

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-TS-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

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

ORAL ARGUMENT 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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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This the 11 day of May, 2007.

Respectfully submitted,

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I. STATEMENT OF ISSUES

The issues in this appeal are set forth by Appellant, Willie Nelson d/b/a Nelson Plumbing Company ("Nelson") as follows:

- A. Whether the City of Horn Lake had the right to reject Nelson's low bid for the Goodman Road Sanitary Sewer Extension ("Project") for the reasons set forth in its Resolution #09-07-05 unanimously adopted by the City's Board of Aldermen on September 20, 2005.
- B. Whether the City of Horn Lake violated *Miss. Code Ann.* § 31-7-13(d)(i) by awarding the contract for the Goodman Road Project to the second low bidder, Freeland and Lemm Construction, Co. ("Freeland") without placing on its Minutes "detailed calculations" showing that Freeland's second low bid was the "lowest and best bid."
- C. Whether Nelson's position as the lowest, responsive bidder, created a property interest, i.e., a right to award of a contract and, if so, whether the City of Horn Lake violated Nelson's constitutional right to due process rights by rejecting Nelson's lowest bid without notice and an opportunity to present all lawful evidence in defense of adverse allegations asserted by the City of Horn Lake and others from whom comments were solicited.
- D. Whether the City of Horn Lake acted arbitrarily and capriciously when it embarked on an investigation of Nelson's performance and payment history to deprive Nelson of its right to the award but made no investigation of Freeland before it awarded the Project to Freeland.
- E. Whether it was error for the Circuit Court to exclude from the record a copy of an Occupational Health and Safety Administration report fining awardee Freeland nearly \$100,000 for intentionally violating safety regulations that resulted in the death of a construction worker.
- F. Whether the individual members of the Board of Alderman for the City of Horn Lake are personally liable for damage due to the unlawful award of the Goodman Road Project to Freeland and Lemm Construction, Co.
- G. Whether Nelson is entitled to its lost profits and attorney's fees from the City of Horn Lake and/or the individual members of the Board of Aldermen for being unlawfully deprived of the contract for the Goodman Road Project.

II. STATEMENT OF THE CASE

A. Nature of the Case

This appeal requires the Court to determine whether the City of Horn Lake ("the City") complied with Mississippi's public bid laws, violated Nelson's constitutional due process rights, or otherwise acted arbitrarily and capriciously when it rejected Nelson's lowest, responsive bid and made award to the second low bidder *without* doing any of the following: (1) placing detailed calculations and a narrative summary in its Minutes as required by *Miss. Code Ann.* § 31-7-13 (d)(i) when award is made to other than the lowest bidder; (2) providing notice and an opportunity to Nelson to respond to the adverse comments the City solicited in its campaign to blackball Nelson's lowest, responsive bid; and (3) performing any investigation of Freeland's past performance, which included the death of a construction worker for which Freeland was significantly fined for safety violations.

B. Course of Proceedings and Disposition in the Court Below

Nelson timely filed a protest to the City when it learned its lowest, responsive bid was rejected in favor of Freeland's higher bid. When the City refused to reverse its rejection of Nelson's bid, Nelson timely filed its Notice of Appeal and Bill of Exceptions under *Miss. Code Ann.* § 11-51-75 with the Circuit Court for DeSoto County.

After a hearing on December 1, 2006, the Circuit Court affirmed the City's award to Freeland. The Circuit Court held that Nelson had no property interest by virtue of its lowest bid and that the City's award to Freeland was not arbitrary and capricious and was supported by substantial evidence. The Circuit Court also held that an OSHA report on Freeland's safety violations was not properly before the Circuit Court but in any event did not affect its findings. Nelson timely appealed to this Court.

C. Statement of the Facts

a. Proceedings Prior to Award of Contract

1. Nelson is an experienced plumbing and utilities contractor duly licensed and determined by the Mississippi State Board of Contractors to be "responsible." **AR 000016.**
2. The Mayor and Board of Aldermen ("the Board") for the City issued an Advertisement for Bids soliciting lump sum sealed bids for construction of the Goodman Road Sanitary Sewer Extension ("Project"). Bids were due not later than July 1, 2005, at 3:00 p.m. **AR 000018 – 000025.**
3. Nelson timely submitted its bid which complied in all forms and particulars with the Advertisement for Bids and Instruction to Bidders. **AR 000027-31.**
4. When bids were opened, Nelson was determined to be the apparent low bidder. **AR 000033.**
5. On September 20, 2005, the Board voted to award the work in the Base Bid and Additive Alternate "A". **AR 000090 – 91.** Nelson's bid for those items, which totaled \$2,294,076.50, was the lowest responsive bid. The next lowest bid for those items was Freeland's in the amount of \$2,298,761.62, which is \$4,685.12 higher than Nelson's bid. **AR 000033.** As evaluated by the Project engineers, Nelson's bid price was \$2,294,035.50. Accordingly, the difference between Nelson's and Freeland's bid was \$4726.12. **AR 0061.**
6. Rather than award the contract to Nelson, the Board voted to award the contract to Freeland. The Board justified its decision based upon its finding Nelson was not a responsible contractor. **AR 000038-39.**

b. Nelson's Protests to the City of Horn Lake

8. Aggrieved by the decision of the Board, Nelson timely protested to the City on September 22, 2005, challenging the award to any bidder other than Nelson. **AR 000035 – 000036.**

