IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

Case No. **2008-CA-01815**

WASTEWATER PLANT SERVICE CO., INC.
Plaintiff/Appellant

v.

HARRISON COUNTY UTILITY AUTHORITY
Defendant/Appellee

Response to Appeal from a final judgment rendered by the Circuit Court of Harrison County, First Judicial District, docket no. A2401-2006-00413, the Honorable Jerry O. Terry, Judge, presiding.

ORAL ARGUMENT REQUESTED

Brief of Appellee

Filed on behalf of

HARRISON COUNTY UTILITY AUTHORITY

Respectfully submitted,

Leonard A. Blackwell, II
MS Bar No. [redacted]
Jason R. Savarese
MS Bar No. [redacted]
Blackwell's Lawyers and Counselors
1613 23rd Avenue
Gulfport, MS 39501
Tel: (228) 864-1484
Fax: (228) 868-6484

Attorneys of record for
Harrison County Utility Authority

REQUEST FOR ORAL ARGUMENT

Appellee Harrison County Utility Authority requests oral argument for two reasons: 1). this case involved interpretation of the Mississippi Code, applicable case law, and regulations governing a public body's request for proposals and the decision will provide guidance for lower courts in numerous other cases; and 2). The facts are sufficiently complicated that oral argument would be in the interest of judicial efficiency.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

The HCUA would correct the Appellant's Statement of Issues, in that Appellant incorrectly and repeatedly labels the HCUA's August 2006 Request for Proposals as pertaining to "bids" and "bidders," rather than proposals. This lawsuit and appeal do not concern bids.

STATEMENT OF THE CASE

(i) Course of Proceedings

In August 2006, the Harrison County Utility Authority (hereinafter the "HCUA") published a Request for Proposals (an "RFP") (R. 14-34), under Mississippi Code Section 31-7-13(r), which invited proposals for the operation and maintenance of its wastewater treatment plants and interceptor lines. HCUA received responses to its RFP from several companies, including Wastewater Plant Services Co., Inc. (hereinafter "WPSCO") for operation of the interceptor lines, Operations Technologies, Inc. (hereinafter "Optech") for operation of the wastewater treatment plants, and from S.H. Anthony, Inc. and Utility Partners, LLC, for operation of the both the interceptor lines and wastewater treatment plants, respectively. Optech filed a Complaint for Entry of Temporary Restraining Order and Motion for Preliminary and/or Permanent Injunction and Damages in the Harrison County Circuit Court, seeking to prevent S.H. Anthony, Inc., Utility Partners, LLC, and their officers and employees from entering into negotiations with the HCUA for the operation of the HCUA's facilities.[1] Optech claimed that several of its former employees had violated the Mississippi Trade Secrets Act when they left Optech to work for Utility Partners and/or work with S.H. Anthony, Inc.

Optech moved *ex parte* for a Temporary Restraining Order (hereinafter a "TRO") without notice, which the court granted on October 2, 2006. When the HCUA's Board of Directors held its regular meeting on October 5, 2006, it selected the proposal submitted by S.H. Anthony and Utility Partners as the best proposal. However, the Board was aware of the TRO then in effect,

[1] The lawsuit seeking the TRO was styled *Operations Technologies, Inc. v. S.H. Anthony, Inc., Utility Partners, LLC, Robert Monette; Bobby Berry; Barry Walker, and Robert J. Knesal,* Harrison Co. Cir. Ct. Cause No. A2401-06-399 (filed Oct. 2, 2006).

and, as such, mandated that S.H. Anthony and Utility Partners would have to provide the HCUA Board with evidence of their legal ability to enter into negotiations with the HCUA prior to contract negotiations occurring. The case was transferred to the Harrison County Chancery Court, where a hearing was conducted on October 12 and 13, 2006, regarding the TRO and permanent injunction. On October 13, 2006, the Court dissolved the TRO and denied the permanent injunction.[2] Though WPSCO's prior counsel was present for most or all of the hearing and in-chambers conferences with the presiding judge, WPSCO made no effort to join in the action. At the HCUA Board of Directors' meeting held on October 19, 2006, the Board was informed of the Chancery Court's dismissal of the TRO and denial of the permanent injunction, and, at that meeting, the Board reaffirmed its acceptance of the proposal submitted by S.H. Anthony and Utility Partners as the best proposal. Thereafter, WPSCO filed a Bill of Exceptions to contest the HCUA's actions.[3] Over the course of two years, WPSCO and HCUA filed several briefs, and a hearing was held on July 25, 2008, with the Honorable Jerry O. Terry presiding. On October 17, 2008, the Court ruled in favor of HCUA. It is from this Order that WPSCO appeals.

