

IN THE SUPREME COURT OF MISSISSIPPI

WASTEWATER PLANT SERVICE CO., INC.

PLAINTIFF/APPELLANT

VERSUS

NO. 2009-SA-00413

CITY OF LONG BEACH, MISSISSIPPI, BY AND  
THROUGH ITS MAYOR AND ALDERMEN

DEFENDANT/APPELLEE

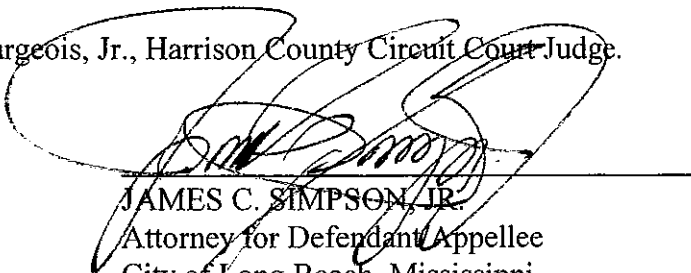
UTILITY PARTNERS, LLC

INTERVENOR

**CERTIFICATE OF INTERESTED PERSONS**

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 Justices of this Court may evaluate possible disqualifications or recusal.

- A. Wastewater Plant Service Co., Inc. - Plaintiff/Appellant;
- B. Roland F. Samson, III, Esq. - with the law firm of Samson & Powers, PLLC, attorneys of record Plaintiff/Appellant, Wastewater Plant Service Co., Inc.;
- C. City of Long Beach, Mississippi - Defendant/Appellee;
- D. James C. Simpson, Jr., Esq. - with the law firm of Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P., attorneys for Defendant/Appellee
- E. Brandi C. Schwartz - with the law firm of Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P., attorneys for Defendant/Appellee
- F. Utility Partners, LLC - Intervenor;
- G. Paul Richard Lambert, Esq. - attorney of record for Intervenor; Utility Partners, LLC;
- H. Honorable Lawrence P. Bourgeois, Jr., Harrison County Circuit Court Judge.

  
JAMES C. SIMPSON, JR.  
Attorney for Defendant Appellee  
City of Long Beach, Mississippi

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### **STATEMENT OF THE ISSUES**

1. Whether the City of Long Beach was required to comply with Miss. Code Ann. § 31-7-13 ( r) when awarding a contract for professional services.
2. Alternatively, if Miss. Code Ann. § 31-7-13 ( r) applies, whether the City of Long Beach complied with Miss. Code Ann. § 31-7-13 ( r) when issuing a Request for Proposal to obtain services for the professional utility management, operations and maintenance services of the City's Public Works Operation, accepting the proposal of Utility Partners, L.L.C. and entering into a contract with Utility Partners, L.L.C.

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW**

On January 11, 2007, Wastewater Plant Service Co., Inc., ( hereafter “WPSCO”) filed a Bill of Exceptions in the Circuit Court of Harrison County, Mississippi alleging that “[t]he actions of the City of Long Beach in selecting the Utility Partners proposal in response to the December 2006 RFP were arbitrary and capricious, discriminatory, illegal and without a substantial evidentiary basis.” ( R. Vol. 1, p. 11)<sup>1</sup>. WPSCO further alleged in the Bill of Exceptions that the aforesaid actions City of Long Beach were taken “without proper justification, including factual or legal, and have caused serious and irreparable injury to WPSCO.” ( R. Vol. 1, p. 11). Lastly, WPSCO alleged that the City’s actions were “unrelated to any proper exercise of any legitimate authority and violated WPSCO’s substantive and procedural due process rights.” ( R. Vol. 1, p. 11). WPSCO prayed that Circuit Court of Harrison County would overturn or reverse the City of Long Beach’s selection of UP’s proposal and find that the proposal submitted by WPSCO was the best proposal in response to the December 2006 RFP.<sup>2</sup> ( R. Vol 1, p. 14).