9. The City's attorney responded to the protest in a letter dated September 23, 2005, confirming the vote by the Board to make award to Freeland instead of Nelson. **AR 000038 – 000039.**

10. Based on information provided in a telephone conversation between the City's attorney and counsel for Nelson, Nelson filed a supplemental protest on September 26, 2005. **AR 000046 – 000049.**

11. On September 29, 2005, Nelson filed a Notice of Appeal and Bill of Exceptions challenging the decision of the City to reject Nelson's low bid and award to Freeland. **AR 000004 – 000049.**

12. Despite repeated demands, the City failed to timely sign and file the Bill of Exceptions. Nelson was forced to file a Motion to Compel. **AR 000050 – 000054.**

13. On April 5, 2006, the City's counsel signed a Corrections to Bill of Exceptions. **AR 000101 – 000105.**

14. Finally, on May 8, 2006, the Mayor of the City filed its Designation of Appeal record, which included the Corrections to Bill of Exceptions signed by the City's Mayor. **AR 000055 – 000228.**

15. By this time, the Project was virtually complete. However, this was the first that Nelson saw of the City's October 4, 2005, Minutes reflecting the Board's unanimous vote on September 20, 2005, to award to Freeland over Nelson and the other documents before the Board, including responses the City received from its

"investigation" of Nelson which allegedly substantiate the decision to reject Nelson's lowest, responsive bid.

c. The record on appeal to the Circuit Court, as finally revealed by the City of Horn Lake

16. The record compiled by the City shows that the only bidder it investigated was Nelson, that investigation included no contact with Nelson itself. Also, the City did not comply with the statutory mandates requiring a documented demonstration that award had been made to the lowest and best bidder.

17. After bids were opened, the City set out to build its case against lowest-bidder Nelson. Although the City's Engineer, Matt Thomson, prepared a memorandum stating 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", there is not a scintilla of any "research" by the City into any bidder except Nelson. **AR 000106 – 000228.**

18. There is not a single letter or other documentation in the record of any inquiry, request for reference, or other type of "research" that the City made of Freeland.

19. The "research" the City obtained on Nelson in 2005 consisted of solicited (by the City's Engineer) correspondence making vague accusations of Nelson's being in breach on other contracts and other solicited (by the City's Engineer) correspondence from suppliers to Nelson complaining of late or no payment on transactions as old as a decade (1995). **AR 0000118 and 000124.**

20. The City's Engineer doggedly sought and compiled a list of these accusations (**AR 000122**). However, at no time did the City ever request *any* response from Nelson as to whether the complaints were legitimate, the result of late or slow payment to Nelson, due to the fault or mistake of others involved with those projects, or simply ask Nelson for its position. The City gave Nelson no notice of these complaints

and no opportunity to respond to them despite the fact that the Advertisement and Instructions to Bidders stated that "the Bidder shall furnish to the Owner all such information and data" for the purposes of the Owner's investigation of the Bidder's ability to perform the work. **AR 000024.**

21. The bulk of the City's "investigation" included its own one-sided grievances against Nelson in connection with Nelson's alleged performance problems on a contract with the City in 1999, six years prior to the bid for the Project at issue here. **(AR 000125 – 000228).**

22. Had even a cursory inquiry into Freeland's "past performance" been done by the City, it would have found that Freeland was fined nearly \$100,000 for violations of the Occupational Safety and Health Administration's ("OSHA") regulations when it intentionally ignored safety requirements. A worker was buried alive and suffered death when a trench collapsed on him on a project in Olive Branch, Mississippi. According to OSHA, "company officials [of Freeland] knowingly put employees in harms way by callous disregard for well-recognized safety practices." **AR 000302.** This was also in 1999, the same time-frame the City went back to in its "research" of Nelson.

23. Not only was the Project involving this fatality in the City's neighboring city, Olive Branch, the information on it was still available in 2005, when the City purportedly conducted research on the "various bidders".

24. Upon its Minutes reflecting its decision to reject Nelson's lowest, responsive bid and accept the higher bid of Nelson, the City stated in its preamble that (1) it had "received many complaints about Nelson" and (2) that Nelson's performance on its contract with the City in 1999 "resulted in delay and/or damages to the City and other City Hall contractors." **AR 000061 – 000062.**

25. In its Resolution # 09-07-05 ("Resolution"), the City's Board of Aldermen unanimously adopted the foregoing, unanswered allegations against Nelson as "declared and adjudicated to be true and correct." **AR 000062.**

26. *Miss. Code Ann. § 31-7-13* (2005) states that award shall be made to the "lowest and best bidder." Where an awarding entity's determination that the "lowest and best" bidder is not the bidder that submitted the lowest dollar bid, the law requires a demonstration that the higher-priced bid is, in fact, the "lowest and best." This must be done, according to *Miss. Code Ann. § 31-7-13(d)(i)* by the entity's "plac[ing] 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."

