

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-01532

PREFERRED TRANSPORT COMPANY, LLC

APPELLANT

VS.

**CLAIBORNE COUNTY BOARD
OF SUPERVISORS**

APPELLEES

From the Circuit Court of Claiborne County, Mississippi

**BRIEF OF THE APPELLANT
PREFERRED TRANSPORT COMPANY, LLC**

Respectfully submitted on the 2ND day of March, 2009,

**Robert C. Latham (MSB [REDACTED])
Jeremy P. Diamond (MSB [REDACTED])
TRULY, SMITH & LATHAM, P.L.L.C.
P.O. Box 1307
Natchez, MS 39121
Telephone: (601) 442-6496
Facsimile: (601) 442-8874**

***Attorney for Appellant Preferred Transport
Company, LLC***

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certified that all 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.

1. Preferred Transport Company, LLC, Natchez, Mississippi, Appellants;
2. Claiborne County Board of Supervisors, Port Gibson, Mississippi, Appellees;
3. Honorable Lamar Pickard, Circuit Judge for Claiborne County, Mississippi;
5. Robert C. Latham, Esquire and Jeremy P. Diamond, Esquire, Truly, Smith & Latham, P.L.L.C., Post Office Box 1307, Natchez, Mississippi 39121. Attorneys of record for Preferred Transport Company, LLC, Appellants;
6. J. Lawson Hester, Esquire and Jacqueline H. Ray, Esquire, Page, Kruger & Holland, P.A., 10 Canebrake Blvd., Ste. 200, Jackson, Mississippi 39232. Attorneys of record for Claiborne County Board of Supervisors, Appellees;
7. A. Michael Espy, Esquire, Mike Espy, P.A., 317 Capitol Street, Ste. 101, Jackson, Mississippi 39225. Attorney of record for Claiborne County Board of Supervisors Appellees;

Respectfully submitted on the ^{24th} day of ^{March} ~~February~~, 2009.

By:

JEREMY P. DIAMOND

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INTRODUCTION

This case is about upholding the integrity and fairness of the bidding laws in the face of the Claiborne County Board of Supervisors usurping those laws to ensure their desired outcome.¹ Appellees did this *by unilaterally changing the rules of the bid in the eleventh hour*. In doing so, the Appellees awarded the bid to a higher bidder, HomeBase Litter Control, LLC, on the basis that it is a local company and on the grounds of economic development.² However, Appellees did not include these requirements in their Request For Proposal, or bid request, nor was Preferred Transport Company, LLC ("Preferred Transport") aware that this would be a considering factor in awarding the waste collection contract. Furthermore, the factors relied on by the Claiborne County Board of Supervisors are not related in any way to the collection of solid waste in the county. The Claiborne County Board of Supervisors must rely on factors that are reasonably related to the performance of the contract up for bid.

The bidding requirement for the case at bar requires competitive sealed bids. *See Miss. Code Ann. § 31-7-13(c) & (r)*. "The purpose of the law is to protect the public by promoting competition so as to prevent fraud, favoritism and the like." *Hemphill Construction Company, Inc. v. City of Laurel, Miss.*, 760 So. 2d 720, 724 (Miss. 2000). In requiring contracts with public entities be let only after competitive bidding "is to secure economy. . . in the expenditures of

¹For the purpose of this Brief, Appellant will be referring to the Board of Supervisors as a whole. However, it is important to note that Supervisors Mott Headley, Jr. and Charles Shorts voted in favor of the motion awarding the contract to the Appellant; whereas, Supervisors Allen Burks, Michael Wells and Ronald Shoulders voted against the motion awarding the contract to the Appellant.

²The contract was awarded to HomeBase Litter Control at \$13.00 per household. After awarding the contract, Appellees entered into executive session to negotiate with HomeBase Litter Control, who reduced its' bid to \$11.00 per household thereafter.

public funds. . .; to protect the public from collusive contracts;. . .and to promote actual, honest, and effective competition” so that all bids may be in competition on the same basis. *See Hemphill Construction Company*, 760 So. 2d at 724. Appellant submits that the notions of openness, fairness, and effective competition in the bidding process was not accomplished in the case at bar. Appellant recognizes that in some cases the public authorities are vested with some discretion pursuant to relevant statutory authority. However, this case is illustrative of the public authority acting beyond the discretion allowed by considering factors that were not included in the bid documents.

