

2009-CC-01720 E

CERTIFICATE OF INTERESTED PARTIES

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

Hinds County Board of Supervisors
Appellee

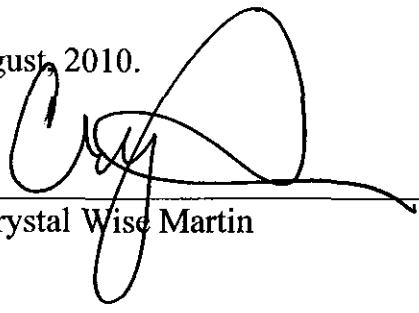
Hon. Tomie Green
Hinds County Circuit Court Judge

Precision Communications, Inc..
Appellant

Robert L. Gibbs, Katie L. Wallace
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So certified, this the 17th day of August, 2010.



Crystal Wise Martin

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STATEMENT OF THE ISSUES

- 1. Assuming for the sake of argument that it matters at this point, the Board did not act illegally in awarding the contract as it did.**
- 2. The Circuit Court did not err in ordering the Board to reconsider the bids.**
- 3. Precision Communications' Appeal was properly dismissed as moot.**

STATEMENT OF THE CASE

In July 2008, the Hinds County Board of Supervisors (the Board) published a request for bids to replace emergency weather sirens throughout Jackson, Mississippi. Board members became aware that many of the sirens were no longer functioning after tornadoes ripped through a large part of north Jackson on April 4, 2008, and many Hinds County citizens reported that they did not hear the sirens go off.

After it was determined that many of the sirens were in disrepair, the Board authorized Hinds County Emergency Operations Manager Larry Fisher to apply for grants for funds to repair or replace the non-functioning sirens. The grants were applied for through the Mississippi Emergency Management Agency with funds supplied by the Federal Emergency Management Agency and the United States Department of Homeland Security. Jim McCreary of Precision Communications (the Appellant herein) actually assisted the Board with the application for grant funds. He provided estimates for early warning systems to be included within the grant application.

Hinds County also hired a company, BidBridge, Inc., to assist with the logistics of conducting the bid. Prior to the due date for the bid responses, BidBridge was given the task of determining whether the bidders would need a Mississippi certificate of responsibility in order to bid on the project. CP. 131-32. Apparently the same vendors who were expressing interest in the Hinds County project had installed early warning systems for various public entities throughout the state and had not been required to hold

a Mississippi Certificate of Responsibility. CP. 132. A BidBridge representative verbally assured the Board that the licensure issue had been “worked out.” CP. 132.

Seven bids¹ including those of Precision and Federal Signal were presented to the Board.² During the time in which the bids were being considered, McCreary, on November 5, 2008, e-mailed Larry Fisher with a list of reasons why Precision Communication’s bid was superior to that of Federal Signal’s. CP. 119.

After weeks of evaluating the bids with the assistance of BidBridge, Inc., on November 17, 2008, the Board awarded the bid to the company that had the best and lowest bid, EDNS/Federal Signal Corporation.³ Apparently McCreary was at the meeting wherein BidBridge recommended that the Board of Supervisors award the bid to Federal Signal and voiced his opposition to the award to Federal Signal. CP. 132. A week later Precision Communications, Inc., filed a Bill of Exceptions challenging the award of the bid to its competitor and appealed the Board’s decision to the Circuit Court of Hinds County. CP. 3.

Precision thereafter filed a motion with the Circuit Court requesting that the Court stay the Board from proceeding with its contract with Federal Signal Corporation. CP. 18. The Court refused to issue a stay. CP. 49. In July 2009, the Board decided to rebid

¹ One of the seven bids was not considered because it was not complete.

² According to Precision, it was the only bidder with a certificate of responsibility on the outside of its bid. Precision’s certificate of responsibility is in “Communication Systems”. Bill of Exceptions Vol 2, Ex. 1. If this is so, it would provide a valid reason for the Board to have the project rebid especially given McCreary’s participation in determining the bid’s specifications as well as his improper lobbying the Board against Federal Signal.

the project and filed a Motion to Dismiss Precision's appeal of the original award as moot. CP. 68. The Circuit Court, on September 2, 2009, denied the motion, entered a stay, and ordered the Board to reconsider all of the bids submitted in response to Hinds County's original request for bids. CP. 126.