27. The City's Minutes do not comply with § 31-7-13(d)(i). Although the Minutes include both the evaluated amount of Nelson's lowest bid (\$2,294,035.20) and Freeland's higher bid (\$2,298,761.62), there are "no detailed calculations" demonstrating that whatever the City found objectionable in its "investigation" of Nelson actually translated into specific, additional costs that, when added to Nelson's bid, made it other than lowest and best.

d. Nelson's appeal to the Circuit Court

28. On appeal, the Circuit Court upheld the award to Freeland. The Circuit Court determined that "'some research' on the various bidders" had been done and, therefore, the City's "finding that Nelson was not the lowest responsible bidder was no arbitrary or capricious." **AR 000317.**

29. The Circuit Court also ruled that Nelson's due process right had not been violated because, even as the lowest bidder, it had no such right. **AR 000317 – 000318.**

30. Nelson had included the OSHA bulletin (see ¶ 22, *supra*) in its reply brief during the appeal to the Circuit Court, and the City's counsel filed a motion to strike the bulletin because it was allegedly not before the City at the time award was made to Freeland. **AR 000302 and 000305.**

31. The Circuit Court determined that the OSHA report was not properly part of the record before it on appeal. However, it was apparently considered by the lower court, as it stated "the report does not affect the Court's findings." **AR 000318.**

32. Nelson timely appealed to this Court.

III. SUMMARY OF THE ARGUMENT

The City's award of the contract to Freeland is incurably defective. It is the result of undisputable violations of Mississippi's clear and unambiguous public procurement statutes. The award is also the result of constitutional violations of Nelson's due process rights and otherwise arbitrary and capricious.

The City failed at the critical moment—i.e., before award to Freeland—to demonstrate that Nelson's bid was *not* the lowest and best bid, and it failed to demonstrate that Freeland's bid was the lowest and best bid. It did this by failing to perform the "detailed calculations" which are required to demonstrate that the higher bid of Freeland was, in fact, the lowest and best bid presented to the City.

The errors of the City are not mere technical defects in the Minutes. The gravamen of this aspect of Nelson's appeal is not that the City's Minutes fail to include an equation showing the arithmetical difference between the two bids as submitted. Rather, Nelson's complaint is that *detailed calculations showing that its alleged past performance deficiencies translated into some additional costs to the City that made its bid not the actual lowest* were never made. If such calculations had been made, they

would have appeared somewhere in the record even if not in the Minutes. They do not. The City ostensibly performed only the "narrative summary" work required by §31-7-13(d)(i); it did not perform the "detailed calculations" work required by §31-7-13 (d)(i). Although the difference in Nelson's and Freeland's bid was only \$4726.12, the law does not have a "sliding scale" of compliance with § 31-7-13(d)(i) depending on the spread between the lowest bid and the bid of the awardee.

As the lowest bidder whose bid complied with all the forms and particulars of the City's Advertisement and Invitation to Bidders, Nelson had a property interest of which it could not legally be deprived without notice and opportunity for a hearing. Nelson was given none. Even where the difference in bids has been a few hundreds of dollars rather than nearly five thousand, Mississippi jurisprudence supports some requirement for a response opportunity from the low bidder to allegations against him and some actual inquiry into the similar aspects of the higher awardee's past.

Even if there were no statutory or constitutional defects in the award and award process, the award to Freeland over Nelson is arbitrary and capricious and, therefore, should not have been affirmed. The investigation conducted by the City's Engineer was a veritable witchhunt against Nelson. Unsubstantiated allegations of late or non-payment from transactions that were a decade old and from alleged businessmen who were admittedly bitter towards Nelson (**AR 000124**) were not passed on to Nelson for any response but were the root of the City's rejection of Nelson's bid. The City solicited letter after letter against Nelson but, if their record is to be believed, never checked into the first reference for Freeland and never lifted a finger to find out any information about their past performance.

If the City's entire Board of Aldermen had not heard of Freeland's callous

disregard for the safety of its employees which resulted in death, they did not do their job because the catastrophe was a matter of public record not to mention outcry. If they had heard of Freeland's safety violations, they did not do their job because they ignored information far more damaging than what they think they had on Nelson. As far as this procurement is concerned, the City applied one standard of inquiry to Nelson and a far different, deferential standard to Freeland. How could such an inexplicable difference in the examination to determine the "lowest and best" bid *not* be considered arbitrary and capricious?

For the reasons set forth by Nelson in the lower court, all of which are incorporated herein by reference, Nelson was the lowest and best bidder and was illegally deprived of its right to perform the Goodman Road Project.

IV. ARGUMENT

A. Standard of Review

The standard of review is a *de novo* review of the City's rejection of Nelson's lowest, responsive bid and a *de novo* review of the Circuit Court's exclusion from the record of the OSHA bulletin reporting on Freeland's fines for the death of a worker. As to issues appealed under *Miss. Code Ann.* §11-51-75, this Court has held that all reviewing courts, including this one, shall not set the challenged action aside "unless it is clearly shown to be arbitrary, capricious, or discriminatory or is illegal or without substantial evidentiary basis." *City of Jackson v. Capital Reporter Pub. Co.*, 373 So.2d 802, 806 (Miss. 1979). As to whether the Circuit Court should have considered the OSHA bulletin presented on appeal in that court, that involves a question 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).