STATEMENT OF THE ISSUES PRESENTED

- A. Whether the Trial Court correctly held the Claiborne County Board of Supervisors exceeded its discretion by considering factors not included in the bid documents?
- B. Whether the Claiborne County Board of Supervisors finding that Preferred Transport Company, LLC was not the lowest and best bid was arbitrary, capricious, discriminatory, illegal, or is not supported by substantial evidence by considering factors of local employment, local access, and providing economic development opportunities to qualified local residents as relevant factors?
- C. Whether the Trial Court erred by deviating from the statutory relief of awarding the solid waste collection contract to Preferred Transport Company, LLC?
- D. Whether the Trial Court has the authority to award damages as an equitable alternative of awarding the solid waste collection contract to Preferred Transport Company, LLC as provided by the statute?

STATEMENT OF THE CASE

A. Course of the Proceedings

In January 2008, Claiborne County Board of Supervisors requested competitive bidding for the collection and disposal of solid waste. *See Request for Proposals; R. Vol. 1, pg. 11*, In response to the request for bids, Preferred Transport Company, LLC, Waste Management, and HomeBase Litter Control, LLC submitted sealed bids pursuant to the competitive bidding requirement of § 31-7-13(c) & (r) of the Mississippi Code Annotated.³ On February 21, 2008, the County unsealed and reviewed the bids submitted in response to the bidding documents. *See Board of Supervisors March 3, 2008 Minutes; R. Vol. 1, pg. 114*. Preferred Transport submitted a bid of \$9.77 per household for an annual cost to Claiborne County of \$386,071.32.⁴ *See Request for Proposal; Id. at pg. 32*. HomeBase Litter Control submitted a bid of \$13.00 per household for an annual cost to Claiborne County of \$513,708.00. *See Board of Supervisors March 3, 2008 Minutes; Id. at pg. 117*. After the bids were opened and reviewed, the President of the Board requested an opinion from the County Attorney as to the relevant rules governing the Appellees actions in accepting a competitive bid. *Id.* Thereafter, the County Attorney recited the relevant statutory authority that the Board should consider “price, technology, and other relevant factors.” *Id.* The County Attorney continued that the other relevant factors can include “matters such as local employment, local access, and providing economic development

³Preferred Transport performed this service for the past six and one-half years. Although it was not an issue at oral arguments, it is worth reiterating that Appellant performed this service to a very high standard and enjoyed significant public satisfaction.

⁴The contract documents set the household units served under the contract at 3293. *See Instructions to Bidders at para. 12*.

opportunities to qualified local residents.” *See Board of Supervisors March 3, 2008 Minutes; R. Vol. 1, pg. 118.*

Upon completion of this discussion by the County Attorney, the Board heard comments from representatives from both Preferred Transport and HomeBase Litter Control and generally discussed the matter prior to the vote. *Id.* Thereafter, the Board invited motions on the matter. On the motion to award the contract to Preferred Transport pursuant to their bid of \$9.77 per household, Supervisors Mott Headley, Jr. and Charles Short voted in favor of the same, and Supervisors Allen Burks, Michael Wells and Ronald Shoulders voted against the same. *Id. at pg. 117.* On the motion to award the contract to HomeBase Litter Control pursuant to their bid of \$13.00 per household, Supervisors Allen Burks, Ronald Shoulders, Michael Wells voted in favor of the same, and Supervisors Mott Headley, Jr. and Charles Shorts voted against the same. *Id.*⁵

After the Board voted on the respective motions, they entered executive session with a representative of HomeBase Litter Control to negotiate the bid price submitted by HomeBase Litter Control. *Id.* As a result of the executive session negotiation, HomeBase Litter Control agreed to reduce its’ per household price to \$11.00 for an annual cost to Claiborne County of \$434,676.00. *See Id.* Appellant submits that even with the per household price reduction, HomeBase Litter Control will still cost Claiborne County an additional \$48,604.68 annually. The Appellees provided the following narrative in supported of their decision:

⁵The additional cost borne by Claiborne County in awarding the contract to HomeBase Litter Control, as opposed to Preferred Transport, is \$127,636.68 annually.

