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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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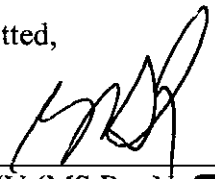
Respectfully submitted,



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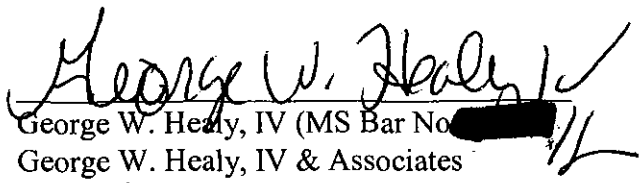

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REQUEST FOR ORAL ARGUMENT

Appellant Wastewater Plant Service Co., Inc. requests oral argument for two reasons: (i) this case involves interpretation of the public bid laws and the decision will provide guidance for lower courts in numerous other cases; (ii) the facts are sufficiently complicated that oral argument would be in the interest of judicial efficiency.

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STATEMENT OF ISSUES:

ISSUE 1: Did HCUA deviate from the requirements laid down in its 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 ANN. §31-3-21 by accepting a bid submitted by two corporations acting "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?

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"?

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

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 bid?

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

STATEMENT OF THE CASE:

(i) Course of Proceedings

Harrison County Utility Authority ("HCUA") operates a wastewater treatment system which includes wastewater treatment plants and an interceptor system. In August 2006, HCUA issued a Request for Proposals which invited bids for operation and maintenance of these systems. HCUA received three bids as follows:

1. Wastewater Plant Service Co., Inc. ("WPSCO") bid on the interceptor system;

2. Optech bid on the wastwater treatment plants;

3. A bidder self-identified as " S. H. Anthony, Inc. in association with Utility Partners", shortened to "SA/UP", placed a bid on both systems.

HCUA selected the bid of SA/UP.

WPSCO contends that HCUA's decision to accept the SA/UP bid was in violation of the public bid laws and/or was arbitrary and capricious. WPSCO filed a bill of exceptions and a supplementary and amended bill of exceptions (R. 6, 383)in the Harrison County Circuit Court presenting WPSCO's position. The circuit court ruled in favor of HCUA and this appeal followed.

(ii) Statement of Facts

Harrison County Utility Authority ("HCUA") operates a wastewater treatment system which includes (i) wastewater treatment plants and (ii) an interceptor system consisting of interceptor lines and lift systems [1] (R. 17). Historically, HCUA has treated these operations as

[1] In the bid documents, these systems are occasionally referenced as WWTP (for wastewater treatment plants) and Interceptor O and M (interceptor operations and maintenance).

two different systems and has contracted out responsibility for managing these systems to two different contractors. For example, during the five year contract period ending in October 2006, WPSCO maintained and operated the interceptor lines and Optech maintained and operated the treatment plants [2] (R. 364: HCUA Exhibit M).

In August 2006, HCUA issued a Request for Proposals which invited interested contractors to submit bids to maintain and operate these systems (R. 14: WPSCO exhibit A, HCUA exhibit K, pp. 1 and 3):

(i) a contractor could bid on operation and maintenance of the treatment plants (R: 15: Project No. OM2006P)

(ii) a contractor could bid on operation and maintenance of the interceptor system (R. 15: Project No. OM2006I)

HCUA's Request for Proposals included specifications identifying the services that HCUA expected the successful bidder to perform in return for the bid price.

In the Request for Proposals, HCUA provided the date of a mandatory pre-proposal meeting, as follows (R. 14: WPSCO Exhibit A, HCUA Exhibit K first page):

> **A mandatory pre-proposal meeting will be conducted at the (HCUA) Administrative Office on Wednesday, August 16, 2006 at 9:00 a.m. C.D.T. All proposers must be represented.**

Representatives of the following entities attended the pre-bid meeting: WPSCO, Optech, S.H. Anthony, Inc. ("SA"), and Severn Trent (Record Exerpts Exhibit C; Record . 413).

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[2] As this contract period drew to an end, employees of WPSCO and Optech decided to set up competing firms and bid against their former employers. Former employees of WPSCO organized S. H. Anthony, Inc ("SA"); former employees of Optech organized Utility Partners, L.L.C. (R.114: HCUA Exhibit A, SA/UP bid: cover letter 9-15-06; R. 127, 163, 166, 168: sections 5.7, 6.2, 6.6). This set the stage for the current litigation.

At this point, it should be noted that Utility Partners, L.L.C. aka Utility Group, L.L.C. ("UP") did not have a representative at the mandatory pre-bid meeting. There was a good reason for this: on the date of the mandatory pre-bid meeting, UP did not exist because it had not yet been incorporated. Examination of the records of the Mississippi Secretary of State will show that UP was organized in the state of Georgia on September 8, 2006 (three weeks after the mandatory pre-bid meeting) and UP applied to do business in the state of Mississippi on September 20, 2006 (more than a month after the mandatory pre-bid meeting) (Record Excerpts Exhibit I; R. 409-412).

By the terms of the Request for Proposals, the bids were due no later than 10:00 a.m. on September 15, 2006:

> **Written proposals will be accepted until 10:00 a.m. on Friday, September 15, 2006 at the Authority's administrative office ... to be opened September 15, 2006.**

On September 15, 2006, when the bidding closed and the bids were opened, three bids had been submitted as follows:

> WPSCO bid on the interceptor lines (R. 35);
>
> Optech bid on the treatment plants (R. 62);
>
> A bidder which described itself as "S.H. Anthony, Inc. in association with Utility Partners" (self-abbreviated, throughout the bid, as "SA/UP") submitted a bid on both projects [3] (Record Excerpts Exhibit D; R. 110).