B. Mississippi's Public Bid Statute Mandates Award to the "Lowest and Best Bidder" and Prescribes a Clear and Unambiguous Process for Documenting Awards to Other than the Lowest Bidder which Horn Lake Ignored

Under Mississippi's public bid statute, *Miss. Code Ann.* § 31-7-13 (2005), award of a public contract can only be made to the "lowest and best bidder". Public owners have some discretion to determine which bidder, if any, constitutes the "lowest and best bidder". However, to ensure that purchases made with citizens' money are obtained on the basis of the lowest and best bid and not as a result of bias or favoritism on the part of awarding officials, Mississippi law also expressly requires a specific documentation by the awarding entity any time award is made to a bidder other than the bidder that submitted the lowest, responsive bid. *Miss. Code Ann.* §31-7-13 (d)(i) provides in pertinent part as follows:

. . . If any governing 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. No agency or governing authority shall accept a bid based on items not included in the specifications.

Emphasis added. The requirements of this statute are mandatory and unambiguous when a governing authority accepts a bid other than the lowest bid actually submitted. It mandates documentation not just of a narrative summary but also "*detailed calculations*" showing that the accepted bid was determined to be the lowest and best bid. The *objective requirement* for these calculations is necessary to protect the integrity of the public procurement system and taxpayers. Absent this *objective requirement* for a demonstration that the subjective objections to the lowest bid (as set forth in the narrative summary) actually translate into higher costs such that the lowest bid is not, in fact, the purposes of public bidding cannot be preserved. In short, dollar

values must be attached to the words. Without that complete process, governing agencies have not complied with the requirement to make award only to the "lowest and best bidder".

The City's decision to award the contract to Freeland violates *Miss. Code Ann.* §31-7-13(d)(i). The Meeting Minutes for the Board on September 20, 2005, recite the following findings of fact as the sole justification for the award of the Goodman Road Sanitary Sewer Extension Project contract to Freeland in Resolution #09-07-05 as follows:

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 Alternate A in the total amount of \$2,294,035.50, and Freeland and Lemm Construction Company submitting the second lowest base bid with Alternate 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); McCrory & Williams, Inc. (Pascagoula, MS); Consolidated Pipe & Supply Co. (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.

AR 0061 – 0063.

On its face, the Minutes fail to comply with the law and must be overturned. Prior

decisions of this Court hold that the procedural requirements in *Miss. Code Ann.* 31-7-13 must be strictly construed. *City of Durant v. Laws Constr. Co.*, 721 So.2d 598, 601-05 (Miss. 1998). The reason for such strict construction was explained in *Hemphill Constr. Co. v. City of Laurel*, 760 So.2d 720 (Miss. 2000):

The purpose of provisions requiring that contracts with public authorities be let only after competitive bidding [is] to secure economy in the construction of public works and the expenditures of public funds for materials and supplies needed by public bodies; to protect the public from collusive contracts; to prevent favoritism, fraud, extravagance, and improvidence in the procurement of these things for the use of the state and its local self-governing subdivisions; and to promote actual, honest, and effective competition to the end that each proposal or bid received and considered for the construction of a public improvement, the supplying of materials for public use, etc., may be in competition with all other bids upon the same basis, so that all such public contracts may be secured at the lowest cost to taxpayers.

Id. at 724.

In *Hemphill*, the lowest bidder discovered soon after bid opening for a public project with the City of Laurel that it had a significant error in its bid. The lowest bidder notified the City of its offer and requested either that the error be corrected, which would have resulted in an increase in the bid price, or the bid withdrawn without penalty. If corrected, the lowest bid would still have been the lowest bid by a substantial amount. The City examined the error, found it to have been honestly made, and allowed the upward adjustment and award to this bidder. This Court ruled that that action was improper. Even though the Court specifically stated that the City's and the lowest bidder's actions showed no culpable wrongdoing, and even though there was no statute expressly prohibiting the post-bid adjustment in price, the Court held that the City had acted beyond its powers. "Municipalities have only such powers as are expressly granted or necessarily implied by statutes. Such powers are to be construed most strongly against an asserted right, if there the right is not clearly given." *Id.* at 723.

Thus, while the Court recognized that there was "a measure of discretion in awarding public contracts" that "***discretion exists, however, only where it is supported by statute.***" *Id* (emphasis added). The Court's premises, it said, "are the words of the statute, together with its recognized purpose." *Id.* at 724.

Here, the City went beyond the power given it by law. The City failed to follow a clear and unambiguous statute dictating the precise procedure to be followed when making award to the higher priced Freeland over Nelson. There is no room here for "substantial compliance", as the Circuit Court would have allowed. There is an express procedure to be followed--whether the difference in bid prices is \$1 or \$1 million--and any award made without compliance with *all* of Section 31-13-7(d)(i) is action beyond the City's power. Without "detailed calculations", how could it possibly be demonstrated that Freeland's bid was actually the lowest? It certainly was not on the basis of initial bids. Nelson's was. Assuming, for the sake of argument, that the complaints against Nelson solicited by the City were relevant and accurate, the City did not perform any calculations to show what extra costs and the amount of those costs the City would likely incur in the Goodman Road Project if Nelson was given the award. The City was required to do that before it could make award to any other bidder.