(ii) Statement of Facts

To correct WPSCO's Statement of Facts, HCUA would show that in August 2006, HCUA issued a Request for Proposals (hereinafter the "RFP") (R. 14-34), which invited interested companies to submit **proposals** (not bids) for the operation and maintenance of its wastewater plants and interceptor lines. Companies could submit a proposal for the operation of the wastewater plants and/or the operation of the interceptor lines. HCUA's RFP identified the services that HCUA expected the successful proposer to perform in return for payment of the proposal price. Though WPSCO, on page 3 of its Appeal Brief, at first correctly cites the

[2] An Order was subsequently entered in the TRO lawsuit on October 31, 2006, and reflects the rulings made by the Court on October 13, 2006.

[3] Wastewater Plant Services Co., Inc. v. Harrison County Utility Authority, Harrison County Cir. Ct. Cause No. 2006-00413 (filed October 16, 2006).

meeting of contractors submitting proposals as a "pre-proposal meeting", WPSCO then immediately and incorrectly calls the meeting a "pre-bid meeting." Though the HCUA did state on the first page of its RFP that "A mandatory pre-proposal meeting will be conducted,...all proposers must be represented," it is important to note that on that same page of the RFP, the HCUA stated that "The Authority further reserves the right...to waive any informalities deemed to be in the best interest of the Authority." (R. 14), Operations Technologies, WPSCO, and S.H. Anthony, in conjunction with Utility Partners (hereinafter jointly referred to as "SA/UP"), all submitted proposals.

However, only SA/UP's proposal offered to service the wastewater plants and the interceptor lines and pumps. SA/UP specifically stated in its proposal (Exhibit "A") (R. 110, 185) that it would offer several services that were not found in WPSCO's proposal, (Exhibit "B") (R. 35-60). Both SA/UP and WPSCO submitted these proposals to the HCUA by the RFP deadline of September 15, 2006. These additional services included infrared surveying of HCUA's pump stations every three (3) years (for preventive maintenance), and draw down testing of the pump stations (to determine their volume of wastewater flow) by an engineer, paid for by S.H. Anthony (Exhibit "A", p. 7.8) (R. 185).

Once the RFP submission deadline had passed and only ***after*** an opportunity to learn of the specifics of SA/UP's proposal did WPSCO contact the HCUA to claim it also would include those services in its proposal, at no additional charge to the HCUA. This late correspondence from WPSCO was sent the HCUA on September 26, 2006, some eleven (11) days after the RFP deadline had passed and the RFP responses were opened. This date is evident from the Record, next to Bruce Anthony's signature (WPSCO representative, R. 65).

On page 9 of Appellant WPSCO's Statement of Facts, WPSCO erroneously claims that Utility Partners "applies for permission to do business in Mississippi" on September 20, 2006.

As Exhibit "C" indicates (R. 409-412) , Utility Partners signed its Application for Appointment of Registered Agent on September 12, 2006; its Application for Registration of Foreign Limited Liability Company was stamped by the Secretary of State on September 14, 2006, on the right side of the document, and was stamped "filed" by the Mississippi Secretary of State on September 20, 2006. The HCUA asked SA/UP to provide evidence of its ability to enter into a contract with the HCUA because of Optech's TRO, which was later dissolved. The HCUA Board did not vote, as stated by Appellant, "to accept the SA/UP bid contingent on SA/UP providing evidence which would enable HCUA to beat back objections to UP's lack of qualifications," despite WPSCO's claim to that effect on page 9 of its Statement of Facts and page 23 of its Argument, Issues 1 and 2. In reality, the HCUA voted to accept the proposal (not bid) submitted by SA/UP, contingent on SA/UP proving that it was not restrained from entering into a contract with the HCUA under the then-existing TRO. It was never the opinion of the HCUA that Utility Partners might lack any qualifications for the work on which it and S.H. Anthony had submitted a proposal.

WPSCO's discussion of "extras" on page 13 of its Statement of Facts is incorrect. The HCUA viewed the SA/UP proposal as offering services not specified in the proposal submitted by WPSCO.

While it is true that the RFP called for the services WPSCO mentions in the present appeal, WPSCO failed to specify that it was offering those services by the September 15, 2006, RFP deadline. Only after the RFP deadline had passed and SA/UP's proposal terms became known did WPSCO then attempt to match SA/UP's proposal, service for service, some eleven (11) days late.