The Board of Supervisors concluded that the elements and benefits that could be offered by a true local contractor: hiring local workers, providing local access, offering new and special services to the local elderly community, and further that the demonstration to the constituent community of its commitment to foster economic development within Claiborne County whenever reasonably possible would certainly justify the slightly higher comparative per unit cost that will be required of the County by awarding the contract to locally based, HomeBase Litter Control.

See Board of Supervisors March 3, 2008 Minutes; R. Vol. 1, pg. 117. In awarding the contract to HomeBase Litter Control, *the Appellees relied on the “other relevant factors” language in § 31-7-13 upon advice from the County Attorney. See Id. at 118.*

Appellees defined these “other relevant factors” after the bids were unsealed and opened and not in the bid request itself so as to provide notice to all potential bidders of the additional relevant factors. This is a clear violation of the governing statutory authority for competitive bidding. Furthermore, it exceeds the authority of the Claiborne County Board of Supervisors in determining the lowest and best bid for the solid waste collection contract. After a hearing on this matter, the Trial Court agreed that the Claiborne County Board of Supervisors exceeded their authority in considering factors not contained in the bid documents. *See Memorandum and Order; R. Vol. 2, pg. 287.* However, the Court erred in ordering the Claiborne County Board of Supervisors to reopen the bidding process and to include “all relevant factors, including hiring of local workers, providing local access, offering new and special services to the local elderly community, and local economic development” in the bid documents. *Id.*

B. Relevant Documents.

In January 2008, Claiborne County Board of Supervisors requested competitive bidding for the collection and disposal of solid waste. The bid material contained a Request for Proposal for Solid Waste Collection & Solid Waste Disposal Services in Claiborne County, Mississippi, Instructions to Bidders, Rural Solid Waste Collection & Solid Waste Disposal Services General Specifications, and the Contractor's Proposal and Bid Form. *See Request for Proposals dated January 17, 2008; R. Vol. 1, pg. 11.* The request required that all bids be sealed and be submitted in accordance with the instructions provided by the Appellees. *Id. at pg. 12.* The request recited that the County may "reject any and all proposals . . . , and to make an award in any manner, consistent with law, deemed in the best interest of the County." *Id.* It further recited that the County may "accept what it considers, in its judgment, the lowest and best proposal for its citizens and is not obligated to accept the cheapest proposal." *Id.* During oral arguments, Appellees relied on this language to give them carte blanche authority in accepting, denying, and negotiating any bid proposal and for defining the relevant factors irrespective of bid price and the statutory mandates for the bidding process. *See Transcript; R. Vol 3, pg. 17.* Appellant submits that the above language is nothing more than a recitation of the language found in § 31-7-13 (c) & (r). Furthermore, Appellant submits that these reservations must be consistent with the relevant statutory authority, and any conflicts therein would be resolved in favor of the statute.

The Instructions to Bidders and General Specifications contains the rules for bid proposals and the technical information for performing the service if awarded the contract. *See Instructions to Bidders and General Specifications, R. Vol. 1, pg. 13-30.* Specifically, the