Unfortunately, the City and the Circuit Court did not grasp that the real issue here is not determined by how small the difference between the amount of the lowest bid and the amount of the higher awardee's bid. The issue is whether the action was legal, and the plain language of 31-7-13(d)(i) and *Hemphill* teach that it was not. Under the Circuit Court's logic, 31-7-13(d)(i) only is applicable when the difference in bids is large. But what, exactly, is that amount? For some governing boards and authorities "large" may be \$100,000. For others, it may be \$500,000. Where is the protection in the public

procurement system when such vagaries control? The Legislature gave a "bright line" requirement in 31-7-13(d)(i) to ensure that there were no such vagaries. It certainly considered the potential for mischief by local governing authorities when it passed that statute. The Meeting Minutes from the Board make it abundantly clear that the City ignored the statutory mandate of *Miss. Code Ann.* §31-7-13 (d). There are no "detailed calculations" which document the decision to award the contract to other than the Nelson as the low bidder. The award to Freeland was therefore unlawful and in violation of the mandatory requirements of *Miss. Code Ann.* §31-7-13(d).

C. Nelson's Constitutional Right of Due Process Was Violated By Horn Lake

To establish a due process violation, "the complaining party must first show that he had a legally cognizable property interest." *Harris v. Miss. Valley State Univ.*, 873 So.2d 970, 985 (Miss.2004). "[P]roperty interests are creatures of state law." *Univ. of Miss. Medical Center v. Hughes*, 765 So.2d 528, 536 (Miss.2000). *Miss. Code Ann.* § 31-7-13 created a contractual property interest to low bidders by requiring public entities to let such contracts to "the lowest and best bidder after advertising for competitive sealed bids." The purpose of the Mississippi Public Bid Law is "to safeguard public contracts, and secure competitive bids from parties interested, to secure to the public fair contracts, and the advantages of competition." *Bigham v. Lee County*, 185 So. 818 (Miss.1939). It is well established under Mississippi law that a low bidder on a public contract may sue to set aside the award of the contract to another bidder. See, e.g., *Parker Bros. v. Crawford*, 68 So.2d 281 (Miss.1953). More recently and specifically, the Northern District determined in *Shepard vs. City of Batesville*, 2007 WL 108288 (N.D. Miss. 2007) that Mississippi's Public Purchasing Statute (31-7-13) gives a protected property interest in the project to one who is the lowest and best bidder for

that project. *Id.* at 7. Once that interest attaches, the bidder cannot be deprived of it without due process before he can be deprived of his contract: "The Fourteenth Amendment to the United States Constitution provides that a State shall not 'deprive any person of life, liberty, or property with due process of law.'" *Id.* at 6.

Under *Miss. Code Ann.* § 31-7-13, on its face and as interpreted by *Shepard*, Nelson, as the lowest, responsive bidder could not be deprived of its property interest in a contract for the Goodman Road Project without due process. Its contract right, earned by submission of the lowest, responsive bid, could only be revoked after due process. *See also Harris*, 873 So.2d at 985. Nelson's substantive and procedural due process rights were violated. "To prevail on a substantive due process claim, the plaintiff must show that the government's deprivation of a property interest was 'arbitrary or not reasonably related to a legitimate governmental interest.'" *Harris*, 873 So.2d at 985 (*quoting Hall v. Board of Trustees of State Institutions of Higher Learning*, 712 So.2d 312, 319 (Miss.1998)). "Substantive due process only requires that public officials exercise judgment in a nonarbitrary manner when depriving an individual of protected property interest." *Id.* at 985. (*Bluitt v. Houston Indep. Sch. Dist.*, 236 F.Supp.2d 703, 731 (S.D.Tex. 2002.)) Procedural due process requires that complainant be given notice and opportunity to be heard: "The fundamental requirement of due process is simply the opportunity to be heard 'at a meaningful time in a meaningful manner.'" *Miss. Real Estate Com'n v. McCaughan*, 900 So.2d 1169, 1174 (Miss.App.2004) (*quoting Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

The procedures employed by the City in rejecting Nelson's low bid and accepting a higher bid without affording Nelson an opportunity to be heard on the matter violated Nelson's substantive and procedural due process rights. In deciding to award the

contract to the second low bidder without conducting a fair and impartial investigation, the City acted in an arbitrary manner depriving Nelson of its substantive due process rights. Nelson was aggrieved by the Board's investigation which involved contacting only the references of Nelson to create the appearance of reason and "fairly debatable" issues before making award to a higher bidder. The record supplied by the City is void of any efforts to make inquiries into the past performance of Freeland, the second low bidder. The Board's decision to only inquire about Nelson's past performances and give preference to the next lowest bidder is blatant proof of the arbitrary manner in which their decision was made.

Because the Board's record lacks any evidence that the Board contacted Freeland's references, the complaints made against Freeland could be just as many, or more, than those alleged against Nelson. Instead of conducting a fair and impartial inquiry, the Board decided to turn a blind eye to Freeland's past performance and dig as deep as it could to find complainants against Nelson and also support its decision by expressing its dissatisfaction with work Nelson performed six years ago and for which Nelson was not defaulted by the City. The complete absence of inquiry into Freeland's past performances as well as the obvious prejudice the City held toward Nelson supports the only conclusion that the Board's decision was arbitrary and in violation of Nelson's substantive due process rights.