It should be noted that, at this point in the proceedings, UP existed as a legal entity because it had

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[3] The cover of the bid describes the bid as a "Proposal Prepared by S.H. Anthony, Inc. In association with Utility Partners" (R. 110) and, elsewhere in the bid, the bidder is identified by the abbreviation "SA/UP" and the relationship between S.H. Anthony, Inc. and Utility Partners is variously described as a joint venture, general contractor/subcontractor, "association", "team", and "partnership." HCUA, in its opposition to WPSCO's bill of exceptions, describes the final contract as "the existing contract between the utility authority and SA/UP."

been incorporated in Georgia. However, UP did not apply to do business in Mississippi until September 20, 2006 [4] (five days after the bids were due and opened) and, therefore, **UP was not authorized to do business in Mississippi and did not have a certificate of responsibility on the date that the bids were due and opened** [5] (Record Excerpts Exhibit I; R. 409-412) .

Thus, on the face of it, in accepting the SA/UP bid, HCUA has accepted a bid from a bidder who was unqualified and failed to attend the mandatory pre-bid meeting. HCUA attempts to justify this action by arguing that SA was qualified and attended the pre-bid meeting and UP was merely a subcontractor of SA, not a bidder.

However, HCUA's justification is without merit for two reasons. **First,** as explained in the "Argument" section *infra*, every subcontractor hired through a public bid process must be a qualified contractor under Mississippi law. Thus, HCUA cannot eliminate the deficiencies in the bid by characterizing UP as a subcontractor. **Second,** the evidence does not establish that UP acted as a subcontractor of SA in submitting the bid. In fact, the SA/UP contract which purports to establish a general contractor/subcontractor relationship was drafted and signed several weeks **after** HCUA accepted the SA/UP bid, in an effort to meet legal objections to UP's qualifications. The evidence concerning the relationship between SA and UP, and UP's role in the bidding

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[4] Careful examination of UP's application to do business in Mississippi will show that the UP official who signed the application dated the application as September 12, 2006 but the stamp placed on the application by the Mississippi Secretary of State (R. 409 - upper right hand corner) shows that the application was filed at 12:00 noon on September 20, 2006.

[5] It may be worth noting that, when Utility Partners finally applied to do business in Mississippi, several days after the bids were submitted and opened, Utility Partners did not apply under the name "Utility Partners" which is the name used throughout the SA/UP bid. Instead, Utility Partners applied to do business in Mississippi under the name "UP Group, L.L.C." (Record Excerpts Exhibit I; R. 411).

process is, in more detail, as follows.

The SA/UP bid submitted on September 15, 2006 characterizes the SA/UP relationship in vague and internally contradictory fashion. The cover sheet states that the bid is submitted by "S.H. Anthony, Inc. **in association with** Utility Partners." (Record Excerpts Exhibit D; R. 110).

The introductory letter which is incorporated into the bid (Record Excerpts Exhibit E, R. 114-115) is printed on **a joint letterhead** with SA's address in large type on the left and UP's address in equally large type on the right, implying an equal relationship between SA and UP. In the body of this letter and in the bid itself, **the term "we"** is used to refer to SA and UP collectively and the relationship between SA and UP is described in five different ways which are ambiguous and internally contradictory:

(i) "S.H. Anthony, Inc. **in association with** Utility Partners" (R. 110, R. 117)

(ii) "**the SA/UP Team**" or **"the SA/UP management team"** (R. 117, 118)

(iii) as a **"joint venture"** (R. 114);

(iv) as a relationship in which SA will be the **general contractor** while UP is **the subcontractor** (R. 115);

(v) as a **"partnership"** (Record Excerpts Exhibit F, R. 179).

The bid is repeatedly described as **"the SA/UP proposal"** (see, e.g., R. 117, 118).

Examples of these characterizations, in context, include the following:

> "**we have come together in this joint venture** to continue the level of service and performance you have come to trust " (Record Excerpts Exhibit E, R. 114)
>
> "This proposal is submitted to the Harrison County Utility Authority ... by S. H. Anthony Inc. **in association with** Utility Partners, L.L.C. (SA/UP)" (R. 117)

"S.H. Anthony, **as part of a team with our subcontractor**, Utility Partners" (R. 117)

"We believe this home **team** advantage provides an important strength **to the SA/UP proposal**" (R. 117)

"Our strategic **partnership** to do this job as a **team** results in ultimate financial savings to the HCUA" (Record Excerpts Exhibit F, R. 179)

The commonest characterizations, which appear in literally dozens of locations throughout the bid, identify the bidder as **"the SA/UP Team"** and identify the bid as **"the SA/UP Proposal."**

When the bid is examined to show how the work will be performed, it appears that, in practice, there is to be a division of labor between SA and UP which corresponds to the division in HCUA's Request for Proposal: SA will maintain and operate the interceptors while UP will maintain and operate the wastewater treatment plants.

This division of responsibility starts with the identification of key employees. The proposal describes the qualifications of SA and UP employees to demonstrate that the bidder's employees have the experience and skill necessary to perform the work: SA employees' qualifications are cited to demonstrate that the bidder has sufficient knowledge and experience to maintain and operate the interceptor lines, while UP employees' qualifications are described to demonstrate the bidder's ability to maintain and operate the wastewater plants, (R. 119: HCUA Exhibit A p. 1.3 - "Mr. Sean Anthony ... will continue in his role managing the "interceptor" system"; "Mr. Bobby Berry ... will have overall responsibility for the delivery of the "Wastewater Treatment" component of the operations contract"); (R. 126: HCUA Exhibit A p. 2.5 - organizational chart); (R. 151: HCUA Exhibit A p. 5.1 - Sean Anthony of SA and Bobby Berry of UP "will be leading our team in the operation and maintenance of the Interceptor and Wastewater Treatment facilities, respectively").