On February 15, 2007, the City of Long Beach filed its Reply to Bill of Exceptions. ( R. Vol. 1, pp. 95-97). The City of Long Beach denied WPSCO’s allegations and prayed that WPSCO’s Bill of Exceptions be dismissed with prejudice. ( R. Vol. 1, p. 97). Alternatively, The

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References to the record are designated “R.” followed by the volume number of the record and the page number therein. References to the Appellant’s Record Excerpts are designated “Appellant’s R.E.” followed by the page number.

2

WPSCO also sought injunctive relief against the City of Long Beach “in order to avoid irreparable damage and injury.” ( R. Vol. 1, p. 12).

City of Long Beach prayed that the Court would affirm the decision of the Mayor and Board of Aldermen of the City of Long Beach. ( R. Vol. 1, p. 97).

Utility Partners, L.L.C. (hereafter "UP") filed a Motion to Intervene on March 9, 2007. ( R. Vol. 1, pp. 99-102). WPSCO filed an Opposition to UP's Motion to Intervene on April 5, 2007. ( R. Vol. 1, pp. 124-128). The Circuit Court entered an Order Allowing Intervention on October 16, 2007. ( R. Vol. 1, p. 140). UP filed its Answer on October 24, 2007. ( R. Vol. 1, pp. 141-145). Thereafter, UP filed a Joinder to the Reply Brief of the City of Long Beach on November 5, 2007. ( R. Vol. 1, pp. 146-147).

On May 1, 2007, WPSCO filed its Brief of Appellant and Record Excerpts with the Circuit Court of Harrison County. ( R. Vol. 1-4, pp. 176-511). On June 18, 2007, City of Long Beach filed it's Reply Brief. ( R. Vol. 1, pp. 129-139). WPSCO then filed a Reply Brief on November 26, 2007. ( R. Vol. 1, pp. 148-164).

Oral arguments were held before Judge Lawrence P. Bourgeois, Jr., on August 21, 2008.<sup>3</sup> On February 17, 2009, Circuit Judge Lawrence P. Bourgeois, Jr., affirmed the decision of the City of Long Beach to award the Contract for Professional Management, Operation and Maintenance of the Public Works Department of the City to UP. Judge Bourgeois reasoned:

The Court accepts the City's assertion that contracts for services, only, do not require advertisement and invitations for bids as argued by WPSCO. *See* Miss. Code Ann. §31-7-1 et seq. As a result §31-7-13 requiring explanation in the event of award of a contract to a bidder other than the lowest bid is not applicable. It was within the City's discretion to select the Company they believed most suited to perform the work and in this instance the Court's scope of review is limited.

( R. Vol. 2, p. 166; Appellant's R.E., p. 5).

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<sup>3</sup>

The transcript of the August 21, 2008 oral argument is a separate volume in the record that is not numbered or paginated.

On March 16, 2009, WPSCO filed a Notice of Appeal with the Circuit Court of Harrison County appealing to this Court the February 17, 2009 Order denying the Bill of Exceptions and affirming the decision of the City of Long Beach to award the contract for professional management, operation and maintenance of the Public Works Department of the City of Long Beach to UP.

**II. STATEMENT OF THE FACTS RELEVANT TO THE ISSUES  
PRESENTED FOR REVIEW.**

On December 5, 2006, The Mayor and Board of Aldermen of the City of Long Beach met in executive session and found:

3. That due to the damage and destruction caused by Hurricane Katrina, the Mayor and Board of Aldermen expect:

- a. Reduction of Ad Valorem tax revenue receipts for 2007 of approximately 25% from those receipts for the 2006 tax year, being a reduction of approximately \$1,000,000, and
- b. A reduction in Water and Sewer revenues of approximately \$730,000, which revenues are the primary source of funds applied annually by the City to pay the OPTECH contract price; and
- c. Increased insurance costs;

and as a result of the above expectations and in anticipation that such reductions will not be alleviated for several years, and in anticipation of increasing financial demands upon the City in the future, the City's financial future is uncertain and its ability to continue its long term, multi-year commitment as set forth in the aforesaid contract with OPTECH and its payment obligations is uncertain, if not doubtful; and