Turning to Nelson's procedural due process rights, the City did no better. The City, at a minimum, should have afforded Nelson an opportunity to refute the allegations cited in the Minutes. Allowing Nelson an opportunity to be heard on allegations of late or non-payment by Nelson's suppliers before awarding the contract to the second low bidder is consistent with the procedural due process other states recognize. *Scott v.*

Buhl Joint School Dist. No. 412, 852 P.2d 1376 (Idaho 1993) ("If a responsible bidder tenders [it]self ready to fulfill [its] bid by entering into the contract . . . [it] is entitled to be awarded the contract as against any person whose bid was higher than [its]. If there be an allegation that a bidder is not responsible, [that bidder] has the right to be heard upon that question and there must be a distinct finding against [that bidder], upon proper facts, to justify it.").

Nelson was never contacted by the City to respond to allegations against it. Not once in the more than two months that the City spent collecting "evidence" against Nelson did it bother to request a response from Nelson or even notify Nelson that complaints had been received. The City incorrectly assumed that all the allegations were true and that Nelson had no justification for delayed or refusal of payment to suppliers. The City's failure to give notice to Nelson of the complaints received and an opportunity to be heard regarding those complaints violated Nelson's procedural due process rights and is further evidence of the arbitrary and capricious manner in which the City's decision was made.

In stark contrast to the City's utter lack of due process stands the inquiries made by the school board in *Parker Bros. vs. Crawford*, 68 So.2d 281 (Miss. 1953) before rejecting the lowest responsive bid in favor of a higher bid as the "lowest and best" bid. In *Parker Brothers*, the difference in Parker Brothers' lowest bid and Lundy Construction's next higher bid was only \$318. However, the school board made inquiries into *both* bidders' respective abilities. The board "also requested the architects to get information concerning the experience, financial responsibility and other qualifications of these two bidders." *Id.* at 282. The board did not stop there. Before voting on the acceptance of the bids, the board contacted Parker Brothers and

requested that they contact the board and left word that Parker Brothers "were at liberty at any time to present their qualifications to the Board...." *Id.* The City's procedure unquestionably does not pass Constitutional muster. The City's own Minutes state that the allegations against Nelson were "adjudicated". That adjudication took place in a manner akin to a defendant not being allowed to cross-examine witnesses against him, which would never be considered constitutional.

D. Horn Lake's "Past Performance" Analysis is Arbitrary and Capricious and Without Substantial Evidence

It was arbitrary and capricious for the City to reach back to Nelson's 1999 contract with the City to deny award to Nelson in 2005. This is indisputable when the City failed to look at Freeland's "performance" in 1999 (or any other time) in which Freeland put its workers lives in peril and one ended up dead. Where evidence is clearly marshaled with the intent to deprive the lowest bidder of its award in favor of a higher bidder, this "witchhunt" does not include any opportunity for rebuttal by the lowest bidder, most of the information relied upon is significantly dated, any determination that the so-called "evidence" is "substantial" and the award decision *not* arbitrary or capricious is clearly erroneous. As to allegations the City solicited concerning Nelson's past payment history, Nelson was never contacted about these allegations and given a chance to respond to them. The City incorrectly assumed that all allegations were true and that Nelson had no justification for delayed or refusal of payment to suppliers.

Further, Nelson's performance on a contract six years ago has little, if any, relevance now. Federal procurement regulations, though not binding, provide sound guidance here. Federal Acquisition Regulation § 42.1503 (48 C.F.R. § 42.1503) permits agencies to look back only three (3) years on a contractor's past performance and

offerors must be given a chance to respond to allegations of negative past performance. (AR 000258 – 000261) Any past performance information older than 3 years is deemed irrelevant to a contractor's present-day ability to perform. This time limitation prevents the use of outdated, irrelevant information to deny a contractor an award. The City not only went back six years, twice as long as federal regulations allow, it also failed to make any inquiry of Nelson in 2005 concerning any changes Nelson may have made to correct any of the performance problems the City alleges existed in 1999.

Finally, allegations of payment issues had no place in the City's decision because it is protected by the payment bond Nelson provided. Legitimate disputes between prime contractors and their subcontractors do occur, and it was improper for the City to "adjudicate" them as "true and correct" as reflected in its Minutes. Mississippi courts have long recognized that where there is a payment bond in place, owners cannot use payment dispute allegations by a subcontractor to refuse payment to a prime contractor. As stated by the Mississippi Supreme Court:

If the contractor does not give the bond provided by the statute [i.e. the predecessor to *Miss. Code Ann.* § 85-7-185 (Rev. 1991)], laborers and materialmen have an equity under [the stop payment notice of *Miss. Code Ann.* § 85-7-181 (Rev. 1991)], in the funds due the contractor by the owner of the building. But where the bond is given as provided by the statute, such funds are released from such equity or trust in favor of materialmen and laborers and go into the hands of the contractor untrammelled. The purpose of the bond section of the statute was to provide for the protection of materialmen and laborers, the bond being in lieu of their equity in the funds arising out of the building contract.