On page 15 of WPSCO's Statement of Facts, the Appellant attempts to make an issue of Engineer Kamran Pahlavan's calculation of the value of the services offered by SA/UP, which

services were not properly included within the proposal submitted by WPSCO on or before the September 15, 2006, RFP deadline. The O&M Summary that Mr. Pahlavan sent to the Technical Committee (Exhibit "D") (R. 62-65) was a factually correct summary of the proposals. Mr. Pahlavan estimated the costs of the infrared surveying and draw down testing by an engineer, based on his previous twenty-two (22) years' experience in dealing with vendors of related services. Thus, the O&M Summary reflected these additional estimated costs under WPSCO's "base price," so that the HCUA's Technical Committee would have all the facts and financial information needed to offer input regarding the Board's selection of the most qualified and best proposal.

The HCUA knew well the principals and employees of S.H. Anthony and Utility Partners, having worked with them closely for many years as previous contractors to the HCUA while employed at other companies. As such, the HCUA was aware of the MDEQ-issued licenses held by the principals and/or employees of SA/UP, added to the Record hereto as a supplement to rebut Appellant's allegations (Exhibit D-2). This was one of many factors that influenced HCUA's decision to select the proposal submitted by SA/UP.

SUMMARY OF ARGUMENT

This appeal is the result of a) sour grapes on the part of WPSCO, which was not selected to negotiate a contract with the HCUA because it did not offer the same services, as did SA/UP, in WPSCO's RFP proposal submitted by the clearly established RFP response deadline of September 15, 2006, and for other reasons, and b) a fundamental misunderstanding of the difference between an "invitation for bids" and a "request for proposals" under Mississippi law on the part of the Appellant, WPSCO.

WPSCO incorrectly states that the Mississippi Public Bid Act applies in this matter, as it claims the HCUA solicited "bids" for the operation and maintenance of its facilities. Time after time, and throughout its Appeal Brief, WPSCO labels the HCUA's August 2006 RFP and subsequently submitted proposals as "bids."

The difference between "bids" and "proposals" is an important distinction that must be made in this case. To be clear, the HCUA published a Request for Proposals in August 2006, and never published an invitation for bids in this matter.

The status of Utility Partners is also mischaracterized by WPSCO. Utility Partners was not required to have a representative present at the pre-proposal meeting; the HCUA specifically reserved the right to waive informalities, and did so in that instance. In addition, Utility Partners applied to do business in Mississippi on September 12, 2006, not September 20, 2006. (R. 409-412). However, S.H. Anthony, the prime contractor, was licensed to do business in Mississippi on the day the RFP responses were submitted and opened. As such, Utility Partners did not need to be so licensed. Finally, Utility Partners was not required to obtain a certificate of responsibility, since a) S.H. Anthony, the prime contractor/proposer possessed a certificate of responsibility when the proposals were opened by the HCUA, and b) a private company, such as Utility Partners, that offers its *services* (as opposed to offering to perform construction work) is not required to have a certificate of responsibility, as the Mississippi Attorney General has stated many times.

As a matter of institutional necessity, HCUA is the proper body to determine whether, WPSCO's proposal was lower, more qualified, and better than SA/UP's proposal. Based on Mr. Pahlavan's calculations for the HCUA Technical Committee, the HCUA is confident that SA/UP's proposal was lower than WPSCO's.

However, whether the amount of one proposal was lower than the other is not the final determination to be made by a public body like the HCUA; rather, the HCUA must determine, under Miss. Code 31-7-13(r), which proposal is "the most qualified proposal or proposals on the basis of price, technology and other relevant factors...". With such discretion under the law, and based upon sound and logical reasons, the HCUA made its decision and selected the proposal submitted by SA/UP as the most qualified proposal.

ARGUMENT

ISSUE 1: Did HCUA deviate from the requirements laid down it is request for proposals by giving a contract to a bidder who did not have a representative present at the mandatory pre-bid meeting?

ISSUE 2: Did HCUA violate Miss. Code Ann. § 31-3-15 and Miss. Code § 31-3-21 by accepting a bid submitted by two corporations "in association" when under the terms of the bid:

> **12% of the work would be performed by a corporation which had a certificate of responsibility;**
> **and**
> **88% of the work would be performed by a corporation which did not have a certificate of responsibility?**

First, the HCUA objects to WPSCO's characterization of this case as involving "bidders" and "bids". It is clear on the face of the document published by the HCUA in August 2006 that the case at bar involves a Request for Proposals, not an invitation for bids.

