

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-01532

PREFERRED TRANSPORT COMPANY, LLC

APPELLANT

VS.

**CLAIBORNE COUNTY BOARD
OF SUPERVISORS**

APPELLEES

AND

**CLAIBORNE COUNTY BOARD
OF SUPERVISORS**

CROSS-APPELLANTS

VS.

PREFERRED TRANSPORT COMPANY, LLC

CROSS-APPELLEE

From the Circuit Court of Claiborne County, Mississippi

**RESPONSE BRIEF OF THE APPELLANT/CROSS-APPELLEE
PREFERRED TRANSPORT COMPANY, LLC**

Respectfully submitted on the 1ST day of July, 2009,

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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 1st day of July, 2009.

By: 

JEREMY P. DIAMOND

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INTRODUCTION

The Claiborne County Board of Supervisors ("Board"), on a pretext, accepted a higher bid and awarded the solid waste collection contract to HomeBase Litter Control, LLC. In the case at bar, the pretext was a vague, ill defined requirement of the economic development benefits provided by hiring a "true" local contractor (i.e. resident of the County as opposed to the State of Mississippi). The Board's reliance on the economic development and "true" local contractor pretext was a *post hoc* determination to justify their decision in the face of a lower bid submitted by an established and reliable company, Preferred Transport Company, LLC, the Appellant.¹ The Board *did not* include these requirements in its request for proposal or advertisement.² Therefore, the Board obviously did not consider the economic development and resident local contractor factors until it was faced with its predetermined contractor, HomeBase Litter Control, not being the lowest and best bidder. As a result of their procedurally flawed contract award to HomeBase Litter Control, the Board unreasonably expended public money in the annual amount of \$127,636.68, which is the difference between the bids submitted by Appellant and HomeBase Litter Control.³

¹ For 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.

² Appellant does not concede that the Board has the authority to include notions of economic development or resident contractor preferences in their advertisements for bids. Appellant submits that any other relevant factors considered must be related to the service being advertised. However, in this case the considered factors were not included in the Board's advertisement, so this issue is not before the Court.

³ The Board subsequently negotiated with HomeBase Litter Control to reduce its per household rate to \$11.00 resulting in a excess annual expenditure of \$48,604.68.

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 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. Furthermore, any requirements considered by the public entity “***shall be duly included in the advertisement to elicit proposals.***” *See Miss. Code Ann. § 31-7-13(r)* (emphasis added). Appellant submits that the notions of openness, fairness, and effective competition in the bidding process was not accomplished in this case. Appellant recognizes that public entities are vested with some discretion, but this discretion is only granted where the public entity acted within the relevant statutory guideline set for by the Mississippi Legislature. This case is illustrative of the public entity acting outside of its statutory authority.

STATEMENT OF THE ISSUES PRESENTED

- A. Whether the Trial Court correctly found that the Claiborne County Board of Supervisors acted without any statutory authority by considering factors not included in the solid waste collection Request for Proposal?
- B. Whether the Trial Court erred by not awarding the solid waste collection contract to Preferred Transport Company, LLC as having the lowest and the best bid?

STATEMENT OF THE CASE

Appellant is satisfied and incorporates by reference its Statement of the Case as set for in its Brief filed March 2, 2009.

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. Furthermore, this is a mandatory requirement under § 31-7-13(r) of the Mississippi Code Annotated. The public entity is given no discretion or deference in complying with this statutory requirement. The Claiborne County Board of Supervisors' failure to follow the letter of the law is procedural error making their decision to award the solid waste collection contract to HomeBase Litter Control illegal. Therefore, the contract award to HomeBase Litter Control should be held for naught. The trial court correctly held that the Board acted outside of its statutory authority by considering factors that were not included in the Request for Proposal. Since the Board acted illegally, the Board is not entitled to any deference in reviewing its decision. The relevant 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. To uphold the Board's actions in the case at bar, the Court would be granting *carte blanche* authority in awarding public contracts and it would nullify the purpose of requiring sealed bids for certain expenditures. Therefore, this Court should uphold the trial court's findings that the Appellee acted illegally and outside the scope of its authority.

As a result of the trial court finding that the Board acted outside of its authority, the trial court should have awarded the solid waste collection contract to the actual lowest and best

bidder, Preferred Transport Company, LLC, the Appellant. Instead the trial court allowed the Board to re-bid the contract. In effect, the trial court gave the Board the opportunity to rehabilitate its prior illegal act by giving it a second bite at the apple at ensuring their preferred bidder gets the contract. However, this does not address the underlying problem, that the Board acted illegally and without statutory authority in awarding the contract to HomeBase Litter Control. It is important to note that the Board's decision in awarding the contract was based entirely on the factors not included in the advertisement to elicit proposals. The applicable statute requires that the trial court award the contract as it should have been awarded had the Claiborne County Board of Supervisors followed the law. In the case at bar, that would require the solid waste collection contract to be awarded to Preferred Transport Company, LLC, the Appellant, as the lowest and best bidder. Therefore, this Court should reverse the trial court's order to rebid the solid waste collection contract, and to order the Board to award the contract to the Appellant as the lowest and best bidder.