Instructions to Bidders contains the standards by which submitted bids will be judged by the Appellees. *See Instructions to Bidders, R. Vol. 1, pg. 13.* The Instructions to Bidders would also contain any conditions such as price, technology, and other relevant factors to be considered by the public authority in awarding the contract. Appellant submits that there are a few provisions worth discussing which are relevant in the case at bar. First, Appellant submits that paragraph 9 of the Instructions to Bidders provides that the County will consider the competency and responsibility of a bidder, which is synonymous with choosing the “best” bidder. *Id. at pg. 15.* Second, paragraph 10 of the Instructions to Bidders provides for disqualifying factors by which a bidder may be rejected. *See Id. at pg. 16.* Finally, paragraph 11 of the Instructions to Bidders states that the “[p]roposals for refuse collections service and for disposal service ***are solicited on the basis of rates for each type of work.***” *Id.* (emphasis added). It goes on to state “[p]roposals ***will be compared on the basis of the summation of the rates proposed.***” *Id.* (emphasis added). The bidding documents clearly state that the proposed “rates” will be the primary basis for which bids would be evaluated. This is the information that the Appellant used to prepare its bid. Appellant submits that noticeably lacking from these bid documents is the requirement or notice of relevancy of any factor, other than price, such as preference to local bidders and economic development. Therefore, it is confusing why the Appellees would rely on factors not contained in the bidding documents to justify awarding the contract to HomeBase Litter Control whose bid was \$127,636.68 higher than the lowest bid submitted by Preferred Transport.

SUMMARY OF THE ARGUMENT

The requirement that all relevant factors be included in the bid documents protects the openness, fairness and competitive nature of the bid process. It also ensures that the governmental authority is evaluating bids on the same terms so as to choose the lowest and best bid. Furthermore, the statutory authority requires that all relevant factors, as determined by the governing authority, *shall* be included in the bid documents. The legislature granted no deference to the governing authority or entity with regard to this requirement. As such, the Appellees are not entitled to any deference in their decision as it violates the legislative mandate. Appellant submits that the statutory language is clear and this Court should give it its plain meaning. Furthermore, Appellant submits that the purpose of the statute and the reasoning of the legislature is clear in that it seeks to protect the openness, fairness, and competitive nature of the bidding process.

Appellant submits that the Appellees violated the applicable statutory authority by considering factors not included in the bid documents, and this Court should reverse their decision or, in the alternative, award damages to the Appellants. The applicable statute calls for the Circuit Court to award the contract as it should have been awarded had the Claiborne County Board of Supervisors followed the applicable statutory authority. However, if it is too late to render the correct decision and award the solid waste collection contract to Preferred Transport, the Court can award compensatory damages and attorney's fees. Appellants can be made whole by an award of compensatory damages and attorney's fees where it would be inequitable to award the relief provided in the statute. Furthermore, by awarding damages, this Court is upholding the public bid laws and the legislative intent to protect the veracity of the competitive

bid process. Appellant can prove that as a result of the Appellees' actions it has incurred compensatory damages in the approximate amount of \$408,490.00, which is the net profit to be derived from the contract and other costs incurred as a result of the breach.

STANDARD OF REVIEW

The scope of review is limited when examining the actions of a municipal board. *See Sunland Publ'g Co. v. City of Jackson*, 710 So. 2d 879, 881-82 (Miss. 1998). For questions of law, a governing board's decision is reviewed de novo. *A&F Props, LLC v. Madison County Bd. of Supervisors*, 933 So. 2d 296, 300 (Miss. 2006). A de novo standard is also applied to issues of statutory interpretation as is a factor in the case at bar. *Nelson Plumbing Company v. City of Horn Lake*, 968 So. 2d 938, 942 (Miss. 2007).

LAW AND ARGUMENT

I. THE COURT CORRECTLY HELD THAT THE CLAIBORNE COUNTY BOARD OF SUPERVISORS EXCEEDED ITS AUTHORITY BY CONSIDERING FACTORS NOT CONTAINED IN THE BID DOCUMENTS SUBMITTED TO PREFERRED TRANSPORT COMPANY, LLC.

This Court has allowed governing authorities to exercise some discretion in awarding public contracts where the discretion is supported by statutory authority. *See Hemphill Construction Co., Inc.*, 760 So. 2d at 723. "Municipalities have only such powers as are expressly granted or necessarily implied by statutes [and] such powers are to be construed most strongly against an asserted right, if the right is not clearly given." *Id.*; citing *City of Jackson v. McMurry*, 288 So. 2d 23 (Miss. 1974). Furthermore, if the statute is not ambiguous, "the court should simply apply the statute according to its plain meaning and should not use principles of statutory construction." *See Estate of Klaus v. Vicksburg Healthcare, LLC*, 972 So. 2d 555, 556

(Miss. 2007).