In accordance with this order, the Board of Supervisors met to reconsider the bids and, after doing so, voted to reject all of the bids. CP. 134-135. During the discussion regarding reconsideration of the bids, the Board was made aware of the fact that an award of the bid to Precision Communications could endanger the grant funding the project. The funds intended to pay for the Hinds County Early Warning Sirens were from a grant from the Mississippi Emergency Management Agency (MEMA) which, in turn, were funds secured from the United States Department of Homeland Security.

In addition to the licensure requirements promulgated by the Mississippi legislature and the Mississippi Board of Contractors, the Board, in awarding the bid for early warning sirens, was also required to comply with the Financial Management Guide provided by the United States Department of Homeland Security, Preparedness Directorate, Office of Grants and Training, Office of Grant Operations (the Directorate). Should the Board fail to adhere to the requirements of the Directorate, it could lose the funding for the sirens. CP. 132-133.

The United States Department of Homeland Security Financial Management Guide, page 41 prohibits "non-competitive practices." Specifically, the Directorate states

³ Federal Signal is a leading supplier of emergency warning signals to city and counties. See <http://www.federalwarningsystems.com/products.php?prodid=47>.

that “[c]ontractors that develop or draft specifications, requirements, statements of work, and/or Requests for Proposal (RFP) for a proposed procurement shall be excluded from bidding or submitting a proposal to compete for the award of such procurement.” CP. 133, 138; http://www.dhs.gov/xlibrary/assets/Grants_FinancialManagementGuide.pdf

The Board notified the Circuit Court that it had reconsidered the bids as ordered and had decided to reject all of them. The Court then lifted the stay and dismissed Precision’s appeal as moot. CP. 201.

It is from this Order that Precision has filed the instant appeal. CP. 203.

SUMMARY OF THE ARGUMENT

The Circuit Court was correct in dismissing Precision Communications' appeal as moot when the Hinds County Board of Supervisors decided to reject all of the bids and rebid the project. The law is clear that a losing bidder's appeal is moot if, after the losing bidder lodges a protest, the governmental entity decides to rebid the project.

Because the appeal is moot, the other issues identified by Precision in its appeal are irrelevant. However, for the sake of argument, Precision's presumption that the bids for the installation of early warning sirens required the bidders to have certificates of responsibility is incorrect. The State Board of Contractors is vested with the authority to determine which contracts require the bidders to have certificates of responsibility and contracts for the purchase and installation of early warning sirens are not on the State Board of Contractors' exhaustive list of contracts requiring such certificates. For this reason, it is not altogether clear that Federal Signal's bid was an illegal one. Again, given the Board's ultimate decision to rebid the project, this issue is irrelevant.

Furthermore, the Circuit Court did not err in remanding the case back to the Board to reconsider its decision with regard to the project. And the Board of Supervisors was well within its rights to thereafter reject all of the bids and put the project up for rebidding.

LAW AND ARGUMENT

A. Standard of review:

The standard of review of an order of a Board of Supervisors is the same standard which applies in appeals from the decisions of administrative agencies. *Barnes v. Board of Supervisors*, 553 So.2d 508, 511 (Miss.1989). “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.” *Board of Law Enforcement Officers Standards & Training v. Butler*, 672 So.2d 1196, 1199 (Miss.1996). See also *Van Meter v. City of Greenwood*, 724 So.2d 925 (Miss.App.1998); *Hinds County Board of Supervisors v. Leggette*, 833 So.2d 586 (Miss. 2002). “[S]o long as the governing body’s decision is ‘fairly debatable,’ [appellate courts] are without authority to supplant the municipality’s legislative action.” *Gannett River States Publishing Corp. v. Jackson Advocate*, 856 So.2d 247, 249 (Miss. 2003).

- 1. Assuming for the sake of argument that it matters at this point, the Board did not act illegally in awarding the contract as it did.**

Precision argues that the initial award of the bid to Federal Signal was illegal because Federal Signal’s bid did not have a certificate of responsibility⁴ attached to it. M.C.A. § 31-3-15 mandates that bids for public projects can only be awarded to contractors who have a certificate of responsibility from the Mississippi State Board of

Contractors or from a similar board of another state. The purpose of this requirement “is to protect the health, safety and general welfare of all persons dealing with those who are engaged in the vocation of contracting and to afford such persons an effective and practical protection against incompetent, inexperienced, unlawful and fraudulent acts of contractors.” M.C.A. § 31-3-2. Any bid submitted without a certificate of responsibility number on the outside of the bid is not to be considered. M.C.A. §31-3-21.