However, if it is too late to render the correct decision and award the solid waste collection contract to Preferred Transport Company, LLC, the Court can award compensatory damages and attorney's fees. Absent the contract award, Appellant can be made whole by an award of compensatory damages and attorney's fees. 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 Board's illegal actions. Therefore, absent an award of the contract, this Court should remand this matter to the trial court for a hearing on the Appellant's damages.

LAW AND ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE CLAIBORNE COUNTY BOARD OF SUPERVISORS EXCEEDED ITS AUTHORITY IN AWARDING THE SOLID WASTE COLLECTION CONTRACT TO HOMEBASE LITTER CONTROL.

The Appellees argue that the lower court “made no findings that the decision of the Claiborne County Board of Supervisors was arbitrary, capricious, discriminatory, illegal or without substantial evidentiary basis.” *See Appellee’s Brief at pgs. 16-17*. Appellees conclude that the trial court should not have disturbed its decision and that the Appellant did not meet its burden in this case. *Id. at pg. 17*. However, Appellees’ conclusion ignores the clear finding of the trial court that “***the BOS’s [Board of Supervisors] decision to award the contract to HBLC [HomeBase Litter Control] exceeded its discretion.***” *See Memorandum and Order; R. Vol. 3, pg. 287* (emphasis added). The trial court found that the Appellees acted illegally or “beyond the scope or power granted to the board by statute.” *See Hinds County 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)).

Contrary to their argument, the Appellees are not entitled to the greater degree of deference generally granted in these cases where there is no explicit or implied legislative authority supporting their actions. *See Hemphill Construction Co., Inc. v. City of Laurel, Miss.*, 760 So. 2d 720, 723-724 (Miss. 2000). “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 it 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 Legislature's use of "shall" leaves no room to imply any authority or discretion beyond that explicitly granted in the statute.

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.* By 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. Furthermore, it is clear from the record that these “new” factors was the only basis for the Board awarded the contract to HomeBase Litter Control instead of the Appellant.

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. The trial court found that the Appellees acted illegally, or outside of their statutory authority. The trial court correctly held that the Appellees violated the applicable statutory authority by considering factors not included in the bid documents. Therefore, this Court should uphold the lower court’s finding that the Appellees acted illegally or without any statutory authority in considering factors that were not included in the advertisements to elicit proposals for the solid waste collection contract.

II. THE TRIAL COURT ERRED BY DEVIATING FROM THE STATUTORY RELIEF, OR ALTERNATIVELY NOT AWARDING COMPENSATORY DAMAGES, WHERE IT FOUND THE CLAIBORNE COUNTY BOARD OF SUPERVISORS ACTED ILLEGALLY.

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 authorities ought to have rendered, and certify the same to the board of supervisors or municipal authorities.” *See Miss. Code Ann. § 11-51-75* (emphasis added). Although the trial court reversed the decision of the Board, it allowed the Board to rebid the contract so it can rehabilitate its illegal actions, which will ensure that the contract is awarded to its predetermined choice. *See Memorandum and Order; R. Vol. 3, pg. 287.*

The relief granted in the case at bar is at odds with the statutory authority. To allow such relief to stand undermines the integrity of the bidding process as no aggrieved bidder will be willing to incur the expense of challenging a public entities’ illegal actions if this is the relief to be granted. When the trial court found that the Board acted outside of its authority, it is required to award the contract to as it ought to have been awarded. In this case, Preferred Transport Company, LLC was not only the dollar wise lowest, but it was the best bid given its capacity to perform the work and considering its past performance of this contract in Claiborne County, Mississippi. Therefore, this Court should reverse the trial court’s relief of rebidding the contract and to award the solid waste collection contract to Preferred Transport Company, LLC as the lowest and best bidder.

The trial court not only allowed the Board to rebid the contract, but it also allowed HomeBase Litter Control to continue servicing the contract until such time that it is rebid. It is

hard to imagine that the Board would not ensure that HomeBase Litter Control was the successful bidder in any future advertisements to elicit proposals. Therefore, the ordered relief is further unreliable in ensuring the law is followed by the Board in awarding this contract under new solicitations. At the end of the day, the Appellant will still be aggrieved by the Board's illegal actions. In similar case, this Court has recognized that awarding the contract how it ought to have need awarded is no always an available remedy where substantial or complete performance has occurred under the contract that was illegally awarded to another contractor. *See City of Durant v. Laws Construction Company, Inc.*, 721 So. 2d 598 (Miss. 1998); *see also Hemphill Construction Company, Inc.*, 760 So. 2d 720 (Miss. 2000); *see also David Richardson, et al v. Canton Farm Equipment, Inc.*, 608 So. 2d 1240 (Miss. 1992).