The governing statutory authority on bidding procedures for solid waste contracts states:

[a]ny request for proposal when issued ***shall contain*** terms and conditions relating to price, financial responsibility, technology, legal responsibilities and other relevant factors as are determined by the governing authority or agency to be appropriate for inclusion; all factors determined relevant by the governing authority or agency or required by this paragraph (r) ***shall be duly included in the advertisement to elicit proposals.***

Miss. Code Ann. § 31-7-13(r) (emphasis added). The Appellees are not entitled to the greater degree of deference generally granted in these cases where there is no legislative authority supporting their actions. *See Hemphill Construction Co., Inc.*, 760 So. 2d at 724.

Appellants submit that the “other relevant factors” considered by the governing authority should be reasonably related to the purpose of the contract being let in the bidding documents. In the case at bar, the residency of the contractor and the tenuous prospect of economic development opportunities is not relevant to solid waste collection and is not appropriately considered as a relevant factor under to § 31-7-13(r). Furthermore, the concept of “economic development opportunities” is so abstract as to undermine the ability of any contractor to concretely address this as a factor to a public contract. It further gives the governing authority too much discretion in the review process which in turn opens the door to favoritism, fraud, and waste in the procurement of government contracts. Therefore, Appellant submits that the Appellees lacked the legal authority to designate the residency of the contractor and economic development opportunities as relevant factors as they are not in any way related to the contractor’s ability to perform the service let in the bidding documents.

Assuming that the Appellees could make the local residency of the contractor and the possibility of some economic development opportunities “relevant factors” in the procurement of a public contract, as they did in the case at bar, the issue would turn on whether those factors were included in the bid documents as required by the statute. If these factors were used as a basis for the Board’s decision and they were not included in the bid documents, then the Appellees violated § 31-7-13(c) & (r) and they are not entitled to the greater deference in their decision to award the solid waste contract to HomeBase Litter Control and the Trial Court correctly overturned the County’s decision.

In the case at bar, the Board of Supervisors official minutes dated March 3, 2008, make perfectly clear that the preference given to the residency of the contractors and the notion of economic development as relevant factors in awarding the public contract was decided after the bids were unsealed and opened. The Board Attorney advised, at the request of the Board President and in the meeting, that the Board should consider “price, technology, and other relevant factors.” *See Board of Supervisor Minutes dated March 3, 2008; r. Vol. 1, pg. 118.* He expounded on what “other relevant factors” means by stating “these factors could include matters such as local employment, local access, and providing economic development opportunities to qualified local residents.” *Id.* The Board accepted their attorney’s advice as germane to the decision of whose bid to accept for the solid waste contract. Furthermore, in using these factors, the Appellees awarded the contract to a higher bidder, HomeBase Litter Control, and rejected the lowest bid of Preferred Transport who held this contract for the past six and one-half years.

The requirement that all relevant factors be included in the bid documents protects the openness, fairness and competitive nature of the bid process. It also ensures that the

defined by our supreme court, refers to an act done not according to reason or judgment, but which is solely dependent upon the will alone.” *Briarwood, Inc.*, 766 So. 2d at 80. “It has defined capricious 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 principles.” *Id.*

Section 31-7-13(c) of the Mississippi Code provides that contracts may be awarded to the “lowest and best bidder.” It further states that “if any governing authority accepts a bid other than the lowest bid actually submitted, it shall place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid.” *Miss. Code Ann. § 31-7-13(d)(i)*. Appellant submits that there has been very little litigation as to what “lowest and best” means. However, to the extent this Court has addressed the issue it has held that “lowest responsible bidder [is] synonymous with lowest and best bid.” *See M. T. Reed Constr. Co. v. Jackson Municipal Airport Authority*, 227 So. 2d 466, 469 (Miss. 1969); *citing Wilmott Coal Co. v. State Purchasing Commission*, 54 S.W. 2d 634 (1932). Therefore, Appellees can consider, other than price, the “bidder’s honesty and integrity, the bidder’s skill and business judgment, the bidder’s experience and facilities for carrying out the contract, the bidder’s conduct under previous contracts, and the quality of work previously done by the bidder.” *Billy E. Burnett, Inc. v. Pontotoc County Board of Supervisors*, 940 So. 2d 241, 243 (Miss. App. 2006). Appellant found no authority that allowed a governing authority to consider the residency of the contractor, between other in state bidders, and economic opportunity for qualified residents as grounds for determining the “best” bid proposal for a public contract.

