

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CC-01720

PRECISION COMMUNICATIONS, INC.

APPELLANT

V.

HINDS COUNTY, MISSISSIPPI

APPELLEE

ON APPEAL FROM HINDS COUNTY CIRCUIT COURT

CASE NO. 251-08-940CIV

Precision Communications, Inc. v. Hinds County, Mississippi

REPLY BRIEF OF APPELLANT PRECISION COMMUNICATIONS, INC.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Supreme Court Justices may evaluate possible disqualification or recusal.

1. Precision Communications, Inc., Appellant;
2. Robert L. Gibbs, Esq., Katie L. Wallace, Esq., Attorneys for Appellant;
3. Hinds County, Mississippi, Appellee;
4. Crystal Wise Martin, Esq., Attorney for Appellee;
5. Eddie Jean Carr, Hinds County Chancery Clerk;
6. Hinds County Board of Supervisors; and
7. Honorable Tomie T. Green, Hinds County Circuit Judge.

Dated, this the 20th day of September, 2010



ROBERT L. GIBBS

TABLE OF CONTENTS

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Summary of the Argument	1
Argument	1
I. Standard of Review For This Appeal is <i>De Novo</i>	1
II. The County Has Failed to Set Forth Any Authority Which Would Permit the Circuit Court to Deviate From Its Obligation to Hear Precision's Appeal Pursuant to the Requirements of Miss. Code Ann. § 11-51-75.	2
III. Not Only Does Mississippi Law Require A Certificate of Responsibility, But The County's Own Bid Specs Required One, Thus Belying The County's Argument That It Was Not Required For the Project	4
Conclusion	5
Certificate of Service	7

TABLE OF AUTHORITIES

A. <u>CASES</u>	<u>PAGE</u>
<i>Burleson v. Lathem</i> , 968 So.2d 930 (Miss. 2007)	2
<i>City of Durant v. Laws Construction Company, Inc.</i> , 721 So.2d 598 (Miss. 1998)	2
<i>Northeast Mississippi Community College Dist. v. Vanderheyden Constr. Co.</i> , 800 F.Supp. 1400 (N.D. Miss. 1992)	3
<i>Preferred Transport Company, LLC, v. Claiborne County Board of Supervisors</i> , 32 So.3d 549 (Miss. App. 2010)	3
<i>Whitaker v. Limeco Corp.</i> , 32 So.3d 429 (Miss. 2010)	2
 B. <u>OTHER AUTHORITIES</u>	
MISS. CODE ANN. § 11-51-75	<i>Passim</i>
MISS. CODE ANN. § 31-7-13(r)	3
MISS. CODE ANN. § 31-3-15	4

SUMMARY OF THE ARGUMENT

The County has failed to set forth any argument in its Appellee Brief to rebut the fact that the Circuit Court failed to comply with the mandate of Section 11-51-75. Instead of “render[ing] such judgment as the board or municipal authorities ought to have rendered,” it allowed the County to remedy its violation of Mississippi law and then dismissed Precision’s Appeal. By taking this action, the County was improperly permitted to avoid liability for its award of contract to a bidder without a certificate of responsibility. In addition, Mississippi’s public purchase laws were circumvented, while leaving Precision, the only qualified bidder for the project, without a legal remedy for its unjustifiable denial of the contract. Therefore, this Court should find that the Circuit Court’s denial of Precision’s Appeal be reversed.