The division of responsibility is carried forward in describing how the work will be performed (Record Excerpts Exhibit F, R. 179: SA/UP bid p. 7.2):

> The HCUA interceptors will be managed by S.H. Anthony, Inc. and the Treatment Plants will be managed, operated, and maintained by Utility Partners. Our strategic partnership to do this job as a team results in ultimate financial savings to the HCUA as well as guaranteeing the continued professional operation of facilities.

(R. 179 et seq., R. 110 et seq., SA/UP bid pp. 7.4 et seq. 7.7):

> First, the Wastewater Plant Operations. These services will be provided by Utility Partners, L.L.C. under a subcontract to S.H. Anthony, Inc....
>
> S. H. Anthony, Inc. will provide daily operations and maintenance services to the Harrison County Wastewater Management District for their interceptor lines...

Finally, the division of responsibility is reflected in the price. The proposal does not present a single dollar total intended to cover the cost of both the wastewater and interceptor projects. Instead, there are separate dollar figures for the wastewater treatment plants and the interceptor lines, as follows (Record Excerpts Exhibit H, R. 181 - SA/UP bid p. 7.4 et seq.):

SA/UP bid for interceptor system: (work to be performed by SA) (R. 184)	$ 299, 862
SA/UP bid for wastewater treatment plants: (work to be performed by UP) (R. 182)	$ 2,163,095

A review of these dollar figures will show that when the contributions of SA and UP to the SA/UP proposal are measured in dollar terms, SA's contribution is approximately 12% of the total and UP's contribution is approximately 88% of the total. UP, in terms of the value of the services provided, is unmistakeably the dominant member of the SA/UP association. UP's dominant role may also be inferred from the SA/UP organizational chart (Record Excerpts G, R.

126). On this chart, SA is identified as the general contractor and UP is identified as the subcontractor, However, SA managers oversee functions identified in a single column of four boxes exiled to the extreme left edge of the page, while UP managers oversee functions described in forty one boxes organized in eight separate columns occupying the left of center, center, and right sides of the page.

Thus, a casual inspection of the organization chart (Record Excerpts G, R. 126) indicates that SA's role is, literally, peripheral in comparison to the dominant role of UP.

In sum, a review of the bid does not support the conclusion that SA and UP have a general contractor/subcontractor relationship. The bid's characterization of the SA/UP relationship is internally inconsistent. If any characterization of the relationship can be made based on a review of the bid, it is that SA and UP have entered into a joint venture.

The problem with UP's qualifications was apparent when the bids were opened, and competing bidders immediately objected. In an effort to meet these objections, HCUA asked SA/UP to provide evidence of qualification. This is documented in HCUA board minutes. In sum, the time sequence was as follows.

August 16, 2006 - mandatory pre-bid meeting

September 8, 2006 - UP incorporates in Georgia

September 15, 2006 - bids submitted and opened.

September 20, 2006 - UP applies for permission to do business in Mississippi.

On October 5, 2006, the HCUA board voted 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. The October 5 board minutes read (Record Excerpts L, R. 250-251):

> After the Board came out of executive session ... **the Board ... made selection of S.H. Anthony and Utility Partners as the O&M contractor** ... Mr. Rose made a motion ... **to approve the selection of S.H. Anthony and Utility Partners** as plant operators for the wastewater plants and the interceptors, **contingent on the Authority being furnished evidence of their legal ability to enter into a contract with the Authority,** and that such evidence shall be given no later than October 19, 2006" *(emphasis addded).*

On October 19, 2006, SA/UP provided the Board with a proposed agreement which SA and UP had not yet signed. This agreement, if and when it should be signed, was intended to serve as evidence of a general contractor/subcontractor relationship between SA and UP. The October 19 board minutes read (Rcord Excerpts M, R. 256):

> A **proposed subcontract** between S.H. Anthony, Inc. and Utility Partners was received on October 18, 2006 and is being reviewed **in order to incorporate it into the contract that the Authority will enter with S. H. Anthony.** *(emphasis added)*

On October 25, 2006, the "proposed subcontract" was signed by SA and UP (Record Excerpts N, R. 605). In sum, the proposed subcontract was more than a month AFTER the bids were submitted and opened and, in fact, the proposed subcontract was signed AFTER the Board voted to accept the SA/UP bid. Thus, HCUA cannot point to the subcontract as evidence that SA was the bidder and UP was merely a subcontractor to the bidder.

It may be worth noting that, throughout the review of the various bids and even during the current litigation, HCUA representatives have described events in a fashion which clearly indicates HCUA's understanding that HCUA entered into an agreement with SA and UP, not merely an agreement with SA. In his formal analysis of the various bids submitted to HCUA, HCUA's engineer refers to three "proposers": Optech, WPSCO, and "S. H. Anthony/Utility Partners (SHA/UP)" (Record Excerpts J, R. 65 et seq). The October 5 minutes, already quoted above, summarize the motion through which the SA/UP bid was accepted as follows:

> **the Board ... made selection of S.H. Anthony and Utility Partners** as the O&M contractor ... Mr. Rose made a motion ... to approve **the selection of S.H. Anthony and Utility Partners** as plant operators *(emphasis added)*

In its "Corrected Bill of Exceptions" filed in response to WPSCO's original bill of exceptions, HCUA expresses its intention "to defend its selection of the Operation and Maintenance ("O&M") proposal **submitted by S. H. Anthony, Inc. and Utility Partners, Inc.**" HCUA insists that "**the Authority's selection of SA/UP's proposal** was the most qualified proposal was not arbitrary and capricious" and HCUA argues that it would be imprudent "to now cause the Authority to rescind **its contract with SA/UP**" (R. 108, paragraph 76) . HCUA concludes (R. 107):

> The Authority prays that this Court will not disturb **the existing contract between the Utility Authority and SA/UP**

In its supplementary response, HCUA again refers to **"the existing contract between the HCUA and SA/UP"** (R. 434).