In the case at bar, the Appellees awarded a solid waste contract to HomeBase Litter Control as the lowest and best bid on the grounds that it is a local contractor and that it will provide some economic development opportunities to the county. The Appellees awarded the contract to HomeBase Litter Control even though its bid was \$127,636.68 higher than the lowest bid submitted by Preferred Transport. Appellant submits that HomeBase Litter Control is a new company and has no prior history or experience in performing the service let by the public contract. Furthermore, at the time of the Board vote, HomeBase Litter Control had no equipment to perform the service called for in the contract. Preferred Transport had held this contract for the past six and one-half years and performed under said contract at the highest standards to the great appreciation of the Board members and the community. Appellant has several other contracts of this nature and has an outstanding work history and track record in performing under solid waste contracts. Appellant submits that to award the contract to HomeBase Litter Control under the facts of the case at bar is to act arbitrary, capricious, and unreasonable. Therefore, this Court should overturn the Board of Supervisors' decision, or in the alternative, award Appellant damages incurred for the arbitrary, capricious, and unreasonable action of Appellee.

Appellant submits that the Appellees decision to award the solid waste collection contract to HomeBase Litter Control was not supported by substantial evidence. By not choosing the lowest actual bid, the Appellees were required to "place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid." *See Miss. Code Ann. § 31-7-13(d)(i)*. Appellant submits that this requires a discussion of the qualitative and quantitative justification for awarding a public contract to someone other than the lowest bidder. Appellant submits that it was unable to find any case law discussing what meets

the detailed calculations requirement where the decision is based on quantitative matters.

However, it is clear that a detailed discussion is required where the justification for awarding the contract is based on some numeric analysis.

In the case at bar, Appellees awarded the solid waste disposal contract to HomeBase Litter Control on the grounds that it is a local contractor and that it may provide economic development opportunities to qualified local residents. Appellant recognizes that the local contractor factor, and to a limited extent the economic development opportunities, can be addressed in the detailed narrative. However, Appellees are required to provide detailed calculations that justify requiring the county residents to bear the additional expense of awarding the solid waste collection contract to HomeBase Litter Control. Appellees are relying on some distinct economic benefit that outweighs the additional expense incurred by the county. *See Board of Supervisors March 3, 2008 Minutes; R. Vol. 1, pg. 117.* This requires a detailed calculation in the minutes of the value of the economic benefit to the county as opposed to the economic burden imposed on the county residents by the Appellees decision. Appellees failure to provide the detailed calculation as required by the statutory authority renders their decision arbitrary, capricious, and unsupported by substantial evidence.

III. THE TRIAL COURT ERRED BY DEVIATING FROM THE STATUTORY RELIEF OR, IN THE ALTERNATIVE, NOT AWARDING COMPENSATORY DAMAGES AND ATTORNEY'S FEES FOR THE ILLEGAL ACTION OF THE CLAIBORNE COUNTY BOARD OF SUPERVISORS.

Appellant submits that Mississippi Code Ann. § 11-51-75 is the governing statute on appealing the decision of the Board of Supervisors in the case at bar. It states that "[i]f the judgment be reversed, the circuit court *shall render such judgment* as the board or municipal

award the contract to HomeBase Litter Control on the grounds that it is a local contractor and on the basis of some notion of economic development opportunities. Appellant submits that these items cannot legally be considered relevant factors in awarding a contract for the collection of solid waste. Appellees acted arbitrary, capricious, and unreasonable in awarding the solid waste collection contract to someone other than the lowest and best bid. Appellant was the lowest and best bidder as the term has been defined by this Court. Furthermore, Appellees considered matters not related to determining the lowest and best bid. Therefore, Preferred Transport moves this Court to uphold the Trial Court's ruling that the Appellees exceeded its authority in the case at bar, and to overrule the Trial Court's ruling denying the Appellant the contract award or, in the alternative, awarding compensatory damages and attorney's fees for the illegal action of the Appellees in the case at bar.

