

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PREFERRED TRANSPORT
COMPANY, LLC

APPELLANT

v.

CAUSE NO. 2008-CA-01532

CLAIBORNE COUNTY
BOARD OF SUPERVISORS

APPELLEES

AND

CLAIBORNE COUNTY
BOARD OF SUPERVISORS

CROSS-APPELLANTS

v.

CAUSE NO. 2008-CA-01532

PREFERRED TRANSPORT
COMPANY, LLC



CROSS-APPELLEE

Appealed from the Circuit Court of Claiborne County, Mississippi

BRIEF OF APPELLEES/CROSS-APPELLANTS

ORAL ARGUMENT REQUESTED

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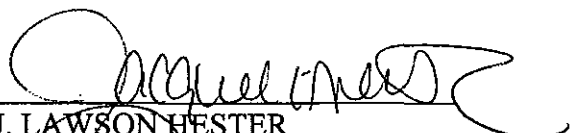
CROSS-APPELLEE

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.

1. Preferred Transport Company, LLC, Appellant/Cross-Appellee
2. Claiborne County Board of Supervisors, Appellee/Cross-Appellants
3. J. Lawson Hester, Jacqueline H. Ray and the law firm of Page, Kruger & Holland, P.A., attorneys for Appellee
4. Robert C. Latham, Jeremy P. Diamond and the law firm of Truly, Smith & Latham, PLLC, counsel for Appellant/Cross-Appellee
5. A. Michael Espy, counsel for Claiborne County Board of Supervisors
6. Hon. Lamar Pickard

THIS, the 6th day of May, 2009.


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I. STATEMENT REGARDING ORAL ARGUMENT

The Appellees/Cross-Appellants hereby request oral argument be heard in the instant matter pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure. The facts of this case are such that oral argument would assist in the presentation of the matter to the Court.

II. STATEMENT OF THE ISSUES

APPEAL

- A. Whether the Trial Court Erred in Finding that the Claiborne County Board of Supervisors Exceeded its Authority by Considering Factors not Contained in the Bid Documents
- B. Whether the Decision of the Claiborne County Board of Supervisors to Accept the Bid of HomeBase Litter Control was Arbitrary, Capricious, Discriminatory, Illegal and not Supported by Substantial Evidence
- C. Whether the Trial Court Erred by not Awarding Preferred Transport Compensatory Damages and Attorney's Fees

CROSS-APPEAL

- A. Whether the Trial Court Erred in Not Affirming the Actions of the Claiborne County Board of Supervisors *in toto*, Specifically Whether Requiring a Re-bid Regarding Solid Waste Disposal was in Error

III. STATEMENT OF THE CASE

The following factual matters appear of Record. By letter dated January 7, 2008, Appellant, Preferred Transport, was notified of the deadline for proposals for solid waste collection in Claiborne County. (R. 10). Also enclosed was a copy of the county's Request for Proposals pertaining to household garbage collection in Claiborne County. (R. 12). By February 21, 2008 (the deadline for submitting bids), the Board had received four bids in response to their request for proposals. (R. 36). The bids were submitted in accordance with Miss. Code Ann. § 31-7-13, subsection (d)(i) of which is entitled "Decision procedure," and specifies that "[p]urchases may be made from the lowest *and best* bidder." (R. 12). Preferred Transport and HomeBase Litter Control, LLC ("HomeBase") submitted bids for collection of solid waste, while the bids of Southern Waste Management and Southern Landfill Management were for waste collection and disposal. (R. 36). Thus, the only bidders which can be compared are Preferred Transport and HomeBase. *Id.* HomeBase's bid was \$13.00 and the Appellant's bids were \$9.77 or \$10.61 (dependant upon the disposal site). *Id.*

At the Board Meeting on March 3, 2008, the bids were discussed in an open forum with representatives of Preferred Transport and HomeBase in attendance. (R. 36-38). At issue were the various bids and whether the Board was obligated to accept the lowest bid. (R. 36). Based on the opinion of counsel for the Board, it was determined that the Board did not have to accept the lowest bid, but could accept what it determined to be the lowest *and best* bid based on the pertinent statutes. *Id.* Determination of the winning bid was to be based upon statutory considerations including "price, technology and other relevant factors." *Id.* "Other relevant factors" were then discussed and deemed to include, but not be limited to, local employment, local access and local economic development opportunities. *Id.* Afterwards, the representatives of Preferred Transport and HomeBase were given the opportunity to address the Board. (R. 37). HomeBase's representative

discussed economic development opportunities and special services whereas the representative of Preferred Transport stated only that they had submitted the lowest bid. *Id.*