These characterizations of the SA/UP bid and the final contract between HCUA and SA/UP border on a judicial admission that HCUA views SA and UP as joint venturers. At the very least, it is an admission that HCUA regards UP's role as integral to the bid. The effort to characterize UP as a mere subcontractor whose qualifications (or lack of qualification) could arguably be deemed to be irrelevant to the acceptability of the SA/UP bid appears to have been an effort to retroactively eliminate deficiencies in the bid resulting from UP's lack of qualification. **As already pointed out above, HCUA's effort to retroactively legitimize the bid by characterizing UP as a subcontractor is destined to fail because (i) as a matter of law, subcontractors must have the same qualifications as contractors so characterizing UP**

as a subcontractor does not resolve the problem (see Argument section, *infra*) **and/or (ii) the parties' actions and statements indicate that, on the date the bid was submitted, the relationship between SA and UP was that of joint venture rather than general contractor/subcontractor.**

Moving forward from the issue of UP's status, when the bids were opened the SA/UP bid priced the work as set forth above. The other bids were as follows:

WPSCO bid for interceptor system (R. 50): $ 273,846.96

Optech bid for waste water treatment plants (R. 62) : $ 2,307,249.00

At this point, a question may arise: was the SA/UP bid intended to be indivisible, or did SA/UP intend to give HCUA the option of accepting the SA/UP bid on the interceptor system while rejecting the SA/UP bid on the wastewater treatment system and vice versa?

The answer is that the terms of the bid indicate that the bid was intended to be severable (see, especially, Record Excerpts Exhibit H, R. 180-181, in which SA/UP, tracking HCUA's division of the project, offers separate dollar bids for the wastewater and interceptor systems). HCUA's actions in reviewing the bids indicate HCUA's contemporaneous understanding that the SA/UP bid was severable. HCUA's engineer did not attempt to compare the SA/UP bid to an alternative WPSCO/Optech combined bid. Instead, HCUA's engineer prepared a bid summary which compared the SA/UP bid on the interceptor system to the WPSCO bid on the interceptor system without reference to the SA/UP and Optech bids on the wastewater treatment plants (Record Excerpts J, R. 62-3, 241 et seq.).

HCUA's engineer concluded that SA/UP's proposal offered three "extras" which had not been offered by WPSCO, as follows (R. 65, WPSCO Exhibit C, HCUA Exhibit C: engineer's

summary):

infrared survey -	estimated value $10,000-$15,000
draw down testing -	estimated value $8,000-$10,000
use of boom truck -	estimated value $10,000

According to HCUA's engineer, this meant that, in order to compare SA/UP's and WPSCO's bids on an apples to apples basis, WPSCO's price had to be adjusted upward $30,000 to include the estimated cost of providing these "extra" services which SA/UP had offered and WPSCO had not offered. Further according to HCUA's engineer, once the WPSCO price was adjusted upward, the proper comparison would be:

SA/UP bid for interceptor lines:	$ 299, 862.00
WPSCO bid for interceptor lines *after being "adjusted" by HCUA engineer adding $30,000 to the actual bid of* $ 273,846.33	$ 303,846.33 *("adjusted")*

Therefore, HCUA's engineer characterized SA/UP as the low bidder on the maintenance and operation of the interceptor system, with WPSCO as a higher bidder.

WPSCO immediately protested that the three items were not "extras." WPSCO pointed out that the bid specifications called for these services to be provided such that the successful bidder would be required to provide these services as part of its proposal (Record Excerpts Exhibit K, R 25, 65: Request for Proposal p. 11 items 2 (infrared surveys) and 3 (draw down tests). Thus, WPSCO's bid necessarily included these items as part of the WPSCO bid. Furthermore, WPSCO had the current contract for operation and maintenance of the interceptor lines and WPSCO had provided these services as part of its current contract without making any

extra charge. Thus, the only difference between WPSCO's bid and SA's bid with respect to these items is that WPSCO has included the items without separately referring to them in its bid whereas SA had included these items on a list of services and equipment SA would furnish.

It must be emphasized that WPSCO pointed this out immediately on receipt of the engineer's summary and prior to any decision by HCUA (R. 65: WPSCO Exhibit C: final pages correspondence from WPSCO to HCUA).

WPSCO would add that, assuming for the purposes of argument that SA/UP's three items actually are "extras" which are not called for in the specifications set forth in HCUA's Request for Proposals, then the SA/UP bid is non-responsive because it does not include a price for the services identified in the bid specifications. Instead, SA/UP's price is a price for something different from the work described in the bid specifications: SA/UP has offered a bid intended to cover the services identified in the bid specifications PLUS the "extras." As explained in the "Argument" section *infra*, this type of nonresponsive bid is specifically prohibited by the public bid laws: all bidders must be allowed to bid on the same set of specifications and if specifications are changed after bids are submitted, all bidders must be allowed to rebid on the new specifications.