4. The Mayor and Board of Aldermen should not contractually obligate the City to expend monies which are not available or not reasonably expected to be available; and

5. The financial uncertainty and prognosis of the City's future, which uncertainty has been caused by the damage and destruction of Hurricane Katrina, an unforeseeable event, makes the City's continued long-term, multi-year performance as required by the aforesaid OPTECH contract impractical if not

impossible and prohibits the City's continuing in the contract for the 2007 calendar year, which calendar year will include three months of the City's next fiscal year, and requires the City to notify OPTECH and ECO Resources, Inc., of its inability to continue performance of its obligations under said contract beyond December 31, 2006, and to seek proposals for professional utility management, operations and services of the City streets, parks, and cemeteries department, vehicle maintenance department and water and sewer department for a one year term commencing January 1, 2007.

( R. Vol. 2, pp.213-214; Appellant's R. E., pp. 15-16.) Thus, the Mayor and Board of Aldermen resolved that the OPTECH contract should be terminated effective January 1, 2007 and should be continued on a month to month basis until the City reviewed proposals for an annual contract and selected a contractor. The Mayor and Board of Aldermen also resolved that a Request for Proposals should be made seeking proposals for professional utility management, operations and services of the City streets, parks and cemeteries department, vehicle maintenance department and water and sewer department. ( R. Vol. 2, p. 214; Appellant's R.E., p. 16).

The notice or advertisement of Request for Proposals to obtain services "for the professional management, operation and maintenance of the Public Works Department for the City of Long Beach" was published in The Sun Herald on December 12, 2006. ( R. Vol. 2, p. 218; Appellant's R.E., p. 48). In the notice or advertisement of Request for Proposals, the City announced its intent to award a one year contract with the option to renew on a year to year basis and further specified that it "reserves the right to award the contract to the Contractor whose proposal represents the best overall value taking into consideration public works operations experience, local knowledge of the Project team, client references and last, price." ( R. Vol. 2, p. 218; Appellant's R.E., p. 48). The notice also stated that the request for proposals could be obtained from the office of the City Clerk, directed questions concerning the matter to the Mayor and provided December 20, 2006 as the deadline for submitting the proposal. ( R. Vol. 2, p. 218;



Appellant's R.E., p. 48).

The Request for Proposals provided by the City Clerk's office specified:

The Contractor shall furnish all labor and supervision for the professional management, operation and maintenance of the Public Works Department of the City of Long Beach. This is a labor services agreement only and the work shall include management of the staff and any other services as specified in this statement of work.

( R. Vol. 2, p. 221). Exhibit 2, Scope of Services, to the Request for Proposal further specified the services to be provided by the contractor. ( R. Vol. 2, p. 225-226). The Request for Proposals also set forth the factors upon which the proposals would be evaluated as follows:

#### VIII. EVALUATION FACTORS FOR AWARD

All proposals submitted in accordance with the requirements of this request will be reviewed for completeness and responsiveness. The award will be made to the responsible Contractor whose proposal conforms to the solicitation requirements and demonstrates the following factors:

1. A sound understanding of the requirements of the Project
2. Sufficient Management Organization Experience and Reputation
3. Competitive Price Proposal

The City reserves the right to award this contract to the Contractor whose proposal is deemed most advantageous to the City.

( R. Vol. 2, p. 223; Appellant's R.E., p. 52).

Appellant, WPSCO, Operations Technologies, Inc. (OPTECH), and UP submitted proposals by December 20, 2006.