The Board then voted to accept HomeBase's bid with the stipulation that they could "negotiate with the vendor the possibility of reducing the per household per month costs." *Id.* Subsequent negotiation with HomeBase resulted in a drop from \$13.00 to \$11.00 per household per month. (R. 38). Thus the bid was accepted and included in the minutes was the amount of each bid submitted and the reasons taken into account in awarding the bid to HomeBase. *Id.* Preferred Transport filed its Notice of Appeal and Bill of Exceptions on March 13, 2008. (R. 3-38).

A hearing was held before Judge Lamar Pickard on May 5, 2008. (R. 40). The Judge reversed the decision of the Claiborne County Board of Supervisors to award the solid waste contract to Home Base Litter Control and ordered that the bidding process for waste collection be reopened. (R. 287). The Court *did not* award Preferred Transport its requested compensatory damages (allegedly \$408,490.00) or attorneys' fees. (R. 283-287). Basically Judge Pickard found that the Board of Supervisors is *not* limited to consideration of only the factors found in Miss. Code Ann. § 31-7-13(r). (R. 286-287). However, pursuant to Miss. Code Ann. § 31-7-13(d)(i), the Board cannot accept a bid based on factors not included in the bid specifications. *Id.* Additionally, the Board is not obligated to accept the cheapest bid, rather it may select the lowest and best bid based on the factors enumerated in the bid specifications. *Id.* The opinion does not preclude Home Base from being re-awarded the contract and indicated that Home Base could temporarily continue solid waste collection until such time as the rebidding process is completed. (R. 287). Both parties appealed this decision. (R. 293-294; 299-301).

Lastly, the crux of the disagreement between the parties is of a legal, rather than a factual, nature. The underlying facts, as set forth in the minutes from the March 3 Board Meeting, are not at

issue. Specifically, the parties disagree over whether the Board of Supervisors was legally required to award the contract for solid waste collection to: (1) the lowest bidder, or (2) to the lowest and best bidder.

IV. SUMMARY OF THE ARGUMENT

Miss. Code Ann. § 31-7-13 sets forth rules regarding bid requirements for public purchases. “Purchases *may* be made from the lowest and best bidder.” Miss. Code Ann. § 31-7-13(d)(i) (emphasis added). However, the bidding process for solid waste must also comply with Miss. Code Ann. § 31-7-13(r) which specifies that the most qualified bid shall be selected “on the basis of price, technology *and other relevant factors* . . .” (emphasis added). The determination of the winning bid and subsequent award to HomeBase was founded upon the statutory considerations set forth in Miss. Code Ann. § 31-7-13(r) including “price, technology and other relevant factors.” Even if HomeBase had supplied only the information that was specifically requested in the bid information, given that price is *not* the only factor to be considered in the determination of the lowest *and best* bid, there is no guarantee that Preferred Transport would have been awarded a contract. The Mississippi Supreme Court has held that the decision of a Board of Supervisors *must* be upheld unless the decision “is clearly shown to be arbitrary, capricious, or discriminatory or is illegal or without substantial evidentiary basis.” *Billy E. Burnett, Inc. v. Pontotoc Co. Bd. of Supervisors*, 940 So.2d 241, 243 (Miss.App. 2006). The lower court made no such finding, and the Appellant has not and cannot prove that the actions of the Claiborne County Board of Supervisors were undertaken in an arbitrary, capricious or discriminatory manner or that their actions were illegal or without a substantial evidentiary basis. The lower court had no basis for its reversal of the Board’s decision. The decision of the Claiborne County Board of Supervisors to award the contract for solid waste collection to HomeBase should be affirmed in all respects.