Furthermore, assuming for the purposes of argument that SA/UP's three items are "extras" and that it is permissible to offer a bid which includes "extras" which vary from the specifications set forth in the request for proposals, then the engineer's decision to assign a value of $ 30,000 to the "extras" is arbitrary, capricious, and unsupported by evidence, and HCUA acted arbitrarily and capriciously and without evidentiary support in accepting this evaluation, for the following reasons:

(i) WPSCO would provide the "extras" for zero dollars since these "extras" were included in WPSCO's original proposal as set forth above and WPSCO made this known to HCUA at the time;

(ii) There is no evidence whatsoever to support the conclusion that the "extras" are worth $30,000 (the amount by which WPSCO's bid has been adjusted upward) as opposed to $25,000 or $35,000. HCUA's engineer has simply offered a ballpark estimate which is deficient for two reasons. First, the engineer's estimate is not based on any bid or any contemporaneous investigation to determine the fair market value of the items. Instead, the engineer has simply offered his personal opinion as to what the "extras" might be worth. [6] Second, the estimate ignores the fact that WPSCO was willing to provide the "extras" for no extra charge and WPSCO informed the engineer of this prior to HCUA's review of the proposals, so the cost of the "extras" was actually zero dollars and not $30,000.

The arbitrary nature of the engineer's estimate is illustrated by the fact that HCUA's engineer gives two DIFFERENT estimates at two different points in his summary. In the initial part of his summary, he estimates the "extras" as having a value between $28,000 and $35,000. However, in the final part of his summary, he estimates the "extras" at $30,000.

HCUA attempts to avoid this problem by suggesting that the HCUA engineer could use his own experience and common sense to determine the market rate for the "extras" without

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[6] There is nothing in the record to suggest the HCUA engineer contacted any company to determine the current going rate of the "extras." There is nothing in the SA/UP bid which would enable the HCUA engineer to determine how much SA/UP was charging for the "extras", since the only dollar figure bid by SA/UP was a bid to perform the work described in the specifications with the "extras" included. **There is no way to determine how much SA/UP would have charged to perform the work described in the specifications without "extras" since SA/UP did not furnish any bid on this work.**

obtaining bids. WPSCO would contend that the public bid process does not contain any room for "extras" which aren't the subject of the bidding process. Furthermore, as a practical matter, the bids were opened, and the contracts were considered, in September 2006, approximately one year after Katrina. Since the price of services skyrocketed in the immediate aftermath of Katrina and then gradually dropped back over the ensuing months, any estimate of current market price which is based on past experience without reference to current pricing is necessarily of little value.

In this connection, it should be noted that, even after WPSCO's bid is "adjusted upward" based on the engineer's arbitrary estimate, the difference between SA/UP's bid and WPSCO's bid is less than $3,000. In sum, the HCUA engineer has "adjusted" the WPSCO bid by just enough to turn SA/UP into the low bidder.

In spite of protests from WPSCO, and even though HCUA was well aware of the problems with UP's qualifications, HCUA chose to accept the SA/UP bid. However, in an effort to meet objections to UP's qualifications, HCUA insisted that SA and UP enter into , contingent on SA/UP entering into a general contractor/subcontractor agreement which did not exist on the date the bids were submitted but which would be drafted in an effort to avoid objections to the bid based on UP's lack of qualification.

WPSCO filed a bill of exceptions and a supplementary and amended bill of exceptions before the Circuit Court (R. 6, 383). The Circuit Court rejected WPSCO's bill of exceptions in a brief opinion which fails to identify and address the substance of WPSCO's complaints (Record Excerpts Exhibit A, R. 676).

SUMMARY OF ARGUMENT:

Defendant-appellee HCUA, a public authority whose projects are governed by the Mississippi Public Bid Act, invited bids for maintenance of its interceptor and wastewater plant systems with a mandatory pre-bid meeting on August 16, 2006 and bids to be submitted and opened on September 15, 2006. Two bids were submitted on the interceptor system, as follows:

$ 273,846.96 - bid of plaintiff-appellant WPSCO (R. 50)

$ 299,862.00 - bid of a bidder which identified itself, on the cover of its bid, as "S.H. Anthony, Inc. in association with Utility Partners", abbreviated to "SA/UP" in the body of the bid (R. 184)

In the body of the SA/UP bid, the relationship between S.H. Anthony, Inc. (SA) and Utility Partners (UP) is characterized in several different, inconsistent ways: as a "joint venture," "partnership," "team," "association," and as a general contractor/subcontractor relationship.

WPSCO would submit that the bid was unqualified because of issues surrounding UP's status. UP is a foreign limited liability company. UP was incorporated in Georgia on September 8, 2006 (after the date of the mandatory pre-bid meeting) and UP applied to do business in Mississippi on September 20, 2006 (after the date the bids were submitted and opened). As a result of this time frame, Utility Partners did not have a representative at the mandatory pre-bid meeting and, on the date the bids were submitted, Utility Partners was not authorized to do business in Mississippi and did not have a Mississippi certificate of responsibility.

WPSCO would also point out that WPSCO's bid was substantially lower than the SA/UP bid. However, HCUA accepted the SA/UP bid.

HCUA dealt with the problem of UP's status as follows. At HCUA's request, several weeks after the bids were submitted, SA and UP entered into an agreement designating SA as the general contractor and UP as a subcontractor to SA. HCUA reasons that, since SA had a certificate of responsibility on the date the bids were submitted, and since UP agreed to act as a mere subcontractor to SA, therefore the SA/UP bid could be treated as a qualified bid. The trial court accepted this argument.