On January 2, 2007, the Mayor and Board of Aldermen met and considered the ranking form reports from the Public Works Professional Management Contract Proposals. ( R. Vol. 3, pp. 426-429; Appellant's R.E. pp 23-26). After much discussion and several motions, Aldermen Allen D. Holder, Jr. made a motion seconded by Aldermen Mark Lishen to terminate the Public Works Contract with OPTECH. ( R. Vol. 4, pp. 476- 478; Appellant's R.E. pp. 27-29). The

motion was approved 4 to 3 after a roll call vote by Mayor William Skellie, Jr. ( R. Vol. 4, pp. 477-478; Appellant's R.E. pp. 28-29). Thereafter, Alderman Allen D. Holder, Jr. made a motion seconded by Alderman Richard Bennett authorizing Mayor William Skellie, Jr., to enter into negotiations with UP for the Public Works Contract to include, but not limited to the following conditions: (1) maintain current Long Beach personnel for a period of twelve (12) months; (2) maintain key personnel in the Long Beach office; and (3) prohibit assignment or sale of contract without prior consent of the City of Long Beach, noting that such consent will not be unreasonably withheld. ( R. Vol. 4, p. 478; Appellant's R.E. p. 29). A roll call vote was called by Mayor William Skellie, and the motion was approved 4 to 2.<sup>4</sup> ( R. Vol. 4, p. 478; Appellant's R.E. p. 29).

A special meeting of the Mayor and Board of Aldermen was called on January 12, 2007, to consider and take action on the Public Works Professional Management Contract with UP. ( R. Vol. 4, p. 481). After review of the proposed contract, Alderman Allen D. Holder made a motion seconded by Alderman Bennett to approve the contract as set forth in the minutes and authorizing the Mayor to execute the contract.<sup>5</sup> ( R. Vol. 4, p. 495, Appellant's R.E., p. 44). Mayor William Skellie called a roll call vote and the Motion carried 4 to 3. ( R. Vol. 4, p. 496; Appellant's R.E., p. 45).

The contract between the City of Long Beach and UP was executed on January 16, 2007.

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Aldermen Richard Notter left the room and was temporarily absent during the vote.

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Alderman Boggs offered a substitute motion seconded by Alderman Burton to rescind the action terminating the OPTECH contract, to recognize the contract as it stands and to attempt renegotiations with OPTECH on their contract. ( R. Vol. 4, p. 495, Appellant's R.E., p. 44). The Mayor called a roll call vote and the Motion was defeated 4 to 3. ( R. Vol. 4, p. 496, Appellant's R.E., p. 45).

( R. Vol. 4, pp. 499-511). The Contract provided:

As a general statement of responsibilities assigned under this contract the Operator shall:

Provide professional utility management, operations and maintenance services of the City's Public Works Operations, consisting of the following Departments: Utility Billing, Water & Sewer Operations, Street and Drainage, Vehicle Maintenance, and Parks & Recreation.

( R. Vol. 4, pp. 499-500; Appellant's R.E., pp. 32-33). The contract further specifically defined the duties of operator and owner and provided for a base fee for management services performed under the contract of One Million, Four Hundred Ninety Thousand, Six Hundred Eighty-Six Dollars (\$1,490,686.00).<sup>6</sup> ( R. Vol. 4, pp. 500-503; Appellant's R.E., pp. 33-36).

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<sup>6</sup>

This is a negotiated reduction of \$36,095.00 from the amount proposed in UP's initial proposal.

## **SUMMARY OF THE ARGUMENT**

WPSCO submitted a proposal on December 20, 2006, in response to a Request for Proposals issued by the City of Long Beach for the professional management, operations and maintenance of the Public Works Department of the City of Long Beach. Despite having the lowest price, WPSCO's proposal was not the most qualified and therefore was not selected. Upset that it was not awarded the contract, WPSCO now complains that City of Long Beach failed to follow the competitive bidding laws and wrongfully selected a contractor who was a nonresident contractor and who did not have a certificate of responsibility.