V. ARGUMENT

APPEAL

A. Whether the Trial Court Erred in Finding that the Claiborne County Board of Supervisors Exceeded its Authority by Considering Factors not Contained in the Bid Documents

Miss. Code Ann. § 31-7-13 sets forth rules regarding bid requirements for public purchases. “Purchases *may* be made from the lowest and best bidder.” Miss. Code Ann. § 31-7-13(d)(i) (emphasis added). However, the bidding process for solid waste must also comply with Miss. Code Ann. § 31-7-13(r). The Appellant alleges that the Board did not choose the most qualified bid on the basis of the factors enumerated in Miss. Code Ann. § 31-7-13(r). This section is entitled “Solid waste contract proposal procedure” and specifies that the most qualified bid shall be selected “on the basis of price, technology *and other relevant factors* . . .” (emphasis added). *Hemphill Construction Co., Inc. v. City of Laurel*, clearly states that “[w]here, for example, the law allows the governing authority to determine the ‘lowest and best bidder,’ *it is permissible for factors other than price to be considered.*” *Id.*, 760 So.2d 720, 723 (Miss. 2000) (citing *Parker Bros. v. Crawford*, 219 Miss. 199, 208-09, 68 So.2d 281 (1953) (emphasis added)). No Mississippi caselaw or statute sets forth a definitive list of the requirements or factors deemed to be “other relevant factors” under Miss. Code Ann. § 31-7-13(r). Other relevant factors appear to be virtually anything that has bearing on the situation. In *Hemphill*, the City was allowed to consider the experience of the bidders. *Hemphill*, *supra* at 207. *See also* Miss.Op.Atty.Gen. No. 2000-0395 (holding that the governing authorities may consider past performance, including prior fraudulent acts of bidders, when making the factual determination as to which bid is the lowest and best); Miss.Op.Atty.Gen. No. 96-0297 (finding that the board may take into consideration resale value, parts and service and warranty and lease terms,

and any other relevant information when making this determination).

In this instance, the Request for Proposals and the Instructions to Bidders set forth the factors to be addressed by each bidder; however, neither the bid documents nor any statute, placed a limit on the information that a bidder may submit in support of its bid. Should additional information be submitted by an interested bidder (as occurred in this situation), the “other relevant factors” stated in Miss. Code Ann. § 31-7-13(r) allows the governing authority to consider this additional information to determine its potential relevance. Had HomeBase supplied only the information that was specifically requested, given that price is *not* the only factor to be considered in the determination of the lowest *and best* bid, there is no guarantee that Preferred Transport would have been awarded a contract. See e.g. *Billy E. Burnett, Inc.*, 940 So.2d at 243 (citing *Hemphill*, 760 So.2d at 723). However, HomeBase chose to submit additional information and Preferred Transport could have taken the initiative to do the same, rather than rest upon the fact that they had held the contract for the previous six (6) years. HomeBase should not be penalized for its initiative in submission of the best bid, with adequate supporting information. The Board was within the parameters of Miss. Code Ann. § 31-7-13(r) when it accepted what it determined to be the lowest *and best* bid and placed a discussion regarding same in the minutes of the March 3, 2008 Board meeting.

At the Board Meeting on March 3, 2008, the bids were discussed in an open forum with representatives of Preferred Transport and HomeBase in attendance. The determination of the winning bid was founded upon the statutory considerations set forth in Miss. Code Ann. § 31-7-13(r) including “price, technology and other relevant factors.” Based on the information requested in the bid documents and the information contained in the bids, themselves, “other relevant factors” were then discussed and deemed to include, but not be limited to, local employment, local access, local economic development opportunities and fostering “economic development within Claiborne County

whenever reasonably possible.” (R. 117).¹ The representatives of Preferred Transport and HomeBase were then given the opportunity to address the Board. HomeBase’s representative discussed economic development opportunities and special services, whereas the representative of Preferred Transport stated only that they had submitted the lowest bid and declined to address any additional factors.