ARGUMENT

I. The Standard of Review For This Appeal Is *De Novo*.

The County erroneously argues that the governing body’s decision should not be disturbed unless it is “fairly debatable” or unsupported by substantial evidence. Appellee Brief at 6. Although Precision admits that this is the general standard of review for a typical Circuit Court appeal of a governing authority’s decision pursuant to MISS. CODE ANN. § 11-51-75, it is not the correct standard of review in this situation because the Circuit Court did not hear Precision’s Circuit Court Appeal. Without even allowing briefing of the Appeal to be completed, the Circuit Court remanded the question of award of contract back to the Board of Supervisors for reconsideration. Then the Circuit Court dismissed Precision’s Appeal on mootness grounds. Therefore, rather than examining the actions of Hinds County at this juncture, this Court must employ a standard of review to examine the actions of the Circuit Court in dismissing Precision’s appeal, without a full briefing and hearing as contemplated by § 11-51-

75. The standard for a dismissal of appeal is *de novo*. See *Whitaker v. Limeco Corp.*, 32 So.3d 429, 433-34 (Miss. 2010); *Burleson v. Lathem*, 968 So.2d 930, 932 (Miss. 2007).

II. The County Has Failed to Set Forth Any Authority Which Would Permit the Circuit Court to Deviate From Its Obligation to Hear Precision's Appeal Pursuant to the Requirements of Miss. Code Ann. § 11-51-75.

The County continually asserts in its brief that it was “perfectly justified in deciding to reopen the bidding process.” It also asserts that the Circuit Court was justified in remanding the case back to the Board to reconsider the bids prior to hearing Precision's § 11-51-75 appeal. However, the County has cited no authority whatsoever to justify the decision both of the Board or the Circuit Court.

Indeed, the only true authority the County contends supports its position is *City of Durant v. Laws Const. Co., Inc.*, 721 So. 2d 598 (Miss. 1998). However, as Precision pointed out in its Appellant Brief, this case in fact points out precisely what the Circuit Court should have done, not what it actually did. Despite the County's assertions, Precision has never disputed that a Circuit Court had the authority to either 1) determine that the contract was properly awarded to EDNS; 2) determine that the County should not have considered EDNS and/or other contractors' bids, and determine the contractor's bid that should have been accepted; or 3) determine that the County should have rejected all bids and rebid the project. See Precision's Appellant Brief at 12. However, the Circuit Court only had the authority to make such a determination after having considered the bill of exceptions and heard Precision's appeal pursuant to § 11-51-75. The Circuit Court did not do so here. Thus, the County's citation to cases such as *Laws* in which the properly Circuit Court heard a § 11-51-75 appeal and then made one of these three determinations are not applicable to the instant case. In this case, the Circuit Court did not even allow the parties to complete the briefing schedule entered, nor did the Circuit Court hold a hearing on the bill of exceptions. Thus, the Circuit Court did not “hear and determine the same

on the case as presented by the bill of exceptions as an appellate court.” MISS. CODE ANN. § 11-51-75.

For this same reason, the holding of *Preferred Transport Company, LLC, v. Claiborne County Board of Supervisors*, 32 So. 3d 549 (Miss. App. 2010) is also inapplicable to this case. In *Preferred Transport*, the Circuit Court properly heard the aggrieved bidder’s appeal pursuant to Miss. Code Ann. § 11-51-75 and then rendered the decision the Board “ought to have rendered.” *Preferred Transport*, 32 So. 3d at 549. In that case, the parties were submitting proposals for a contract for solid waste disposal, and operating under a specific statute governing the procurement of such contracts. *Id.* The Supreme Court recognized that that specific waste disposal statute, § 31-7-13(r) states, provides that: “If the governing authority or agency deems none of the proposals to be qualified or otherwise acceptable, the request for proposals process may be reinitiated.” *Id.* at 554. As such, the Supreme Court held that “as the Board had statutory authority to reopen the proposal process, we find no error in the circuit court’s use of this procedure as an available remedy.” *Id.* (emphasis added). In its brief, the County has pointed to no authority, statutory or otherwise, that would allow the Board or the Circuit Court to bypass the appeal requirements of § 11-51-75 and reopen the bidding process.