This argument is flawed. First, it is well established that contracts for professional services, such as the contract in the case *sub judice*, are not subject to the competitive bidding process outlined in Miss. Code Ann. §31-7-13. Second, the section that WPSCO alleges is applicable, Miss. Code Ann. §31-7-13 ( r), does not require competitive bidding and instead mandates that a governing authority or agency shall issue request for proposals for any contract for garbage collection and disposal, solid waste collection and disposal or sewage collection and disposal. Further, Miss. Code Ann. §31-7-13(m)(xxii) specifically exempts these types of contracts from the competitive bidding process. Third, as the parties submitting proposals are not "bidders" and the competitive bidding laws do not apply, Miss. Code Ann. §§ 31-7-47 and 31-3-21 do not apply. Lastly, although the City of Long Beach maintains that Miss. Code Ann. §31-7-13( r) does not apply to the subject contract as it is a contract for professional services, assuming *arguendo* that Miss. Code Ann. §31-7-13( r) does apply, Long Beach complied with the requirements therein and its award of the contract to UP is supported by substantial evidence, is not arbitrary and capricious, discriminatory or illegal. Therefore, the Circuit Court's Order affirming the City of Long Beach's award of the contract to UP should be affirmed.

## ARGUMENT

### STANDARD OF REVIEW

The scope of review is limited when examining the actions of a municipal board. *Nelson v. City of Horn Lake ex rel Bd. Of Aldermen*, 968 So.2d 938, 942 (Miss 2007) (citing *Sunland Publ'g Co. v. City of Jackson*, 710 So.2d 879, 881-82 (Miss.1998)). For questions of law, a municipal board's decision is reviewed de novo. *See A & F Props., LLC v. Madison County Bd. of Supervisors*, 933 So.2d 296, 300 (Miss.2006). The actions of the governing body of a municipality will not be set aside unless such action is “clearly shown to be arbitrary, capricious, or discriminatory or is illegal or without substantial evidentiary basis.” *Nelson v. City of Horn Lake ex rel Bd. Of Aldermen*, 968 So.2d 938, 942 (Miss 2007) (quoting *Sunland Publ'g Co.*, 710 So.2d at 882 (citing *City of Jackson v. Capital Reporter Publ'g Co.*, 373 So.2d 802, 807 (Miss.1979))). An act is arbitrary and capricious when it is done at pleasure, without reasoned judgment or with disregard for the surrounding facts and circumstances. *Watkins v. Miss. Bd. of Bar Admissions*, 659 So.2d 561, 568 (Miss.1995). Substantial evidence is “such relevant evidence as reasonable minds might accept as adequate to support a conclusion or ... more than a ‘mere scintilla’ of evidence.” *Wilkinson County Bd. of Supervisors v. Quality Farms, Inc.*, 767 So.2d 1007, 1010 (Miss.2000) (quoting *Hooks v. George County*, 748 So.2d 678, 680 (Miss.1999)).

#### **1. A CONTRACT FOR THE PROFESSIONAL MANAGEMENT, OPERATION AND MAINTENANCE OF THE PUBLIC WORKS DEPARTMENT FOR THE CITY OF LONG BEACH IS A CONTRACT FOR PROFESSIONAL SERVICES AND MISS. CODE ANN. § 31-7-13 DOES NOT APPLY**

The contract awarded to UP for “the professional utility management, operations and maintenance services of the City’s Public Works Operations, consisting of the following

Departments: Utility Billing, Water & Sewer Operations, Street and Drainage, Vehicle Maintenance, and Parks & Recreation” is a contract for professional services and does not require competitive bidding under Miss. Code Ann. §31-7-13. ( R. Vol. 4, pp. 499-506; Appellant’s R. E. pp. 32-44). Miss. Code Ann. §31-7-13 provides:

All agencies and governing authorities shall purchase their commodities and printing; contract for garbage collection or disposal; contract for solid waste collection or disposal; contract for sewage collection or disposal; contract for public construction; and contract for rentals as herein provided.

\*\*\*\*

**(m) Exceptions from bidding requirements.** Excepted from bid requirements are:

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**(xxii) Garbage, solid waste and sewage contracts.** Contracts for garbage collection or disposal, contracts for solid waste collection or disposal and contracts for sewage collection or disposal.