Secondly, Section 31-7-13(r) (2009) of the Mississippi Code regulates public sewage collection and disposal contracts. Titled "Solid waste contract proposal procedure," the statute requires public bodies to "issue publicly a request for proposals concerning the specifications for such services which shall be advertised for in the same manner as provided in this section for seeking bids for purchases which involve an expenditure of more than the amount provided in paragraph (c) of this section" when the "contract for sewage collection or disposal...involves an

expenditure of more than Fifty Thousand Dollars ($50,000.00)." Section 31-7-13(r) goes on to say that:

> Any request for proposals 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. After responses to the request for proposals have been duly received, the governing authority or agency shall select the most qualified proposal or proposals on the basis of price, technology and other relevant factors and from such proposals, but not limited to the terms thereof, negotiate and enter contracts with one or more of the persons or firms submitting proposals. Miss. Code § 31-7-13(r) (2009).

In order to rebut and correct the Appellant's oft misused references to "bids" and bid laws, the Appellee would supplement the record with Chapter III of the Mississippi State Official Procurement Manual (hereinafter "the Manual"), attached hereto as Exhibit "E", which clearly differentiates between an "invitation for bids" and a "request for proposals". Section 3.101.01(2) of the Manual defines "Invitation for Bids" as "all documents, whether attached or incorporated by reference, utilized for soliciting bids." Section 3.101.01(4) of the Manual then defines "proposals" as being "documents, whether attached or incorporated by reference, utilized for soliciting proposals." Section 3.102.03.1 of the Manual covers a situation where only one bid is received by a public body. A separate Section, 3.102.03.2, covers a situation where only one proposal is received by a public body. The State felt so strongly that a "bid"

is distinct from a "proposal" that it provided fifteen (15) pages in Chapter III of the Manual to procedures exclusively covering bids (pages 3-7 through 3-21), and in a separate area of Chapter III, it allotted another eight (8) pages dedicated to procedures covering requests for proposals (pages 3-22 through 3-29).

Ferguson allows an appellee to argue that a lower judgment can be affirmed, or an appeal rejected, based on "any grounds," even if those grounds were not raised below. *Ferguson v. Watkins*, 448 So.2d 271, 275 (Miss. 1984). In addition to the Procurement Manual having the weight of law as a regulatory document governing public agencies, HCUA would argue that *Ferguson* allows the Manual's introduction as part of the HCUA's Appellee response.

As shown in Exhibit "C", (r. 409-412) Utility Partners filed its Application for Registration of a Foreign Limited Liability Corporation with the Mississippi Secretary of State on September 12, 2006, prior to the September 15 submission deadline of the HCUA's Request for Proposals. Additionally, at the time of the proposal submission by S.H. Anthony and Utility Partners, S.H. Anthony was properly registered with the State of Mississippi, possessing a Certificate of Responsibility, in addition to its Class III Pollution Control Operator's License, held by S.H. Anthony principal Sean Anthony. The HCUA Board did not vote as stated by Appellant "to accept the SA/UP bid contingent on SA/UP providing evidence which would enable HCUA to beat back objections to UP's lack of qualifications," despite WPSCO's claim to that effect on page 9 of its Statement of Facts and page 23 of its Argument, Issues 1 and 2. In reality, the HCUA voted to accept the proposal (not bid) submitted by SA/UP, contingent on SA/UP proving that it was not restrained from entering into a contract with the HCUA under the then-existing TRO. It was never the opinion of the HCUA that Utility Partners might lack any qualifications for the work on which it and S.H. Anthony had submitted a

proposal. To the extent that WPSCO attacks the October 5 and 19, 2006 minutes of the HCUA, HCUA would show that under *Hawkins*, "It is beyond doubt the rule, and it is well settled, that the minutes of a municipality import verity and that evidence will not be received in a collateral action to vary or contradict such record when regular and complete on its face." *Hawkins v. City of West Point*, 200 Miss. 616, 625 (Miss. 1946).

The Mississippi Attorney General has repeatedly held that service contracts (involving non-construction work) between a private contractor and a public body do not require the contractor to possess a certificate of responsibility. Miss. Ag. Op., Meadows, 2001 WL 1513805 (Oct. 26, 2001) (maintenance of public sand beach by private contractor does not require a certificate of responsibility); Miss. Ag. Op., Bowman, (April 30, 1999) (removal of damaged tree limbs located on public property does not require certificate of responsibility); Miss. Ag. Op., Deaton (Dec. 8, 1980) (demolition contractor not required to possess certificate of responsibility). The Attorney General has also stated that "public purchase laws codified at Sections 31-7-1, *et. seq.*, are not applicable to the acquisition of any services unless the services are part of a contract which includes the purchase of commodities, equipment, or furniture or construction." Miss. Ag. Op., Meadows, (Oct. 26, 2001) (*citing* Miss. Ag. Op., Runnels, (Aug. 2, 1996); Miss. Ag. Op., Cronin, (Feb. 10, 1993); Miss. Ag. Op., Green, (Jan. 31, 1990); Miss. Ag. Op., Grubbs, (Dec. 14, 1987); Miss. Ag. Op., Campbell, (March 11, 1986)).