In *City of Durant*, this Court upheld a circuit court's award of compensatory damages and attorney's fees where the circuit court sat as an appellate court under § 11-51-75. *See City of Durant*, 721 So. 2d 598 (Miss. 1998). The *City of Durant* Court rejected the argument that a jury is required where damages are being considered and awarded. *Id.* at 607. It held:

The Circuit Court found that the contract was illegally granted to King and this Court is in agreement with this determination. Even under the plain language of the statute, it seems that the circuit court had the authority to render such judgment as the board or municipal authorities ought to have rendered by awarding the contract to [appellant]. ***By doing so then [appellant] has a contract claim for breach and contract damages since the City allowed another company to provide the same service that [appellant] had a legal right to perform. Compensatory damages under the law of contracts are the proper measure of damages for an aggrieved bidder which was entitled to the award of the contract.*** Therefore, this Court holds that [appellant] is entitled to damages measured by the law of contracts where a complete and adequate remedy is available, the enforcement of the statutory bid laws are upheld and legislative intent to make sure that public contracts are awarded on a competitive basis and not for any other purpose is reinforced.

City of Durant, 721 So. 2d at 606 (emphasis added). Furthermore, the circuit court in *City of*

Durant ordered discovery on the issue of damages and held a separate hearing to determine the amount of damages the appellant was entitled to as a result of the breach of contract. *Id.* at 601.

In the case at bar, the trial court found that the Appellees acted illegally and contrary to the applicable statutory authority by awarding the contract to HomeBase Litter Control.

However, the trial court allowed HomeBase Litter Control to continue performing under this illegal contract award until such time that the Appellees rebid the contract. HomeBase Litter Control has expended significant sums of money to perform under the illegal contract.

Therefore, as in *City of Canton*, *Hemphill*, and *Richardson*, the only relief available to make the Appellant whole is compensatory damages under the law of contracts as an aggrieved bidder. For the Court to uphold the relief granted in this case or to take the contract from HomeBase Litter Control would have the effect of not holding Claiborne County Board of Supervisors liable for their illegal actions. Furthermore, upholding the relief granted or taking the contract from HomeBase Litter Control does nothing to ensure that the enforcement of the statutory bid laws are upheld and that the legislative intent to make sure public contracts are awarded on a competitive basis and not for any other purpose are reinforced. Therefore, Appellant moves this Court to reverse the trial court's relief as order and remand this matter for a hearing on the Appellant's damages as a result of the Board's illegal actions.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellant moves this Court uphold the trial court's findings that the Claiborne County Board of Supervisors acted outside its statutory authority in awarding the contract for solid waste collection and that it is not entitled to any discretion as a result of its statutory violation. Appellant moves this Court to reverse the trial court's ordered relief to rebid the solid waste collection contract as it violates the statutory relief for this case. Appellant moves this Court to order the trial court to award the solid waste collection contract to it as required by the statutory authority. In the alternative, Appellant moves this Court to award the Appellant compensatory damages as a result of the Appellees' illegal action and to remand this matter to the trial court for a hearing on the amount of damages incurred by the Appellant.

Respectfully submitted this the 1st day of July, 2009.

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

By: 

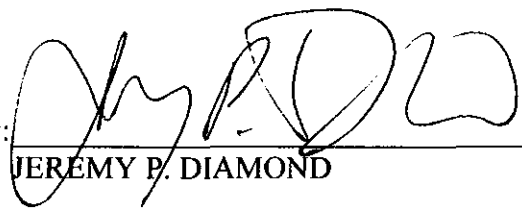
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CERTIFICATE OF SERVICE

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 Brief to Jacqueline H. Ray, Page, Kruger & Holland, P.A., 10 Canebrake Blvd., Ste. 200, Jackson, Mississippi 39232, A. Michael Espy, Attorney at Law, 317 E. Capitol Street, Ste. 101, Jackson, Mississippi 39225, and Hon. Judge Lamar Pickard, Claiborne County Circuit Court Judge, P.O. Box 310, Hazlehurst, Mississippi 39083.

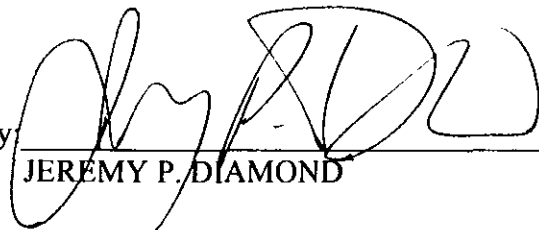
This the 1st day of July, 2009.

By: 
JEREMY P. DIAMOND

CERTIFICATE OF SERVICE TO CLERK

I, Jeremy P. Diamond, certify that I hand delivered an original and three copies of the foregoing brief to the Clerk of the Supreme Court of Mississippi.

This the 1st day of July, 2009.

By: 
JEREMY P. DIAMOND