As mentioned previously, price may not always be the lone or paramount consideration in the Board’s decision. *Nelson v. City of Horn Lake*, 968 So.2d 938, 943 (Miss. 2007); *Billy E. Burnett, Inc.*, 940 So.2d at 243; *Canton Farm Equip., Inc. v. Richardson*, 501 So.2d 1098, 1104 (Miss. 1987). The Mississippi Supreme Court has pointed out that there was no primacy assigned via statute to either the lowest or the best bid, leaving the governing authorities with the obligation to carefully scrutinize each bid for not only the amount of the bid, but the quality of the bid. *Canton Farm Equipment, Inc.*, 501 So.2d at 1104, n. 3. The Board’s Request for Proposals for Solid Waste Collection itself also “*reserve[d] the right to reject any or all Proposals . . . and to retain[] the right to accept the lowest and best proposal for its citizens and is not obligated to accept the cheapest proposal.*” (emphasis added). Similarly, in *Nelson*, the City, in its advertisement for bids, had reserved the right to reject any bid. *Nelson, supra* at 943. The Court found this to be a valid reason for rejection of Nelson’s bid. *Id.*

Miss. Code Ann. § 31-7-13(d) is entitled “Lowest and best bid procedure.” Subsection (i) specifies that “[p]urchases may be made from the lowest and best bidder.” In its Request for Proposals for Solid Waste Collection, the Board reserved the right to reject “any or all Proposals” and to accept the “lowest and best proposal,” while specifically not obligating itself to accept the

¹ The Board’s initial Request for Proposals for Solid Waste Collection stated that the Board “*reserve[d] the right to reject any or all Proposals . . . and to retain[] the right to accept the lowest and best proposal for its citizens and is not obligated to accept the cheapest proposal.*” Thus, Preferred Transport was aware (or should have been aware)

cheapest proposal. In the event the governing authority which solicited the bids does not select the lowest bid, it is required by Miss. Code Ann. § 31-7-13(d)(i) to "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." *See Nelson, supra* at 943 (holding that the minimal, requisite 'detailed calculations' pursuant to Miss. Code Ann. § 31-7-13(d)(i) may be met "by citing the dollar amounts of the lowest bid and the accepted bid.") In this instance, the minutes include both the dollar amounts of the lowest bid and the accepted bid as well as a detailed summary of the rationale behind its decision. Thus, at all times herein, the Board was in compliance with Mississippi law and no grounds exist for a finding to the contrary.

B. Whether the Decision of the Claiborne County Board of Supervisors to Accept the Bid of HomeBase Litter Control was Arbitrary, Capricious, Discriminatory, Illegal and not Supported by Substantial Evidence

The Mississippi Supreme Court has held that the decision of a Board of Supervisors *must* be upheld unless the decision "is clearly shown to be arbitrary, capricious, or discriminatory or is illegal or without substantial evidentiary basis." *Billy E. Burnett, Inc.*, 940 So.2d at 243. *See also Golden Triangle Regional Solid Waste Management Authority v. Concerned Citizens Against Location of the Landfill*, 722 So.2d 648, 652 (Miss. 1998). The terms "arbitrary" and "capricious" were defined by the Mississippi Supreme Court in *Burks v. Amite County School Dist.*, 708 So.2d 1366, 1370 (Miss. 1998) (citing *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So.2d 312, 322 (Miss. 1992)). "An act is arbitrary when it is not done according to reason or judgment, but depending on the will alone." *Id.* "Capricious" is defined as any act done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling

that the cheapest bid would not necessarily be the winning bid.

principles.” *Id.* “Substantial evidence” has been defined as “such relevant evidence as reasonable minds might accept as adequate to support a conclusion” or to put it simply, more than a “mere scintilla” of evidence. *Johnson v. Ferguson*, 435 So.2d 1191, 1195 (Miss. 1983). Importantly, the decision of a local governing board is *presumed* valid, and the burden is upon the person seeking to set it aside to show that it was arbitrary, capricious and unreasonable. *Board of Aldermen, City of Clinton v. Conerly*, 509 So.2d 877, 884 (Miss. 1987); *Walters v. City of Greenville*, 751 So.2d 1206, 1211 (Miss.App. 1999). At the trial court level, Appellants had “the burden of proving that the decision rendered was arbitrary, capricious, discriminatory, or beyond the legal authority of the city’s board or unsupported by substantial evidence.” *McWaters v. City of Biloxi*, 591 So.2d 824, 827 (Miss. 1991). Preferred Transport did not prove and the lower court made no finding that the actions of the Board were arbitrary and/or capricious.