It is clear that 1) the above statutes gives the HCUA the authority to consider the price ***and*** the technology offered ***and*** other relevant factors when deciding on which submitted proposal is the most qualified, if any, and (2) the Board has some discretion as to what factors it considers in such a review. Thus, the Utility Authority is the proper entity to choose the most qualified proposal. The HCUA followed the procedures to publish and RFP and select the

select the most qualified proposal or proposals on the basis of price, technology and other relevant factors. As such, Issues 1 and 2 are without merit.

Though the HCUA did state in its RFP that "A mandatory pre-proposal meeting will be conducted,...all proposers must be represented," the HCUA also stated in the RFP that "The Authority further reserves the right...to waive any informalities deemed to be in the best interest of the Authority," which would include the attendance of company representatives at the pre-proposal meeting. There is a handful of case law in Mississippi discussing RFPs, but none do so in detail. With regard to bids, which the HCUA again stresses is not involved in the case at bar, the waiver of informalities is allowed and has been documented in Mississippi cases. *W & W Contractors v. Tunica Cty. Airport Commission*, 881 So.2d 358 (Miss. Ct. App. 2004); *Landmark Structures, Inc. v. City Council For Meridian* 826 So.2d 746, 749 (Miss 2002). As such, the HCUA used its discretion in determining that attendance at the pre-proposal meeting could be waived to benefit the HCUA's best interests. As such, WPSCO's Issue 1 is without merit.

Also in response to Issue 2, the Mississippi Supreme Court has upheld the Mississippi State Board of Contractor's determination that a contractor was not required to possess a certificate of responsibility for a public contract if less than 50% of the services to be performed under the contract were not of a "maintenance" nature. *Clancy's Lawn Care & Landscaping, Inc. v. Miss. State Bd. Of Contractors*, 707 So.2d 1080, 1085 (Miss. 1997). Despite its title of "Agreement for Operations, Maintenance, and Management Services for the Harrison County Utility Authority," the 2006 Contract between the HCUA and S.H. Anthony (hereinafter "the Contract") is actually a contract for the operations of the HCUA's wastewater lines and pumps. (Exhibit "F") (R. 251, *et. seq.*) That is, the use of the word "maintenance" in the title

of the Contract belies its *de minimis* role in the overall services performed under the Contract.

As shown in Exhibit "G", and allowed under the *Ferguson* decision, S.H. Anthony receives approximately $275,000 per year for its operations services under the Contract. Of this amount, S.H. Anthony spends approximately $233,000 annually on operations labor costs. This is contrasted sharply with the amount S.H. Anthony spends annually on maintenance labor costs, being a paltry $17,000. Thus, the amount spent on operations is approximately 13.7 times as much as the amount spent on maintenance by S.H. Anthony. The same holds true for the work performed by Utility Partners, also shown in Exhibit "G". Utility Partners receives approximately $2,310,000 from its contract with S.H. Anthony for its operation of the HCUA's wastewater plants. Annually, Utility Partners spends approximately $1,650,000 in operation labor costs. However, Utility Partners spends just $150,000 annually on maintenance costs. Thus, the amount spent on operations by Utility Partners is approximately 11 times as much as the amount spent on maintenance. Additionally, the Contract between S.H. Anthony and the HCUA prevents S.H. Anthony from spending more than $100 for repairs to any one vehicle, equipment or structure, with an aggregate limit of $15,000 annually. (Exhibit "F", page 4, Section 2.20) (R. 654). Any amount above this upper limit requires HCUA approval.

Since less than 50% of the work being performed by S.H. Anthony or by Utility Partners constituted "maintenance," a certificate of responsibility was not required by the of Utility Partners by the HCUA. This issue is without merit.

ISSUE 3: Did HCUA violate Miss. Code Ann. §31-7-13 subsection c(ii) and subsection d(i) by awarding a bid based on the perception that the chosen bidder was offering "extras"- items separate from and in addition to the items included

in the specifications- when, in fact, these items were included in the specifications and were offered by other bidders?

ISSUE 4: Did HCUA violate Miss. Code Ann. §31-7-13 subsection c(ii) and subsection d(i) by awarding a bid based on the perception that the chosen bidder was offering "extras"- items separate from and in addition to the items included in the specifications- without amending the specifications and reopening the bidding so that other bidders could offer revised bids which would include the "extras"?