M.C.A. § 31-3-15 states as follows:

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, or a similar certificate issued by a similar board of another state which recognizes certificates issued by said board. Any contract issued or awarded in violation of this section shall be null and void.

M.C.A. § 31-3-1 defines a contractor as “[a]ny person contracting or undertaking as prime contractor, subcontractor or sub-subcontractor of any tier to do any erection, building, construction, reconstruction, repair, maintenance or related work on any public or private project”

That the statutory scheme is not wholly unambiguous as to which public contracts it applies is evidenced by the fact that the Mississippi Supreme Court has held that the State Board of Contractors has the authority “to determine what types of work require a contractor to obtain a certificate of responsibility.” *Clancy's Lawn Care & Landscaping*,

⁴ Apparently a certificate of responsibility is the same thing as a license. *See* <http://www.msboc.us/faqs.html> (“a Certificate of Responsibility is the title of the commercial

Inc. v. Mississippi State Bd. of Contractors, 707 So.2d 1080, 1083 (Miss. 1997). Thus, for example, in *Clancy's Lawn Care*, the Court held that the State Board of Contractors had the authority to determine that a contractor hired to landscape the land adjacent to a state highway need not have a certificate of responsibility. *Id.*

As the entity empowered to determine which contracts require a certificate of responsibility, the State Board of Contractors, to this end, has set forth some 179 types of contracts for which a contractor must have a certificate of responsibility. *See* <http://www.msbec.us/majorclass.txt>. Although the list is quite specific, nowhere in that list is a contract for the installation of early warning sirens.⁵ And, indeed, the Mississippi Attorney General has opined that where the purpose of a contract is to purchase and install equipment such as computer equipment, the contract is probably not one which requires the bidder to a certificate of responsibility. Op.Atty.Gen. No. 94-0305, Ferguson, June 6, 1994.

Federal Signal, which is headquartered in Illinois, has an Illinois license.⁶

Precision argues that “the Circuit Court was well aware not only that [Federal Signal] should not have been awarded the siren contract, but also that the contract between [Federal Signal] and the County was null and void.” *Precision's Brief* at p. 10. But it cannot simply be taken as a given that Federal Signal's bid required a certificate of

state license”).

⁵ There is a classification of “communication systems”. Bill of Exceptions Vol 2, Ex. 6. Whether or not “communication systems” encompasses early warning systems is, apparently, something upon which the State Board of Contractors has not had occasion to rule.

responsibility for it to have been considered for the early warning siren project.

At any rate, this issue need not be addressed by this Court. Like Precision's appeal in this matter, the issue is moot by virtue of the fact that the Board chose to rebid the project.

2. The Circuit Court did not err in ordering the Board to reconsider the bids.

Precision argues that the Circuit Court erred when it ordered the City to reconsider the bid. Precision contends that pursuant to M.C.A. § 11-51-75, the court should have declared Federal Signal's bid void for want of a certificate of responsibility and then rendered "the decision a board or municipality ought to have rendered". Presumably, Precision means that the circuit court should have awarded the bid to itself. In support of this argument, Precision cites the case of *City of Durant v. Laws Const. Co., Inc.*, 721 So.2d 598 (Miss. 1998). That case, however, supports Hinds County's position that the court was correct when it remanded the case and, in effect, allowed the Board to do what it did which was to rebid the project.

Pursuant to Miss.Code Ann. § 11-51-75 (1972), the circuit court is required to render a judgment (sic) which the municipal ought to have rendered. Thus, the circuit court would have ordered the City to not consider King's bid, **and either accept the next lowest bid or reject all bids and rebid the project.**

City of Durant, 721 So.2d at 601 (emphasis added). In *City of Durant*, the Mississippi

⁶ Federal Signal applied for a Mississippi certificate of responsibility in "Communications Systems" and was awarded the same on February 2, 2009. Bill of Exceptions Vol 2, Ex. 6, ¶ 9.

Supreme Court upheld an award of compensatory damages to the unsuccessful bidder but only because the contractor who had been awarded the bid had almost finished the project and there was no other remedy available. *City of Durant*, 721 So.2d at 606. That is not the case here.

What Precision wanted was for the circuit court to award the bid to itself. However, it cites no authority whatsoever for the proposition that the circuit court should have ordered the Board to award the contract to Precision or, for that matter, that the circuit court erred when it remanded the case back to the Board to reconsider the bids. Where a public agency has accepted a bid and that bid subsequently turns out to be void, the public agency must revoke its acceptance; it then may accept the second lowest and best bid or it may reject all of the bids and readvertise the project. Op. Atty. Gen. No. 2003-0420, Moore, August 15, 2003.