The Mississippi Supreme Court has held that a rebuttable presumption exists in favor of decisions of a Board of Supervisors. *Miss. Comm’n. on Env’tl. Quality v. Chickasaw County Bd. of Supervisors*, 621 So.2d 1211, 1215 (Miss. 1993). Further, when it comes to determining the lowest and best bidder, “public boards are vested with a sound discretion” which, when properly exercised, will not be interfered with by the courts. *Mississippi State Building Commission v. Becknell Construction, Inc.*, 329 So.2d 57, 59-60 (Miss. 1976). The term “fairly debatable” has been deemed the opposite of arbitrary and capricious. *Mathis v. City of Greenville*, 724 So.2d 1109, 1112 (Miss.App. 1998); *Saunders v. City of Jackson*, 511 So.2d 902, 906 (Miss. 1987). Although the Board’s decision may not have pleased all of the bidders for the collection of Claiborne County’s solid waste, nor all of the citizens of Claiborne County, to do so would be an impossibility. The Board’s decision to award the contract to HomeBase constitutes a fairly debatable decision, which should not be overturned; it, axiomatically, was not contrary to law or either arbitrary or capricious

as those terms are defined under Mississippi law.

In *Fondren North Renaissance v. Mayor of Jackson*, 749 So.2d 974, 977 (Miss. 1999), the Mississippi Supreme Court noted that the public need to have the property re-zoned is considered to be "fairly debatable" where the development of the subject property is potentially of great benefit to the city and there is little indication that the best interests of the city would be served by the continued undeveloped status of the property. In the matter *sub judice*, there can be no question that the possibility of bringing economic growth and development to the County would be of great benefit. Further, the Board and citizens of Claiborne County are in the best position to determine what constitutes a benefit to their home County. The Board's decision was not made in a whimsical manner or without reason; rather, it was made in accordance with statutory procedures established to ensure the measured consideration of such matters. The minutes reflect the deliberative process, and show that Preferred Transport was afforded ample due process and a meaningful opportunity to be heard in support of its bid. See *Mayor and Bd. of Aldermen, City of Clinton v. Welch*, 888 So.2d 416, 429-30 (Miss. 2004) (holding that the fact that the issue was debated at great length supports a finding that the decision was fairly debatable). Preferred Transport has failed to meet its burden in establishing the actions of the Board to be arbitrary and capricious for purposes of judicial review. Clearly, the Board had, at a minimum, a fairly debatable basis for its determination, which in turn, cannot be characterized as either arbitrary or capricious, or without substantial evidence, considering the on-the-record findings of the Board. The Board's decision should be affirmed in all respects.

C. Whether the Trial Court Erred by not Awarding Preferred Transport Compensatory Damages and Attorney's Fees

Preferred Transport cites *City of Durant v. Laws Constr. Co.*, 721 So.2d 598 (Miss. 1998) for the proposition that an award of compensatory damages against the Board is appropriate in this

situation. However, in *City of Durant*, there was a finding of breach of contract. *Id.* at 606. The Court's holding in *City of Durant* provides no authority for an award of damages in the present case as no contract between the parties was entered into, nor has the Appellant ever asserted or made a claim for breach of contract. In fact, the jurisdiction of this Court is limited by statute to a *review* of the decision-making process of the decision-making body (i.e. the Board of Supervisors) from which the appeal was taken. Thus, there is no procedural vehicle by which to award damages.

The Claiborne County Board of Supervisors is also immune from suit and the imposition of damages based on legislative immunity. In *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct. 966, 971 (1998), the United States Supreme Court determined that legislative immunity was not only for actual legislators, but also applied to "inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like." The Mississippi Supreme Court has held that absolute immunity attaches to the actions taken by the Board "in the sphere of legitimate legislative activity." *Bond v. Marion County Bd. of Sup'rs*, 807 So.2d 1208, 1221 (Miss. 2001) (quoting *Bogan* at 54, 118 S.Ct. at 972). Further, judicial review of any action taken by a board of supervisors is "restricted and narrow in scope in that the actions of the Board are a legislative function and presumed to be valid." *Barnes v. Board of Supervisors, DeSoto County, MS*, 553 So.2d 508, 512 (Miss. 1989) (citing *Ridgewood Land Co. v. Moore*, 222 So.2d 378 (Miss.1969)). A reviewing court is bound by a board's decision where there has been a reasonable adjudication based on substantial evidence. *Barnes, supra* at 511. As discussed above, in determining which proposal was best for Claiborne County, the Board relied on numerous factors which were discussed on-the-record in an open forum. The minutes reflect that the Board made a reasonable decision based on substantial evidence and, as such, their decision should stand. Based on the legislative immunity afforded the Appellees, there is no basis for an award of damages.