ISSUES 3 and 4 are without merit, as the HCUA did not publish an invitation for bids; the HCUA published a Request for Proposals, and followed the law accordingly. To the extent that WPSCO categorizes as "extras" the services offered by SA/UP which were not offered by WPSCO by the deadline established by the HCUA (September 15, 2006), the HCUA would again point out that these services were in fact required in the RFP specifications. The fact is that SA/UP did actually and specifically state in its proposal (Exhibit "A") (R. 110, *et. seq.*)that it would offer several services that were not found in WPSCO's proposal, (Exhibit "B") (R. 35, et. seq.) which it submitted to the UA by the submission deadline of September 15, 2006. These additional services included infrared surveying of UA's pump stations every three (3) years (for preventive maintenance), and draw down testing of the pump stations (to determine their volume of wastewater flow) by an engineer, paid for by S.H. Anthony (Exhibit "A", p. 7.8) (R. 185). Once the submission deadline had passed and only ***after*** an opportunity to learn of the specifics of SA/UP's proposal did WPSCO contact the HCUA to claim it also would include those services in its proposal, at no additional charge to the HCUA

Since WPSCO did not specify in its proposal that was submitted to the HCUA by the RFP deadline any mention of infrared surveying or drawdown testing as part of the services it alleges that it was prepared to offer for the contract price stated in its proposal, the HCUA was under no duty to consider a statement made by WPSCO after the proposals, including SA/UP's proposal, were unsealed. As such, this issue is without merit. WPSCO had the same opportunity

as did SA/UP and Optech to specify exactly which services it was offering and at what price. WPSCO failed to include such services in its RFP response by the submission deadline.

ISSUE 5: Did HCUA act arbitrarily and capriciously by assigning a supposed market values (sic) to the "extras" offered by SA/UP without obtaining any information concerning the current market value of these "extras"?

The decision of the Board to select the proposal submitted by SA/UP was made within the sound discretion of the Board, and was not arbitrary and capricious.

Miss. Code Ann. § 31-7-13(r) (2009) states, in part, "the governing authority or agency shall select the most qualified proposal or proposals ***on the basis of price, technology and other relevant factors*** and from such proposals, but not limited to the terms thereof..." (emphasis added). Bills of exception are creatures of statute, not derived from the common law. The purpose of a bill of exceptions is to bring the proceedings before the governmental tribunal to the court to enable that court to determine whether the tribunal acted properly with reference to what was before it. *Lenoir v. Madison Cty.*, 641 So.2d 1124, 1128 (Miss. 1994) (quoting *McIntosh v. Amacker*, 592 So.2d 525, 528 (Miss.1991).

When reviewing an administrative agency's decision, an appellate court "generally accords great deference to the agency's interpretation of its own rules and statutes which govern its operation" *Tillmon v. Miss. State Dep't of Health*, 749 So.2d 1017, 1020 (Miss. 1999), citing *Miss. State Tax Comm'n v. Mask*, 667 So.2d 1313, 1314 (Miss. 1995). "Great deference" is given to an "administrative agency's construction of its own rules and regulations and the statutes under which it operates" *Melody Manor Convalescent Ctr. v. Miss. State Dep't of Health*, 546 So.2d 972, 974 (Miss. 1989). There is a rebuttable presumption in favor of the agency decision, and the burden of proof is on the party challenging that decision. *Montalvo v. State Bd. Of*

Medical Licensure, 671 So.2d 53, 56 (Miss. 1996); *Miss. State Bd. of Nursing v. Wilson*, 624 So.2d 485, 489 (Miss. 1993).

The Mississippi Constitution does not permit the judiciary of this state to retry de novo matters on appeal from administrative agencies. *Wilson,* 624 So.2d at 489, (quoting *Miss. State Tax Comm'n v. Miss.-Ala. State Fair*, 222 So.2d 664, 665-666 (Miss. 1969)). Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. The appeal is a limited one, however, since the courts cannot enter the field of the administrative agency...This rule has been thoroughly settled in this State. *Id.*

The decision of an administrative agency is not to be disturbed unless the agency order was unsupported by substantial evidence; was arbitrary or capricious; was beyond the agency's scope or powers; or violated the constitutional or statutory rights of the aggrieved party. *Hooks V. George Cty.*, 748 So.2d 678, 680 (Miss. 1999), (citing *Board of Law Enforcement Officers Standards & Training v. Butler,* 672 So.2d 1196, 1199 (Miss. 1996)). An act is arbitrary when it is not done according to reason or judgment, but depending on the will alone. "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 principles' *Walters v. Greenville*, 751 So.2d 1206, 1212 (Miss. Ct. App. 1999) (quoting *Burks v. Amite County Sch. Dist.*, 708 So.2d 1366, 1370 (Miss. 1998).