The problem is, the Mississippi public bid laws do not allow this. Any "contractor" which seeks work through a public bid process MUST have a certificate of responsibility and any contract issued to a "contractor" lacking a certificate of responsibility is void. MISS.CODE ANN. §31-3-15; MISS.CODE ANN. §31-3-21; MISS.CODE ANN. §31-3-15. A company cannot avoid this requirement by characterizing itself as a "subcontractor" or by entering into a joint venture with a company that has a certificate of responsibility because MISS. CODE.ANN. §31-3-1 specifically defines the term "contractor" to include all subcontractors and the Mississippi Attorney General has opined that, when joint venturers submit a bid collectively, each member of the joint venture must meet the qualifications of a "contractor." Miss.Atty.Gen. Op. 12-3-90 (Harper) Additionally or alternatively, the evidence does not support the conclusion that a general contractor/subcontractor relationship existed on the date the bids were submitted. To the contrary, the evidence demonstrates that the general contractor/subcontractor relationship was created after the bids were submitted, in an attempt to deflect legal objections to the SA/UP bid.

Assuming for the purposes of argument that SA/UP was a qualified bidder, the fact remains that WPSCO's bid was substantially lower than the SA/UP bid. HCUA attempts to justify accepting the SA/UP bid by asserting that SA/UP offered $30,000 worth of "extras"

(items which were not included in the bid specifications). Since WPSCO did not offer these "extras", therefore, in HCUA's view, it is necessary to "adjust" WPSCO's bid $30,000 upward before comparing it to the SA/UP bid. When the $30,000 "adjustment" is applied, the SA/UP bid is slightly lower than the WPSCO bid.

There are several problems with HCUA's explanation for its decision to "adjust" the WPSCO bid. The first is that the Mississippi public bid laws expressly prohibit public authorities from making bid decisions based on "extras" (items that are not included in the bid specifications). Under the clear terms of the public bid laws, all bidders are to be given the opportunity to bid on the same identical package specifications. If there is any change in, or addition to, the original specifications, all bidders must be notified before the date the bids are due so that all bidders can bid on the changes and additions. Awarding bids based on "extras" which are not included in the bid specifications is strictly prohibited.

The second problem with HCUA's decision is that there is nothing to support the conclusion that the "extras" were actually worth $30,000. HCUA's engineer simply offered a rough estimate of the value of the "extras" without making any attempt to determine current market value and HCUA accepted this rough estimate without making any attempt to determine current market value. .

The third problem with HCUA's decision to award the bid based on SA/UP's offer of "extras" is that the items identified as "extras" weren't actually extra. These items were called for in the original bid specifications. Because these items were included in the original bid specifications, WPSCO would have a contractual obligation to furnish these items as part of its bid. Thus, WPSCO's bid necessarily included the "extras", even though the "extras" were not

specifically mentioned in WPSCO's bid. There was no reason to adjust the WPSCO bid upward to include the supposed "extras."

For all these reasons, and for additional reasons explained in more detail herein, HCUA violated the Mississippi public bid laws in awarding the contract to SA/UP and HCUA acted arbitrarily and capriciously in awarding the contract to SA/UP.

ARGUMENT:

ISSUE 1: Did HCUA deviate from the requirements laid down in its 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 ANN. §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?

UP did not have a representative at the mandatory pre-bid meeting and UP was not qualified to do business in Mississippi - and, thus, did not have a certificate of responsibility - on the date the bids were opened (Record Excerpts Exhibit C, Record Excerpts Exhibit I). HCUA argues that UP's lack of attendance and lack of qualification should not be viewed as a legal impediment to accepting the SA/UP bid because SA was the general contractor and UP was merely the subcontractor.

There are two problems with HCUA's argument.

First, it doesn't matter how UP is characterized. Under Mississippi law, when a

contract is awarded by public bid, ALL "contractors" must be qualified and this term includes both general contractors and subcontractors. The applicable law is as follows.

MISS. CODE.ANN. §31-3-1 specifically defines the term "contractor" to include all subcontractors:

> **The following words, as used in this chapter, shall have the meanings specified below ...**
>
> **"Contractor": Any person contracting or undertaking as** prime contractor, **subcontractor** or sub-subcontractor of any tier ...

In addition, the Mississippi Attorney General has opined that, when joint venturers submit a bid collectively, each member of the joint venture must meet the qualifications of a "contractor." Miss.Atty.Gen. Op. 12-3-90 (Harper).

Thus, HCUA cannot attempt to avoid the requirements of the public bid laws by attaching a particular legal characterization to UP. UP may have been a joint venturer, a subcontractor, or an "associate" of SA, but **no matter how UP's status is characterized, UP was a "contractor" within the meaning of the public bid laws and UP had to qualify in order for the bid to be acceptable.**

As a matter of law, UP as "contractor" had to have a representative at the mandatory public bid meeting in order to qualify; UP had to be authorized to do business in the State of Mississippi on the date the bid was submitted; and UP had to have a certificate of responsibility on the date the bid was submitted.

Since UP did not have these qualifications, the contract between HCUA and SA/UP was null and void. The statutes which establish this are as follows.

Under MISS.CODE ANN. §31-3-15 and MISS.CODE ANN. §31-3-21, all "contractors" bidding on government projects must have a current certificate of responsibility. MISS. CODE ANN. § 31-3-21(1) provides:

> **It shall be unlawful for any person who does not hold a certificate of responsibility... to submit a bid,** enter into a contract, or otherwise engage in or continue in this state in the business of a contractor, as defined in this chapter. **Any bid which is submitted without a certificate of responsibility number** issued under this chapter and without that number appearing on the exterior of the bid envelope, as and if herein required, at the time designated for the opening of such bid, **shall not be considered further, and the person or public agency soliciting bids shall not enter into a contract with a contractor submitting a bid in violation of this section...**

Any contract awarded to a contractor who lacks a current certificate of responsibility on the date of bid submission is null and void. MISS.CODE ANN. §31-3-15:

> No contract for public or private projects shall be issued or awarded to any contractor who did not have a current certificate of responsibility issued by said board **AT THE TIME OF THE SUBMISSION OF THE BID ... ANY CONTRACT ISSUED OR AWARDED IN VIOLATION OF THIS SECTION SHALL BE NULL AND VOID.** *(emphasis added)*

When our fact pattern is examined in light of the clear and unambiguous statutory language, it is clear that the SA/UP bid is unacceptable because it proposes use of a "contractor" that fails to meet the statutory qualifications. HCUA's contract with SA/UP is null and void.