A request for damages against the Appellees necessarily implicates the Mississippi Tort Claims Act which is the exclusive remedy of any person or unit wishing to file a claim against a state entity or a political subdivision thereof. The Mississippi Tort Claims Act sets forth procedures a claimant must follow in order to assert a claim against a government entity. Although no damages are warranted in this situation, any such demand would necessarily come under the province of the Mississippi Tort Claims Act and Preferred Transport would be required to follow the procedures set forth therein to make a claim under the Act. The relevant rule states:

After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity.

§ 11-46-11(1). Because the Claiborne County Board of Supervisors is a political subdivision of the state, the Appellant is subject to the requirements of the Mississippi Tort Claims Act and any claim for damages must be dismissed due to Preferred Transport's failure to give proper notice under § 11-46-11(1). *See University Medical Center v. Easterling*, 928 So.2d 815, 820 (Miss. 2006) (holding that where the plaintiff did not comply with the notice requirement, her claim was properly dismissed).

Any state law claims made against the Claiborne County Board of Supervisors are subject to and barred by the Mississippi Tort Claims Act, as codified at Miss. Code Ann. § 11-46-1, *et seq.* Miss. Code Ann. §11-46-9 provides that a governmental entity and its employees acting within the course and scope of their employment shall not be liable for any claim based upon an act or omission enumerated therein. If the act or omissions fall under *any one* the subsections of Miss. Code Ann. §11-46-9, then the governmental entity is exempt from liability. Appellees, the Claiborne County

Board of Supervisors, are state actors pursuant to their performance of a public function and employment status. As such, in soliciting bids for the collection of solid waste, they were necessarily acting pursuant to and within the scope of their duties for the county and are necessarily immune from liability. Preferred Transport cannot recover the damages sought in this action against the Claiborne County Board of Supervisors.

To the extent this action against the Board as a whole may be seen as one against the members in their official capacities, they are shielded by sovereign immunity. If there could be any doubt as to whether the pertinent provisions of the Mississippi Tort Claims Act governed Appellant's claims for imposition of liability against the Board, or the governmental entity they represent, such doubt is removed by the Act's "exclusive remedy" provision found at § 11-46-7(1) and which states in pertinent part:

(1) The remedy provided by this chapter against a governmental entity or its employee is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee . . . for the act or omission which gave rise to the claim or suit; . . .

Accordingly, the Act is the sole authority -- statutory or otherwise -- which governs the rights and liabilities of the parties to this action. As demonstrated below, the Act affords Preferred Transport absolutely no basis for any liability under state law, and, therefore, no relief from Appellees. To the extent that Appellant seeks monetary damages of, from or against the Board of Supervisors under the law of the State of Mississippi, the Appellant's claims and cause of action against the Appellees are barred by the provisions of the Mississippi Tort Claims Act, codified at Miss. Code Ann. § 11-46-1 *et seq.* The Claiborne County Board of Supervisors is entitled to statutory, sovereign immunity regarding the claims made by the Appellant.

Additionally the Mississippi legislature has absolutely precluded the imposition of liability

for discretionary acts. "A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . [b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused[.]" Miss. Code Ann. § 11-46-9(1)(d). "A duty is discretionary if it requires the official to use her own judgment . . . in the performance of that duty." *Brewer v. Burdette*, 768 So.2d 920, 922 (Miss. 2000). The record clearly establishes that the complained of actions and omissions were discretionary in nature, and the Claiborne County Board of Supervisors, should be granted the protection and immunity of the Mississippi Tort Claims Act.