The decision-making function performed by the Board in this case -- that of selecting one or more contractors to operate its facilities — is a function the Board and the HCUA has performed successfully since the creation of its predecessor, the Harrison County Wastewater

and Solid Waste Management District in 1982. The HCUA received three (3) proposals in response to its RFP for the operation of its wastewater plants and interceptor lines. On October 5, 2006, the Board held a regularly-scheduled meeting and discussed the selection of a contractor or contractors for the O&M of its wastewater plants and interceptor lines. As allowed under Miss. Code Ann. § 25-41-7(4)(b) (2009), the Board voted to enter executive session to discuss the pending litigation filed by OpTech.

The Board discussed the litigation and all proposals submitted in response to its RFP, as well as the reports of the Technical Committee and the Executive Director, in light of such litigation. Once the executive session ended, the Board reconvened in open session and heard the reports of the Technical Committee and Executive Director on the selection of the O&M contractor or contractors. The Board found that the proposal submitted by SA/UP was the most qualified proposal.

As evidenced in the Board's minutes from October 5, (Exhibit "H") (R. 244, 250-251) the Board made its selection of SA/UP after considering the fact that the proposal submitted by SA/UP was the only proposal offering to operate both the wastewater plants ***and*** the interceptor lines. This joint proposal allowed SA/UP to "facilitate smoother operation because of less employees and, could save money for the Utility Authority due to such combination..." The Oct. 5 minutes also reflect that several additional factors influenced the Board's decision, including SA/UP's expression of qualifications, quality, service, and price. The Board voted 6-1 to approve the selection of SA/UP as operators for the wastewater plants and interceptor lines, contingent on SA/UP providing proof of their legal ability to enter into a contract with the Utility Authority, due to the Optech temporary restraining order that was in place.

The HCUA was notified on October 13, 2006, that Chancellor Steckler had ruled against OpTech in its quest for injunctive relief, which satisfied the Board's conditional selection of

SA/UP as its wastewater plant and interceptor line contractor. The Board reaffirmed its contractor selection at its Oct. 19, 2006, meeting, as stated in that day's minutes (Exhibit "I") (R. 255-256).

As such, the Board made an informed decision after fully considering the proposals put before it, in accordance with sound reason and judgment. Its decision was not made in a whimsical manner; the Board made its selection with an understanding of and consideration for the surrounding facts and other relevant factors, a function the Board is well suited and authorized to perform. Thus, the Board's decision was not arbitrary and capricious and should not be disturbed by this Honorable Court.

ISSUE 6: Did HCUA violate Miss. Code Ann. 31-7-13(d)(ii), by failing to adequately explain the calculations used to "adjust" WPSCO's bid upwards and by failing to explain the purported savings which HCUA relied upon in deeming the SA/UP bid to be the lowest?

Since the HCUA published a "Request for Proposals" and not an "Invitation for Bids," Section 31-7-13(d)(ii) is inapplicable, and Issue 6 is thus without merit.

To the extent that the HCUA "adjusted" the WPSCO "bid" amount as alleged by WPSCO, the HCUA would show the following:

Mr. Kamran Pahlavan, a professional engineer for more than two decades, reviewed all the proposals submitted to the HCUA in an equal and unbiased manner, summarized some important components of each proposal for the benefit of the HCUA's Technical Committee and Board of Directors (the "Board"), and made a fair determination that SA/UP had developed and presented the best overall and/or most qualified proposal. The Technical Committee, which reviewed Mr. Pahlavan's summary, is composed of several experienced individuals from the field of engineering capable of making their own assessment of the proposals and Mr. Pahlavan's summary.

The fact is that SA/UP did actually and specifically state in its proposal (Exhibit "A") (R. 110, 185) that it would offer several services that were not found in WPSCO's proposal, (Exhibit "B") (R. 35, *et. seq.*) which it submitted to the HCUA by the submission deadline of September 15, 2006.

Since WPSCO did not specify in its properly submitted proposal any mention of infrared surveying or drawdown testing as part of the services it was prepared to offer in its proposal, the HCUA was under no duty to consider a statement made by WPSCO after the proposals were unsealed.

The O&M Summary that Mr. Pahlavan sent to the Technical Committee (Exhibit "D") (R. 62-65) was a factually correct summary of the proposals. Mr. Pahlavan estimated the costs of the infrared surveying and draw down testing by an engineer, based on his significant and long-term experience in dealing with vendors of related services. Thus, the O&M Summary reflected these additional estimated costs under WPSCO's "base price," so that the Technical Committee would have all the facts and financial information needed to select the most qualified proposal.