* * * *

We hold, therefor, . . . [t]he builder having given bond, under the statute, with a surety for faithful performance. . . , the moneys coming to him thereunder were freed from any equity or trust which the laborers or materialmen might have had therein if the bonds had not been given. They were moneys belonging to the contractor to do with as he chose.

Dickson v. United States Fidelity & Guaranty Company, 117 So. 245, 248 and 249

(Miss. 1928)(emphasis and bracketed material added); cited with approval and followed by *Jesco, Inc. v. Jefferys Steel Company*, 571 F.Supp. 801, 803 (N.D. Miss. 1983); *Redd v. L.A. Contracting Company*, 151 So. 2d 205, 207 (Miss. 1963). Thus, it makes no sense for a public owner like the City to use alleged payment disputes as a legitimate basis to deny award to Nelson.

E. The Circuit Court Erred by Refusing to Include the OSHA Bulletin on Freeland's Safety Regulation Violations in the Record

The Circuit Court could and should have taken judicial notice of the OSHA Bulletin that Nelson presented for the first time during the appeal in that court. The Circuit Court took too restrictive a view of what must constitute the "record" on an appeal under *Miss. Code Ann.* § 11-51-75. True, the OSHA Bulletin at **AR 000302** detailing Freeland's callous disregard for safety regulations and the death of one of its workers, was not among the documents or information compiled by the City. However, if governing bodies like the City can shore up their rejection of low bids by being careful not to include any adverse information in their record about the higher-priced awardee, then a full judicial inquiry into the matter cannot be had. As a Federal regulatory agency, OSHA's bulletins constitute a governmental agency report. Whether or not in the actual record compiled by the City, this Court, and the Circuit Court, can and take judicial notice of the report and its contents. See, generally, *Gully v. Lumbermen's Mut. Casualty Co.*, 168 So.609 (Miss. 1936).

To demonstrate the fatal flaws in the City's alleged "research" of the "various bidders", as is falsely stated in the City Engineer's August 31, 2005 Memorandum (**AR 000106**), Nelson should be entitled to submit information which is within the Court's "judicial notice" discretion to demonstrate illegal or arbitrary and capricious conduct by those charged with protecting the public. Here, the Circuit Court erred when it excluded

the OSHA Bulletin and, to the extent the Bulletin was considered by that Court, plain error to have determined that the facts therein had no effect on the Circuit Court's analysis.

F. Nelson is Entitled to a Hearing and Award of Lost Profits and Attorney Fees

By the time Nelson could pursue its appeal to the Circuit Court, the Goodman Road Project was well underway. The City's dilatory tactic in not signing and filing the required Bill of Exceptions resulted in the award of the contract to Freeland and the near completion of work by the time the parties were heard. The only remedy for Nelson is for this Court to award Nelson its lost profits and attorney fees. This was the remedy granted by this Court in *City of Durant v. Laws Constr. Co., Inc.*, 721 So.2d 598 (Miss 1998) where the project for which Laws should have been awarded was completed before the matter could be resolved by the circuit court. Just as the City of Durant attempted to render the issue moot by awarding the project in violation of the law and delaying court proceedings until the project was underway, so too has the City. Such conduct, however, does not save the City from liability to Nelson for its illegal conduct. As explained by the Court in *City of Durant*:

In order for a complete remedy to be afforded, the continuing unlawful acts by the Board of Supervisors cannot be allowed to circumvent any liability. If there is no remedy, justice certainly will not prevail and the City will be given a means to directly violate the statutory laws and suffer no consequences unless the bidder also happens to be a taxpayer of that particular municipality. . . If meaningful damages are not allowed then the legislative intent of the statutory bidding laws that public contracts are to be awarded on a purely competitive basis cannot be carried out.

Id. At 606-07. Nelson is therefore entitled to its contract damages and attorney fees. *McIntosh v. Amacker*, 592 So.2d 525 (Miss. 1991). Nelson therefore respectfully requests that this cause be remanded for a hearing on the issue of damages.

G. The Individual Board Members are Personally Liable for Nelson's Lost Profits and Damages

The vote by the Board to reject Nelson's bid was arbitrary, capricious and a violation of the law for which they are personally and jointly and severally liable to Nelson. This personal liability could have been avoided if the Board had requested a written opinion from the Mississippi Attorney General pursuant to *Miss. Code Ann.* § 7-5-25 (Rev. 2002), which provides:

When any officer, board, commission, department or person authorized by this section to require such written opinion of the attorney general shall have done so and shall have stated all the facts to govern such opinion and the attorney general has prepared and delivered a legal opinion with reference thereto, ***there shall be no liability, civil or criminal, accruing to or against any such officer, board, commission, departments or person who, in good faith, follows the direction of such opinion and acts in accordance therewith unless a court of competent jurisdiction, after full hearing, shall judicially declare that such opinion is manifestly wrong and without any substantial support. . . .*** No opinion shall be given or considered if said opinion is given after suit is filed or prosecution begun.

(Emphasis added). Horn Lake's Board elected not to seek an opinion from the Attorney General but relied upon the advice of its legal counsel.