"[A] duty is ministerial and not discretionary if it is imposed by law and its performance is not dependent on the employee's judgment." *Mississippi Dep't of Transp. v. Cargile*, 847 So.2d 258, 267 (Miss. 2003) (citations omitted). "[T]he most important criterion is that if the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion, the act and discharge thereof is ministerial." *Id.* at 267-68 (citations omitted). The Appellant has not and cannot establish that the Claiborne County Board of Supervisors breached any ministerial duty with regard to the bidding process.

Lastly, absent some statutory authority or contractual provision, attorneys' fees cannot be awarded unless punitive damages are also proper. *Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So.2d 495 (Miss. 2007), (citing *Aetna Cas. & Sur. Co. v. Steele*, 373 So.2d 797, 801 (Miss.1979)). There is no statutory authority by which attorneys' fees may be granted in this situation. Punitive damages were not requested and are not warranted or allowed in this case as a

matter of law. In fact, Miss. Code Ann. § 11-46-15(2) provides: "No judgment against a governmental entity or its employee for which any action or omission for which immunity is waived under this chapter shall include an award for exemplary or punitive damages or for interest . . . or an award of attorney's fees. . ." Miss. Code Ann. § 11-46-15(2). Thus, neither an award of compensatory damages nor attorneys' fees would be justified against the Claiborne County Board of Supervisors.

CROSS-APPEAL

A. Whether the Trial Court Erred in Not Affirming the Actions of the Claiborne County Board of Supervisors *in toto*, Specifically Whether Requiring a Re-bid Regarding Solid Waste Disposal was in Error

Upon appeal of a municipality's decision, a reviewing court is limited to an inquiry regarding the nature of the Board's decision. *Board of Sup'rs of Clay County v. McCormick*, 207 Miss. 216, 228, 42 So.2d 177, 179 (Miss. 1949). Further, the Mississippi Supreme Court has held that a rebuttable presumption exists in favor of decisions of a Board of Supervisors. *Miss. Comm'n. on Env'tl. Quality v. Chickasaw County Bd. of Supervisors*, 621 So.2d 1211, 1215 (Miss. 1993). See also *Golden Triangle Regional Solid Waste Management Authority v. Concerned Citizens Against Location of the Landfill*, 722 So.2d 648, 652 (Miss. 1998). The Court has also held that the decision of a Board of Supervisors ***must be upheld*** unless the decision "is clearly shown to be arbitrary, capricious, or discriminatory or is illegal or without substantial evidentiary basis." *Billy E. Burnett, Inc.*, 940 So.2d at 243. Notably, the decision of a local governing board is ***presumed*** valid, and the burden is upon the person seeking to set it aside to show that it was arbitrary, capricious and unreasonable. *Board of Aldermen, City of Clinton v. Conerly*, 509 So.2d 877, 884 (Miss. 1987); *Walters v. City of Greenville*, 751 So.2d 1206, 1211 (Miss.App. 1999). The lower court, in its Memorandum Opinion and Order, ***made no finding*** that the decision of the Claiborne County Board

of Supervisors was arbitrary, capricious, discriminatory, illegal or without substantial evidentiary basis. (R. 283-287). *Without such a finding, the decision of the Board “may not be set aside.”* *City of Jackson v. Capital Reporter Publishing Company, Inc.*, 373 So.2d 802, 807 (Miss. 1979) (citing *Sanderson v. City of Hattiesburg*, 249 Miss. 656, 163 So.2d 739 (1964)). However, in this instance, the court held that the Board’s decision should be reversed and the bidding process re-opened. (R. 287). Clearly, the circuit court did not find that Preferred Transport met its burden as no finding was made that the actions of the Board were arbitrary, capricious, discriminatory, illegal or without substantial evidentiary basis. As such, the court over-stepped its authority by reversing the decision of the Board and requiring the re-bidding process to be re-opened.

