

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

REPLY BRIEF OF CROSS-APPELLANTS

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 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 15th day of July, 2009


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I. STATEMENT OF THE ISSUE

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 Error.

II. SUMMARY OF THE ARGUMENT

The Mississippi Supreme Court has held that the decision of a Board of Supervisors *must* be upheld unless the decision is arbitrary, capricious, discriminatory, illegal, unconstitutional, beyond the power of the board or without substantial evidentiary basis. *Billy E. Burnett, Inc. v. Pontotoc Co. Bd. of Supervisors*, 940 So.2d 241, 243 (Miss.App. 2006); *Board of Sup'rs of Clay County v. McCormick*, 42 So.2d 177, 179 (Miss. 1949). 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, unconstitutional, beyond the power of the board 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, and thus, the decision of the Claiborne County Board of Supervisors should be reinstated.

III. ARGUMENT

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

“The order of the city governing board is a legislative function and is presumed to be valid.” *Currie v. Ryan*, 243 So.2d 48, 52 (Miss. 1970) (citing *Ridgewood Land Co. v. Moore*, 222 So.2d 378 (Miss. 1969)). See also *Miss. Comm’n. on Env’tl. Quality v. Chickasaw County Bd. of Supervisors*, 621 So.2d 1211, 1215 (Miss. 1993) (holding that a rebuttable presumption exists in favor of a decision made by a board of supervisors). 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). Before a board’s decision may be overturned, it must be clearly shown that it is arbitrary, capricious, discriminatory, illegal, unconstitutional, beyond the power of the board or without substantial evidentiary basis. *Billy E. Burnett, Inc.*, 940 So.2d at 243; *Board of Sup’rs of Clay County*, 42 So.2d at 179. The Court has also held that the decision of a Board of Supervisors may not be set aside in the event that its validity is fairly debatable. *Mayor and Bd. of Aldermen v. Hudson*, 774 So.2d 448, 451 (Miss. 2000). The burden is upon the person seeking to set a board’s decision 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). “If a decision is one which could be considered ‘fairly debatable,’ then it could not be considered arbitrary or capricious . . .” *Mathis v. City of Greenville*, 724 So.2d 1109, 1112 (Miss. 1998) (quoting *City of Biloxi v. Hilbert*, 597 So.2d 1276, 1281 (Miss. 1992) (internal citations omitted)). Axiomatically, if the Claiborne County Board of

Supervisors' decision is either (1) fairly debatable; *or* (2) is not shown to be arbitrary and capricious, it should not be overturned.

The Circuit Court 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). 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).

In this instance, it is respectfully submitted that the circuit court over-stepped its authority by reversing the decision of the Board and requiring the bidding process to be re-opened. (R. 287). 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, unconstitutional, beyond the power of the board 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) (emphasis added)).

Clearly, the Board had, at a minimum, a reasonable basis for its determination which, in turn, cannot be characterized as arbitrary, capricious, discriminatory, illegal, unconstitutional, beyond the power of the board or without substantial evidentiary basis, considering the on-the-record findings of

the Board as reflected in the minutes appearing of record and discussed in previous briefing.¹ At the very least, the decision of the Board was fairly debatable. The term "fairly debatable" has been deemed the opposite of arbitrary and capricious. *Mathis*, 724 So.2d at 1112; *Saunders v. City of Jackson*, 511 So.2d 902, 906 (Miss. 1987). See also *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). Although Miss. Code Ann. § 11-51-75 gives the reviewing court the opportunity to "affirm or reverse the judgment" which has been appealed to it, in this situation it logically follows that the lower court had no basis for its reversal of the Board's decision to award the solid waste contract to Home Base Litter Control. As such, the Board's decision should be affirmed in all respects.

IV. 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.² 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*.

¹ See discussion set forth on pages 9-11 of the Claiborne County Board of Supervisors' May 6, 2009 brief submitted to this Court.

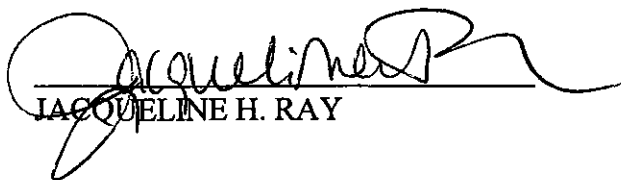
² See discussion set forth on pages 6-9 of the Claiborne County Board of Supervisors' May 6, 2009 brief submitted to this Court.

RESPECTFULLY SUBMITTED, this the 15th day of July, 2009.

CLAIBORNE COUNTY BOARD OF SUPERVISORS,
Defendant

By: Its Attorneys

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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:

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This, the 15th day of July, 2009.



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