Finally, the County failed bring forth any authority in its brief to contradict the applicable ruling in *Northeast Mississippi Community College Dist. v. Vanderheyden Constr. Co.*, 800 F. Supp. 1400, 1402 (N.D. Miss. 1992) cited by Precision in its principal brief. Under *Vanderheyden*, the Court found that the County was only permitted to reject all bids and rebid the project, ‘only prior to the time that it accepts one of the bids it has received.’” *Id.* As such, a County is not permitted to first award the contract to one bidder, then once it realizes it has erred to subsequently rescind the award, rejecting all bids and ordering the project to be readvertised. *Id.* at 1401-02.

The law is clear that the County nor the Circuit Court had any authority to reconsider the bids and reject them all in order to be in a position to rebid the siren project prior to hearing Precision's Circuit Court appeal pursuant to MISS. CODE ANN. § 11-51-75. Despite its citations to many inapplicable cases, the County has not rebutted this fact. Therefore, the Circuit Court's dismissal of Precision's Appeal should be reversed.

III. Not Only Does Mississippi Law Require A Certificate of Responsibility, But The County's Own Bid Specs Required One, Thus Belying The County's Argument That It Was Not Required For the Project.

The County states that "it cannot simply be taken as a given that Federal Signal's bid required a certificate of responsibility for it to have been considered for the early warning siren project." County's Brief at 9. Nothing could be further from the truth. Not only does Mississippi law clearly require such certificates, but the County's own bid specifications required a certificate.

The County does not dispute that MISS. CODE ANN. § 31-3-15 clearly requires that no contract can be awarded absent that contractor possessing a certificate of responsibility—and in fact that "[a]ny contract issued or awarded in violation of this section shall be null and void." The County alleges, however, that Mississippi law "is not wholly unambiguous" as to which type of contracts require a certificate of responsibility. The County's attempt to create doubt as to whether requirement existed for this project is illogical. Indeed, the bid specifications created by the County for the project explicitly provided that "All suppliers must submit a Certificate of Responsibility, for this project...." (Ex. 3 to Bill of Exceptions (Exhibit to the Record on Appeal but unnumbered)). Clearly then, at the time it created the bid specifications, the County agreed that Mississippi law required that all bidders must possess one in order to be eligible to be awarded the contract.

As set forth in its principal brief, it is clear that the Board acted illegally in initially awarding the contract to EDNS.¹ If the Circuit Court would have considered Precision's appeal pursuant to § 11-51-75, it could have properly considered this evidence and easily made this determination.² Instead of doing so, it allowed the County to go back and remedy its wrong and then dismissed Precision's appeal. This left Precision without a remedy at law for the County's improper actions. As such, this Court should reverse the Circuit Court's dismissal of Precision's appeal.

CONCLUSION

The County has failed to set forth any authority in its brief to rebut the fact that the Circuit Court erred in interpreting its role as an appellate court pursuant to § 11-51-75 and in declaring Precision's appeal moot. Thus, this Court should reverse the Circuit Court's dismissal of Precision's appeal, and either remand the action back to the Circuit Court for a proper hearing, or find that evidence presented by Precision was sufficient to find that the County acted contrary to law and consequently could be the only proper recipient of the early warning siren contract.

¹ The County points out that Federal Signal now has a Certificate of Responsibility in "Communications Systems," although it did not have one at the time of the initial bid. Based on this fact, the County awarded the contract to Federal Signal when it rebid the contract the second time around, thereby allowing it and Federal Signal the ability to escape liability for its failure to possess the certificate in the first instance.

² Precision is also confident that had the trial court conducted a hearing as required by § 11-51-75, the court would have determined that Precision was not only was the only qualified bidder, but Precision had the lowest and best bid.

Dated, this the 2nd day of September, 2010.

PRECISION COMMUNICATIONS, INC.



Robert L. Gibbs, One of their Attorneys

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CERTIFICATE OF SERVICE

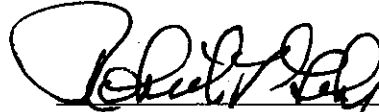
I, Robert L. Gibbs, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of Reply Brief of Appellant to:

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Hinds County Circuit Judge
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Dated, this the 2nd day of September, 2010.



Robert L. Gibbs