Miss. Code Ann. § 11-51-75 gives the reviewing court the opportunity to “affirm or reverse the judgment” which has been appealed to it. However, a board’s decision “must remain undisturbed” unless there is a finding that the decision “(1) is beyond the scope or power granted to the board by statute; (2) violates the constitutional rights or statutory rights of the aggrieved party; (3) is not supported by substantial evidence; or (4) is arbitrary or capricious.” *Hinds Co. Bd. of Supervisors v. Leggette*, 833 So.2d 586, 590 (Miss. 2002) (citing *Board of Law Enforcement Officers Standards & Training v. Butler*, 672 So.2d 1196, 1199 (Miss.1996)). In the instant matter it is undisputed that Miss. Code Ann. § 31-7-13 allows government entities to solicit bids for the collection and disposal of solid waste. The lower court did not find a violation of statutory or constitutional rights of Preferred Transport and this issue was not appealed to this Court. (R. 283-287). No finding was made by the circuit court that the Board’s decision was not supported by substantial evidence. *Id.* Lastly, there was no finding that the actions of the Board in awarding the bid for solid waste collection to HomeBase were arbitrary or capricious. *Id.* At the very least, the decision of the Board was fairly debatable. *See Gannett River States Publishing Corp. v. Jackson*

Advocate, 856 So.2d 247, 249 (Miss. 2003) (holding that where the city council's decision was fairly debatable, the circuit court abused its discretion in supplanting the council's decision). As such, it logically follows that the lower court had no basis for its reversal of the Board's decision.

The Record reflects that the Board afforded the Appellant a meaningful opportunity to be heard, that all legal criteria were met, and a decision was made based on the matters presented as well as the Board's own knowledge and familiarity with the topic in issue. Clearly, the Board had at a minimum a reasonable basis for its determination, which in turn, cannot be characterized as either arbitrary and capricious, or without substantial evidence, considering the on-the-record findings of the Board as reflected in the minutes appearing of record and discussed above. The Board's decision should be affirmed in all respects.

VI. CONCLUSION

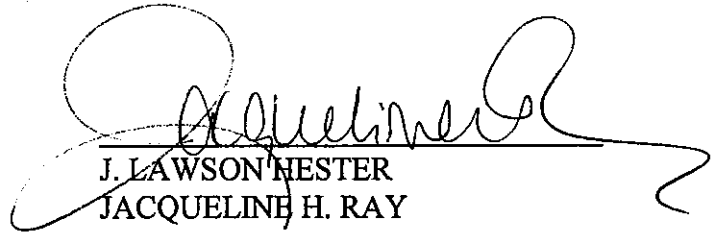
The Claiborne County Board of Supervisors properly considered the bids submitted for the collection of solid waste in accordance with Miss. Code Ann. § 31-7-13. Despite the fact that the company which submitted the cheapest bid was not awarded the contract, all considerations set forth in Miss. Code Ann. § 31-7-13(d) regarding the Board's acceptance of the lowest *and* best bid were met. The Board's actions were not arbitrary and/or capricious, were not unconstitutional, were consistent with statutory procedure and substantive law, and complied with the constitutional requirements of due process. Appellant, Preferred Transport, has not met its burden to overcome the validity of the Board's decision and, as such, this Court should affirm the decision of the Board *in toto*.

RESPECTFULLY SUBMITTED, this the 6th day of May, 2009.

CLAIBORNE COUNTY BOARD OF SUPERVISORS,
Defendant

By: Its Attorneys

PAGE, KRUGER & HOLLAND, P.A.



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CERTIFICATE OF SERVICE

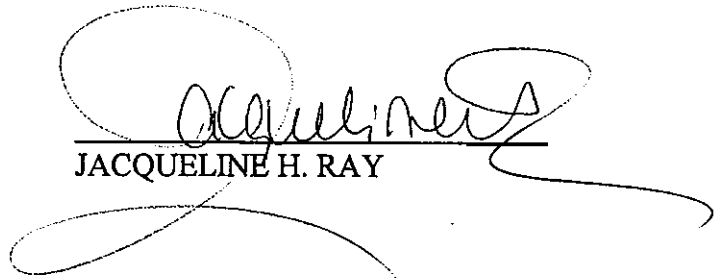
I, Jacqueline H. Ray, do hereby certify that I have this day served via U. S. Mail a true and correct copy of the above and foregoing to the following:

Hon. Lamar Pickard
Claiborne County Circuit Court Judge
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This, the 6th day of May, 2009.


JACQUELINE H. RAY