding entities made inquiry into both bidders' past performance. Horn Lake did not. How, then, can their determination to award to Freeland *not* be arbitrary and capricious? By what fair and impartial "reason or judgment", to use one of the standards enunciated by Horn Lake in its brief, would the City not have made inquiries into Freeland's past performance? Is an investigation only into the lowest bidder's background but not the higher bidder's background not done in "a whimsical manner"? If what the City of Horn Lake did to find evidence to justify rejecting Nelson's bid counts as a fair and impartial manner of jumping over to a higher awardee, then neither bidders nor taxpayers have any hope of ensuring that the public bid laws are (1) meant to protect them and ensure a level playing field and (2) enforceable.

IV. Nelson's Substantive and Procedural Due Process Rights Attached When It Submitted the Lowest, Responsive Bid

The City argues that because the contractor in *Shepard vs. City of Batesville*, 2007 WL 108288 (N.D. Miss. 2007) was given one award of several for which he was also the lowest that it is distinguishable from this case. However, that is a distinction without a difference. In *Shepard*, the aggrieved contractor complied with all forms and particulars for being eligible for award on several commodities contracts. According to the facts set forth in the opinion, Nelson fails to see how any distinction with a difference can be made between *Shepard* and this case. The opinion references the following facts:

During the years 2003 and 2004, the Plaintiff submitted bids on public contracts with the Defendant City of Batesville. During those years, the Plaintiff was the lowest and best bidder on several contracts and the alternate bidder on other contracts. Despite being the lowest and best bidder, the Plaintiff received only one job during those two years. The other [bidders] in this case received multiple contracts from the City of Batesville on those same jobs even though they were not the lowest and best bidder and at times, were not the alternate bidder.

Id. at 1 [bracketed material added]. The mere fact that the contractor in *Shepard* was actually awarded one contract is a distinction without a difference. The contractor in *Shepard* challenged the City of Batesville's failure to make award on those several bids on which he was the also lowest and best bidder but the City of Batesville made award to other bidders instead.

Here, Nelson challenges the City of Horn Lake's refusal to make award to Nelson as the lowest and best bidder. Just like the contractor in *Shepard*, due process right attached to Nelson as the lowest, responsive bidder. Whether Nelson is the victim of one wrongfully deprived contract or several, as was the contractor in *Shepard*, makes no difference. Nelson's rights attached once he submitted a bid that was the lowest and complied with all forms and particulars required for an acceptable bid. Accordingly, Nelson was entitled to due process before its award was taken away by the City.

V. Conclusion

Nelson Plumbing Company seeks a reversal of the Circuit Court's decision to affirm the award to Freeland and Lemm Construction Co. For the reasons set forth above and presented in its Initial Brief to this Court, the City of Horn Lake's award decision violates *Miss Code Ann.* § 31-7-13(d)(i). Further, its failure to conduct a fair and impartial review of both bidders' backgrounds demonstrates that its rejection of Nelson's bid was arbitrary and capricious, as the process why which it made its record

for rejection was not done according to reason, judgment, or fairness. As the lowest bidder, Nelson acquired due process rights which the City violated by refusing to permit any hearing or opportunity by Nelson to respond. Accordingly, the City of Horn Lake's award was improper and Nelson is entitled to damages and other relief as set forth in its Initial Brief.

Even if the Court were to consider the *Burnette* decision, it would quickly determine the opinion is factually distinguishable and fails to squarely address any of the issues Nelson has raised in this appeal. Since the *Burnette* decision addresses different legal issues and factual circumstances than those before this Court, the decision cannot be used to absolve Horn Lake from its arbitrary, capricious and unlawful conduct.

THIS the 25th day of June, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

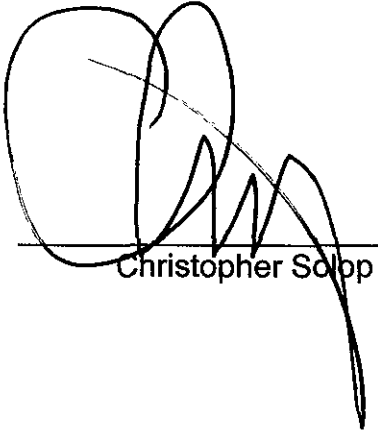
I, Christopher Solop, one of the attorneys for Willie Nelson d/b/a Nelson Plumbing Company, hereby certify that I have this day caused to be sent, via United States Mail, postage pre-paid, the above and foregoing document to the following:

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THIS the 25th day of June, 2007



Christopher Solop