In *Preferred Transport Company, LLC v. Claiborne County Board of Supervisors*, 32 So.3d 549 (Miss. App. 2010), Claiborne County solicited bids for the collection and disposal of solid waste. After the bid was awarded, one of the unsuccessful bidders, Preferred Transport Company (PTC), appealed claiming that the Board erred in considering factors others than those listed in the requests for proposals. *Preferred Transport Company, LLC*, 32 So.3d at 551. The circuit court agreed that the Board was wrong to consider factors other than those listed in the RFP. However, rather than order the Board to award the contract to PTC, the court ordered the Board to reopen the RFP process and to include in the specifications the extra factors considered by the Board

when it initially awarded the contract. *Preferred Transport Company, LLC*, 32 So.3d at 551. On appeal, PTC argued, as does Precision Communications here, that the circuit court should have awarded PTC the contract. PTC cited M.C.A. §11-51-75's language that "[i]f the judgment be reversed, the circuit court shall render such judgment as the board of municipal authorities ought to have rendered" *Preferred Transport Company, LLC*, 32 So.3d at 554.

The Mississippi Court of Appeals rejected PTC's argument on the grounds that M.C.A. §31-7-13(r) specifically allows the governing authority to reinstate the bid process if it finds none of the bids acceptable. *Preferred Transport Company, LLC*, 32 So.3d at 554. Nor, the Court held, was PTC entitled to compensatory damages. While the Mississippi Supreme Court awarded compensatory damages to the unsuccessful bidder in *City of Durant v. Laws Construction Co.*, 721 So.2d 598, 606 (Miss. 1998), in that case, the contractor who had been illegally awarded the bid had nearly completed the project. An award of damages, then, was the only equitable remedy. *Preferred Transport Company, LLC*, 32 So.3d at 554. Where the project is rebid, a losing bidder is not entitled to compensatory damages.

Assuming for the sake of argument that the bid with Federal Signal was void because it lacked a Mississippi license, Hinds County was perfectly justified in deciding to reopen the bid process.

3. Precision Communications' Appeal was properly dismissed as moot.

The Hinds County Board of Supervisors ultimately chose to rebid the work that is the subject of this appeal. The rebidding of the contract renders moot Precision Communications' appeal concerning the first bid and, thus, its appeal should be dismissed. "[I]f pending an appeal, something occurs without any fault of the defendant which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed." *S. Pacific Terminal Co. v. Interstate Commerce Comm.*, 219 U.S. 498, 514, 31 S.Ct. 279, 55 L.Ed. 310, 315 (1910). *See also Strong v. Bostick*, 420 So.2d 1356, 1359 (Miss. 1992) (holding that Mississippi Supreme Court will dismiss an appeal "when no useful purpose could be accomplished by entertaining it, when so far as concerns any practical ends to be served the decision upon the legal questions involved would be merely academic"). If an appeal involves questions about rights which no longer exist, the appeal will be dismissed. *Gartrell v. Gartrell*, 936 So.2d 915, 916 (Miss.2006). *See also City of Madison v. Bryan*, 763 So.2d 162, 163 (Miss.2000) (holding that suit brought by developer regarding denial of zoning request was moot where developer no longer had an interest in the property that was the subject of the request).

That this principle applies equally to construction contracts is evidenced by a leading treatise in that area: BRUNER AND O'CONNOR ON CONSTRUCTION LAW. Section 2:145, entitled "Contract formation by competitive sealed bidding—Remedies for improper award and scope of judicial review—Mootness of protest", states as follows:

Once a protested invitation for bids is cancelled or an awarded contract is terminated, the disputes involving them become moot and bidders have no further right to equitable relief. One device employed to sidestep the mootness issue is to request judicial relief against an owner's *future* noncompliance with bidding requirements. A protest also may be made moot by completion of the contract.

BRUNER AND O'CONNOR ON CONSTRUCTION LAW, Section 2:145.

Courts have dismissed appeals by unsuccessful bidders for public projects where, during the pendency of the appeal, the project was rebid. In *Cummins v. Department of Transportation*, 845 A.2d 983 (Penn. 2004), the Pennsylvania Department of Transportation was sued by a disappointed bidder on a bridge project. While the suit was on appeal, the Department decided to rebid the bridge project. The court thereafter dismissed the disappointed bidder's appeal as moot. *Cummins*, 845 A.2d at 985.