Respectfully submitted this the 2nd day of March, 2008.

TRULY, SMITH & LATHAM, P.L.L.C.

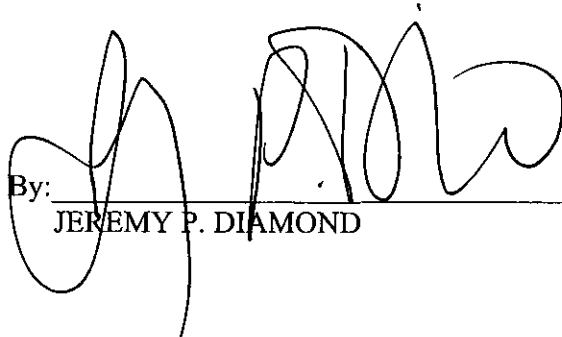
By: 

ROBERT C. LATHAM (MS)
JEREMY F. DIAMOND (MS)
Attorney for Appellant, Preferred
Transport Company, LLC
P.O. Box 1307
Natchez, Mississippi 39121
(601) 442-6495

CERTIFICATE OF SERVICE

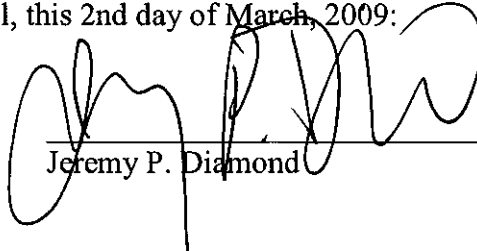
I, Jeremy P. Diamond, do hereby certify that I have this day served by United States Mail, postage prepaid a true and correct copy of the above and foregoing Appellant's Brief to Jacqueline H. Ray, Page, Kruger & Holland, P.A., 10 Canebrake Blvd., Ste. 200, Jackson, Mississippi 39232, (601) 420-0033, and A. Michael Espy, Attorney at Law, 317 E. Capitol Street, Ste. 101, Jackson, Mississippi 39225, (601) 355-6021.

This the 2nd day of March, 2008.

By:  _____
JEREMY P. DIAMOND

CERTIFICATE OF SERVICE

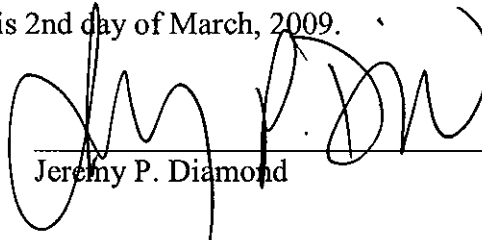
I certify that I have this day served the foregoing brief on the following counsel of record by depositing copies in the United States mail, this 2nd day of March, 2009:



Jeremy P. Diamond

CERTIFICATE OF MAILING TO CLERK

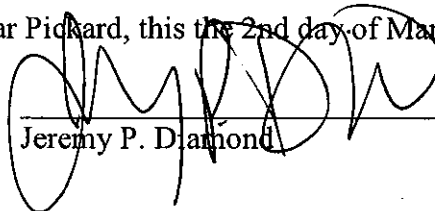
I certify that I will hand deliver an original and three copies of the foregoing brief to the Clerk of the Supreme Court of Mississippi, this 2nd day of March, 2009.



Jeremy P. Diamond

CERTIFICATE OF SERVICE ON TRIAL COURT JUDGE

I certify that on this date a true and correct copy of the foregoing brief was deposited in the U.S. Mail addressed to the Honorable Lamar Pickard, this the 2nd day of March, 2009.



Jeremy P. Diamond