This is sufficient to dispose of the case as a matter of law, without any further examination of the facts. However, examination of the evidence will reveal a second problem with HCUA's argument, which is: UP was not a mere subcontractor. The bid was submitted by "S.H. Anthony, Inc. in association with Utility Partners." At various locations in this bid, the relationship between SA and UP is variously characterized as a general contractor/subcontractor relationship, as a "joint venture", as a "partnership", as an "association",

and as a "team" and the bid is repeatedly referred to as a proposal submitted by "SA/UP."

Examination of the bid will indicate that UP is the dominant member of the "association." Under the terms of the bid, SA/UP is to maintain and operate the interceptor lines for a price of $299, 862 and maintain and operate the wastewater treatment plants for a price of $2,163,095, with SA taking primary responsibility for the interceptor lines and UP taking primary responsibility for the wastewater treatment plants. As this dollar figure - and the companies' organizational chart (Record Excerpts Exhibit G, R. 126) indicate - SA's role, in terms of manpower and dollar value of contribution - is far less significant than UP's role.

HCUA's board minutes, as well as pleadings filed in the current litigation, indicate HCUA's understanding that, in accepting the SA/UP bid, HCUA was entering into a contractual relationship with both SA and UP. The October 5, 2006 Board minutes read (Record Excerpts Exhibit L, R. 250-251):

> After the Board came out of executive session ... **the Board ... made selection of S.H. Anthony and Utility Partners as the O&M contractor** ...

As pointed out in the Statement of the Case above, the contract which supposedly created the general contractor/subcontractor relationship between SA and UP was drafted and signed AFTER the bids were opened and AFTER the Board had voted to accept the SA/UP bid, in an effort to meet objections to the bid based on UP's lack of qualifications.

Furthermore, during the current litigation, HCUA has repeatedly set forth its understanding that HCUA has a contractual relationship with both SA and UP.

In its Corrected Bill of Exceptions filed in response to WPSCO's original bill of exceptions, HCUA expresses its intention "to defend its selection of the Operation and

Maintenance ("O&M") proposal **submitted by S. H. Anthony, Inc. and Utility Partners, Inc.**" HCUA insists that "**the Authority's selection of SA/UP's proposal** was the most qualified proposal was not arbitrary and capricious" and HCUA argues that it would be imprudent "to now cause the Authority to rescind **its contract with SA/UP**" (R. 108, paragraph 76). HCUA concludes (R. 107):

> The Authority prays that this Court will not disturb
> **the existing contract between the Utility Authority and SA/UP**

In sum, when HCUA argues that UP's lack of qualification can be ignored because HCUA accepted a bid from SA, with UP's role that of a "mere subcontractor", HCUA's argument is disingenuous.

WPSCO will conclude by pointing out that, under the statutes cited above, lack of a certificate of responsibility is sufficient to render a contract void irrespective of whether the contracting authority has actual knowledge of the deficiency. However, it is clear that, in this case, HCUA was well aware of UP's lack of qualification because UP did not furnish a certificate of responsibility on the date the bids were submitted and because questions about UP's status were raised before HCUA accepted the SA/UP bid.

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"?

The HCUA engineer concluded that the SA bid included three "extras" which were not part of the WPSCO bid, as follows:

infrared survey -	estimated value $10,000-$15,000
draw down testing -	estimated value $8,000-$10,000
use of boom truck -	estimated value $10,000

The HCUA engineer then "adjusted" the WPSCO bid upward by $30,000 to allow for the "extras."

In order to determine whether this "adjustment" was proper the first step is to begin by recognizing that a governmental authority MUST place all bidders on an equal footing by making its specifications known to all bidders prior to the date on which bids must be submitted, and by evaluating all bids that conform to the specifications without giving weight to any "extras" which are not included in the specifications. These requirements are established by MISS.CODE ANN. 31-7-13 subsection c(ii) and subsection d(I), which provide as follows:

> **(c)(ii) Bidding process amendment procedure.** If all plans and/or specifications are published in the notification, then the plans and/or specifications may not be amended. If all plans and/or specifications are not published in the notification, then amendments to the plans/specifications, bid opening date, bid opening time and place may be made, **provided that the agency or governing authority maintains a list of all prospective bidders who are known to have received a copy of the bid documents and all such prospective bidders are sent copies of all amendments.** This notification of amendments may be made via mail, facsimile, electronic mail or other generally accepted method of information distribution. No addendum to bid specifications may be issued within two (2) working days of the time established for the receipt of bids unless such addendum also amends the bid opening to a date not less than five (5) working days after the date of the addendum.

(d)(i) ... No agency or government authority shall accept a bid based on items not included in the specifications.

To apply these principles to the facts of our case, it is necessary to begin by determining whether the three items listed above were, or were not, contained in the original specifications which accompanied the Request for Proposals.

As far as WPSCO can determine, the "extras" were not "extra" at all: the original bid specifications which accompanied the Request for Proposals required any bidder to furnish these items as part of the bid. (Record Excerpts Exhibit K, R. 25: Request for Proposal p. 11 items 2 (infrared surveys required) and 3 (draw down tests required). If the "extras" were not "extras" at all but were part of the original bid specifications, then any bidder who bid on the project was obligated to provide these items as part of the bid price and WPSCO's bid must necessarily be interpreted as including these "extras" even though WPSCO didn't specifically state that these items were included in WPSCO's bid. In sum, if the items were contained in the original specifications, then WPSCO's original bid already included these items and there was no reason to "adjust" WPSCO's bid upward by $30,000 in order to include these items.