The same result was had in *Blesso Fire Systems, Inc. v. Eastern Connecticut State University*, 713 A.2d 1283 (Conn. 1998). In that case, an unsuccessful bidder for a fire alarm system contract brought an action for injunctive relief; then later, during the course of the plaintiff's appeal, the defendant put the entire project out to be rebid. *Blesso*, 713 A.2d at 1283. The plaintiff was not awarded the contract during this rebidding process, and did not challenge the award to a different bidder. The court dismissed the plaintiff's appeal as moot in light of the rescission of the first contract and the rebidding process that had occurred. *Id.* See also *Paul Wholesale, B.V./HOLS Trading, GmbH, J.V. v. State Department of Transportation*, 908 P.2d 994, 1004 (Alaska 1995) (where appellee cancelled solicitation and rebid concession contract, the appeal from the initial bidding

process would be dismissed as moot); *Kane & Son, Inc. v. City of Philadelphia*, 459 A.2d 866 (Pa. 1983) (lowest bidder's appeal of contract to refinish the roof of a public building was moot where the city thereafter decided to rebid the project); *Keefe-Shea Joint Venture v. City of Evanston*, 845 N.E.2d 689 (1st Dt 2005) appeal denied, 850 N.E.2d 808 (2006) (unsuccessful bidder's claims for order declaring that it was lowest responsible bidder on municipal contract for storm sewer project and that city's contract with successful bidder was null and void, and for mandatory injunction requiring city to enter into contract with unsuccessful bidder, were moot, where, during the pendency of the unsuccessful bidder's action challenging the bidding process, the city terminated the contract awarded to successful bidder); *P. Francini & Co. v. United States*, 2 Cl.Cl. 1 (1983) and *P. Francini & Co., Inc., v. U.S.*, 2 Cl. Ct. 7 (1983) (protest by loser in invitation for bids to modernize courthouse mooted by cancellation of invitation).

As the case of *City of Durant v. Laws Const. Co., Inc.*, 721 So.2d 598 (Miss. 1998), makes clear, the Hinds County Board of Supervisors was well within its rights to reject all of the bids and rebid the contract. The Board's decision to rebid the project means that the outcome of the initial bidding process is irrelevant and Precision Communications' appeal from its failure to obtain the contract on the initial bid is moot.

This is not a case akin to *Richardson v. Canton Farm Equipment, Inc.*, 608 So.2d 1240 (Miss. 1992), wherein the Board of Supervisors conspired to award a bid for tractors in contravention of every law designed to protect the public interest in the awarding of public projects. The Board of Supervisors in this case awarded a bid to the company who they considered to have the lowest and best bid. Precision

Communications is aggrieved because, as the only bidder with a certificate of responsibility, it is under the misapprehension that it should automatically have been awarded the bid. But surely this would violate the very spirit and intent of the laws Precision Communications is supposedly trying to enforce.

Given that it is entirely unclear whether installers of early warning sirens require a certificate of responsibility and, assuming for the sake of argument that such a certificate is required, the inherent unfairness of the Board being forced to award the contract to the single bidder to have a certificate despite that bidder's being involved in the design of the bid thereby jeopardizing the funding for the project, the Board's decision to rebid the project was entirely reasonable and Precision Communication's appeal of that decision is moot.


Conclusion

Given Hinds County's decision to rebid the contract for replacing the outdated emergency weather sirens, Precision Communication's appeal is now moot and should be dismissed.

Wherefore, Hinds County Mississippi respectfully requests that the Court dismiss Precision Communications, Inc.'s appeal.

Respectfully submitted,
The Hinds County Board of Supervisors

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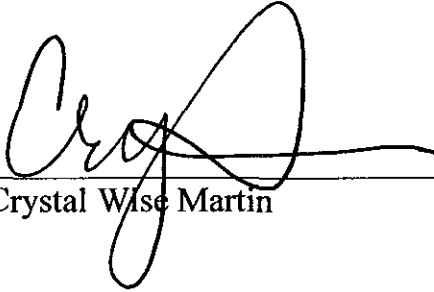
CERTIFICATE OF SERVICE

I, Crystal Wise Martin, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to the following:

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This, the 17th day of August, 2010.



Crystal Wise Martin