Further, the Board of Supervisors' reliance upon past Attorney General Opinions, even with similar facts, will not prevent liability. *City of Durant v. Laws Constr. Co., Inc.*, 721 So.2d 598, 604 (Miss. 1998). Simply speaking with the Attorney General's office over the phone also will not protect the individual members of the Board from personal liability. *Id.* In *the City of Durant*, the City accepted a construction bid from a contractor, King, who failed to place his certificate of responsibility number on the exterior of the bid envelope as required by statute. *Id.* at 599. Laws Construction, the next lowest bidder protested the bid procedure. *Id.* The City Attorney advised the City of Durant that previous Attorney General opinions provided that a bid which failed to include a

certificate of responsibility number on the exterior of the envelope, but did include the number within the bid was valid. *Id.* At its meeting, the Board of Aldermen adopted a resolution awarding the project to King over the objection of Laws and its attorney. *Id.* at 601. Laws appealed this decision to the Circuit Court of Holmes County, which held that the City had acted unlawfully and awarded Laws compensatory damages plus costs and attorney fees. *Id.* The Mississippi Supreme Court affirmed stating that the Attorney General opinions relied upon by the City were manifestly wrong and not binding. *Id.* at 604. In response to the City's argument that they should not be liable because of their good-faith reliance, the Court stated:

We have in the past, when determining that an Attorney General opinion was erroneous, applied the correct construction in future case thereby not penalizing a party's reliance. . . . However § 7-5-25 requires the party to contact the Attorney General's office *in writing* requesting an opinion on *his* particular facts. . . . In the case *sub judice*, the City merely spoke with the Attorney General's office over the phone. Furthermore, the Attorney General's office sent opinions regarding similar circumstances, and did not render a written opinion with regard to the particular facts in the case *sub judice*, as required by the statute. Therefore the City should be held liable.

Id. (emphasis in the original).

The issuance of an opinion from the Mississippi Attorney General would have protected the individual board members for the City voting to reject Nelson's low bid from personal liability. However, the Board elected not to secure such an opinion. The Board voted to reject Nelson's low bid in violation of the Instructions to Bidders and the law. The individual members of the Board cannot escape liability for this breach by mere reliance, even in good faith, on past Attorney General Opinions. The Board did not submit a request in writing setting forth the particular facts of this case. Therefore the Attorney General's office did not render a written opinion with regard to the particular facts of this case. The individual members of the Board voting to reject

Nelson's low bid are not and cannot be shielded from personal liability. Accordingly, these members of the Board are jointly and severally liable to Nelson for the damages associated with rejecting Nelson's low bid and the attorney fees and expenses.

V. CONCLUSION

Nelson appeals to this Court to correct the errors of the City Lake and the Circuit Court's failure to render the decision the City ought to have rendered. Rejection of Nelson's lowest responsive bid for the Goodman Road Project violated the statutory mandate of *Miss. Code Ann.* §31-7-13, Nelson's constitutional rights, and was otherwise arbitrary and capricious. The procedure employed by the City was inadequate, incomplete, unfair, and one-sided. The arbitrary and capricious nature of the investigation resulted in an arbitrary and capricious decision by the City to reject Nelson's bid. As the lowest responsive, responsible bidder, Nelson was entitled to the award. Accordingly, Nelson respectfully requests that the judgment of the Circuit Court be reversed and this cause remanded for such further proceedings as are just.

THIS the 11th day of May, 2007.

Respectfully submitted,

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

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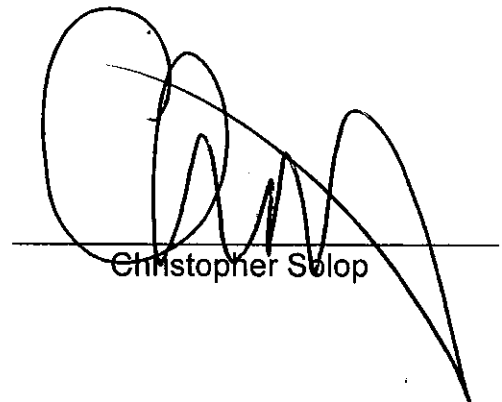
CERTIFICATE OF SERVICE

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 11th day of May, 2007



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CERTIFICATE OF SERVICE

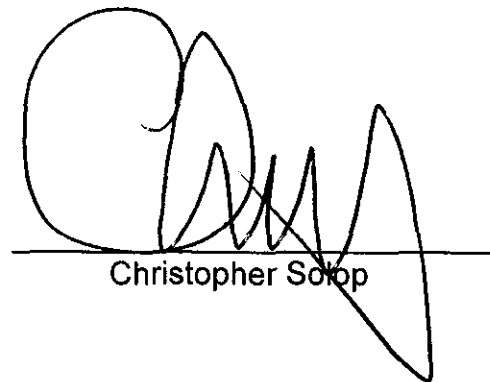
I, Christopher Solop, attorney for Appellant, Willie Nelson d/b/a Nelson Plumbing Company, certify that I have this date served by United States mail, postage prepaid, a true and correct copy of Appellant, Willie Nelson d/b/a Nelson Plumbing Company's Notice of Service to the following at the address shown:

Billy C. Campbell, Jr.
Counsel for City of Horn Lake
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Honorable Robert P. Chamberlin, Jr.
Circuit Court Judge
Post Office Box 280
Hernando, MS 38632

This the 14th day of May, 2007.



Christopher Solop