On the other hand, assuming for the purposes of argument that the original specifications did not call for these three items, then it follows that WPSCO submitted a bid which was responsive to the specifications whereas SA offered a bid which was non-responsive in that SA did not state the price for which SA would provide the services required by the original bid specifications and, instead, SA stated its price for the original bid specifications PLUS the three "extras." In effect, SA made a counter-offer: SA offered services different from, and in addition to, the services requested through the original bid specifications.

In this situation, the law is clear: HCUA could not accept SA's counter offer based on "extras" which were not included in the original specifications because MISS.CODE ANN. 31-7-13 subsection d(i) expressly prohibits this:

> **(d)(i) ... No agency or government authority shall accept a bid based on items not included in the specifications.**

If HCUA concluded that the "extras" were desirable, then, by law, HCUA had to amend the specifications and reopen bidding so that all qualified bidders could bid on the "extras."

This requirement is at the heart of the public bid process because the essence of the public bid process is that all bidders will know exactly what work the governmental authority wants performed and all bidders will bid on the same work at the same time so that the government authority can compare comparable bids and easily identify the lowest bidder.

A review of the lower court's decision will show that the lower court failed to grasp this key principle. The circuit court apparently did not recognize that the issue of whether the bids are responsive to the bid specifications is a threshold issue. Instead, the circuit court apparently believed believed that it is permissible for a bidder to win a bid by offering "extras."

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

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 bid?

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

The HCUA engineer initially evaluated the three items identified as "extra" as having a market value between $28,000 and $35,000. However, in his final conclusion, he "adjusted" WPSCO's bid upward by $30,000 to allow for the three "extras." The HCUA engineer arrived at the $ 28,000 figure, the $30,000 figure, and the $35,000 figure without seeking bids on the three items and, apparently, without obtaining any contemporaneous information as to the market value of these three items: these dollar amounts were, apparently, his "guesstimates" as to what the fair market value of these items might be. There is nothing in the record to show how he arrived at these guesstimates (Record Excerpts Exhibit J, R. 65 et seq.).

WPSCO would point out that this form of adjustment unsupported by any evidence is not authorized by the public bid statutes and is unacceptable because, as a practical matter, the "extras" have not been adequately valued. To begin with, because prices gyrated wildly in the aftermath of Katrina, past experience as to market values could be at most a very rough guide to estimating current market prices. Furthermore, allowing for the engineer's $30,000 "adjustment" to WPSCO's price, WPSCO and SA are less than $3,000 apart. If the HCUA engineer had chosen to use the $28,000 figure which he himself proposes as reasonable, then the WPSCO and SA bids are only a few hundred dollars apart, a tiny fraction of a percent. When the bids are this close, an engineer's estimate, without any current information as to market prices, simply isn't enough information to enable the governing authority to pick the lowest bidder. HCUA acted arbitrarily and capriciously in accepting the engineer's estimate without making any attempt to obtain accurate information as to current market prices, especially in the face of WPSCO's offer to provide the same services as part of WPSCO's bid price.

HCUA argues that, even if the "adjustment" is not considered, it was still reasonable to

accept the SA/UP bid because having all maintenance and operations provided by two entities that were working together would provide savings which would not be available if HCUA selected WPSCO instead of SA to maintain and operate the interceptor lines. However, there are several problems with this reasoning. First, this assumes that UP is a qualified bidder such that HCUA had the option of accepting the SA/UP bid as a combined bid. This assumption is unwarranted as explained in the discussion of Issue 1 and 2 supra.

Second, no one connected with SA, UP, or HCUA has ever identified any specific saving to HCUA that would result from the supposedly more efficient operation of SA and UP. On the face of it, it would appear obvious that, once the bid is accepted, the bid price is the contract price and HCUA would remain liable for the contract price, no more and no less, whether SA and UP operated efficiently or inefficiently. Thus, if SA and UP were, in fact, able to operate more efficiently by cooperating, then the savings resulting from this efficiency would be for the benefit of SA and UP rather than producing a benefit to HCUA. In sum, HCUA's willingness to award the contract based on an unspecified possibility of savings which cannot be identified or measured is an example of arbitrary and capricious behavior and/or a violation of MISS. CODE ANN. 31-7-13(d)(ii).

As a final line of defense, HCUA claims that HCUA could reasonably reject a bid from WPSCO because WPSCO had the contract to maintain and operate the interceptor lines during the 2001-2006 time period and WPSCO's performance was unsatisfactory. There are two difficulties with this argument. First, this comes after the fact. During the time that WPSCO performed the contract, HCUA made no complaint and while the bids on the new contracts were being considered, no representative of HCUA suggested that there had been any deficiency in

WPSCO's performance. The second problem is that SA was formed by employees of WPSCO who quit to go into competition with their former employer. In fact, SA representatives touted the experience they had gained in working with HCUA's interceptor system as WPSCO employees as a reason for awarding the contract to SA. Thus, any alleged deficiencies in WPSCO's performance is as likely to be attributable to the fault of people currently employed by SA as to people currently employed by WPSCO.

Conclusion: For all the above and foregoing reasons, HCUA violated public bid laws and/or acted arbitrarily, capriciously, and without reasonable basis in accepting the SA/UP proposal and rejecting the WPSCO proposal. The judgment of the circuit court should be reversed and WPSCO should be awarded damages and injunctive and other relief as prayed in the bill of exceptions and supplementary bill of exceptions.

Respectfully submitted,

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