Since Miss. Code Ann. § 31-7-13(r) provides, in part, that Utility Authority 'shall select the most qualified proposal or proposals on the basis of price, technology, and other relevant factors.' Thus, it should be clear to Plaintiff that (1) the Utility Authority has the authority to consider the price ***and*** the technology offered ***and*** other relevant factors when deciding on which submitted proposal is the most qualified, if any, and (2) the Board has some discretion as to what factors it considers in such a review. The Utility Authority is the proper entity to choose the most qualified proposal. This issue is without merit.

ISSUE 7: Is there any justification for HCUA's decision to accept the SA/UP bid and reject the WPSCO bid?

This issue is without merit, as no bids are at issue in this matter.

However, in addition to the reasons previously stated above, the HCUA would show the following: Mississippi Code Section 21-27-201, *et. seq.*, authorizes the Mississippi Commission on Environmental Quality (the "Commission") to issue certificates to qualified wastewater operators. The Commission has delegated this duty to the Mississippi Department of Environmental Quality ("MDEQ"), under Commission Regulation MCEQ-2. Under Miss. Code Section 21-27-211(1), the Mississippi Legislature made it "unlawful to operate or cause to be operated any wastewater facility or community water system covered under Sections 21-27-201 through 21-27-221 unless the operator of that facility or system holds a current certificate of competency issued by the board or commission, as provided by Sections 21-27-201 through 21-27-221, in a classification corresponding to the classification of the facility or system." MDEQ was kind enough to search its records for licenses issued to Pollution Control Operators, including a search of those being so licensed on September 15, 2006, and currently (May 2009). The results of MDEQ's search, attached to HCUA's Appellee Brief under *Ferguson* to rebut WPSCO's arguments that it should have been selected over SA/UP, indicate that none of WPSCO's principals or staff listed in its RFP response (R. 35, 54) were properly licensed on September 15, 2009, the deadline for RFP responses, and those same individuals, as of May 1, 2009, or May 20, 2009, respectively, do not currently possess such licenses. (Exhibit "J") As such, on September 15, 2006, WSPCO was not qualified to operate the HCUA's interceptor lines and pumps, and remains just as unqualified today.

On the other hand, Sean Anthony of S.H. Anthony did possess the requisite licenses and certificates, which he continues to hold. (Exhibit "K") (R. 437, 440, 441, 443). The licenses not already in the Record are also offered in rebuttal to WPSCO's Appellant Brief, under *Ferguson*, at 275. As such, WPSCO was not qualified to operate the HCUA's facilities

at the time of their proposal submittal in September 2006, nor are they currently qualified to do so. As such, WPSCO should be denied the relief it seeks, so that the HCUA's selection of the contractor that actually holds the requisite Pollution Control Operator's License from MDEQ can continue to effectively operate the HCUA's critical facilities. This issue is without merit.

CONCLUSION:

For all the above and foregoing reasons, the trial court below was not in error in finding that HCUA did not violate any "bid" laws as alleged by WPSCO; did not act arbitrarily, capriciously, or without a reasonable basis in accepting the proposal submitted by S.H. Anthony, Inc. and Utility Partners, LLC, as the best proposal. The HCUA did not abuse its discretion in its non-selection of WSPCO's proposal. The judgment of the trial court below should be affirmed, and as WPSCO is not entitled to any damages, nor is WPSCO entitled to any injunctive or other relief, whatsoever, its requests for the same should be denied.

Respectfully submitted,

Leonard A. Blackwell, II
MS Bar No. [redacted]
Jason R. Savarese
MS Bar No. [redacted]
Blackwell's Lawyers and Counselors
1613 23rd Avenue
Gulfport, MS 39501
Tel: (228) 864-1484
Fax: (228) 868-6484

Attorneys of record for
Harrison County Utility Authority

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the above and foregoing brief in hard copy form and electronically via CD, as well as a hard copy and an electronic copy of the accompanying record excerpts, on the Mississippi Supreme Court and all counsel of record by placing the same in the U.S. Mail, this the 20th day May, 2009, via Fed Ex, overnight, and properly addressed as follows:

MS. BETTY SEPHTON, COURT CLERK
MISSISSIPPI SUPREME COURT
A total of 5 copies
P. O. Box 249
Jackson, Mississippi 39205

WASTEWATER PLANT SERVICE CO., INC.
By and through it attorney of record,
GEORGE W. HEALY, IV
1323 28TH Avenue, Suite A
Gulfport, MS 39501

TRIAL COURT JUDGE
Hon. Jerry O. Terry
Harrison County Circuit Court
P.O. Box 1461
Gulfport, MS 39502

Jason R. Savarese