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**( r) Solid waste contract proposal procedure.** Before entering into any contract for garbage collection or disposal, contract for solid waste collection or disposal or contract for sewage collection or disposal, which involves an expenditure of more than Fifty Thousand Dollars (\$50,000.00), a governing authority or agency shall issue publicly a request for proposals concerning the specifications for such services which shall be advertised for in the same manner as provided in this section for seeking bids for purchases which involve an expenditure of more than the amount provided in paragraph ( c) of this section. Any request for proposals when issued shall contain terms and conditions relating to price, financial responsibility, technology, legal responsibilities and other relevant factors as are determined by the governing authority or agency to be appropriate for inclusion; all factors determined relevant by the governing authority or agency or required by this paragraph ( r) shall be duly included in the advertisement to elicit proposals. After responses to the request for proposals have been duly received, the governing authority or agency shall select the most qualified proposal or proposals on the basis of price, technology and other relevant factors and from such proposals, but not limited to the terms thereof, negotiate and enter contracts with one or more of the persons or firms submitting proposals. 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. Notwithstanding any other provisions of this paragraph, where a county with at least thirty-five thousand (35,000) nor more than forty thousand (40,000) population, according to the 1990 federal decennial census, owns or operates a solid waste landfill, the governing authorities of any other county or municipality may contract with the governing authorities of the county owning or operating the landfill, pursuant to a resolution duly adopted and spread upon the minutes of each governing authority involved, for garbage or solid waste collection or disposal services through contract negotiations.

First, as documented in the Scope of Services in the contract between the City of Long Beach and UP, the contract is not a contract for the purchase of commodities and printing, a contract for garbage *collection or disposal*, a contract for solid waste *collection or disposal*, a contract for sewage *collection or disposal*, contract for public construction or contract for rentals as contemplated by Miss. Code Ann. §31-7-13.<sup>7</sup> Rather this is a contract for the *management, operation and maintenance* of the City's utility billing, water and sewer operations, street and drainage, vehicle maintenance and Parks & Recreation. ( R. Vol. 4, pp. 499-500; Appellant's R.E., pp. 32-33). UP is not required anywhere in the specific Scope of Services (2.1-2.22) to collect and dispose of garbage, solid waste or sewage. (*See* 2.1-2.22, R. Vol. 4, pp. 500-502; Appellant's R.E., pp. 33-35).

Numerous Attorney General opinions support that competitive bidding is not required when awarding contracts for professional services. In Miss. Att. Gen. Op., 2008 WL 445795, Jones (January 11, 2008), the Mississippi Attorney General's office evaluated whether a municipality is required to advertise and solicit bids for the procurement of a timber management

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Although the Scope of Services states that the operator may have to remove yard debris and refuse "if required", this is not mandated and seems to indicate more the possibility an incidental task and it does not render this a contract for solid waste collection and disposal. ( R. Vol. 4, p. 500).

contract. The Attorney General's office opined:

It is our opinion that contracts for services are not subject to the statutory competitive bidding requirements of Mississippi Code Annotated Section 31-7-1 et seq. However, because the mandates of public policy require that the public receive the best possible service for the lowest available price, we strongly encourage public entities to solicit bids or proposals even when not required.

Similarly, in Miss. Att. Gen. Op., 2007 WL 852280, Herring (January 12, 2007), the Mississippi Attorney General's office advised that a contract with a non-profit water association wherein the association, on behalf of the city, would read the meters of mutual customers, bill and collect the sewer services from the mutual customers and provide a cut-off provision in the event of default of payment for sewer services by a mutual customer was not subject to Miss. Code Ann. § 31-7-13 as "the awarding of a contract for services only does not necessitate competitive bidding under Section 31-7-13." *Id.* at 2 (quoting Miss. Att. Gen. Op. No. 99-0185, Bowman (April 30, 1999)( The professional services of a tree surgeon are not subject to the bidding requirements of Miss. Code Ann. § 31-7-13)).

Also in Miss. Att. Gen. Op., 1998 WL 833654 , Williams (October 9, 1998), the Mississippi Attorney General's office evaluated whether a public institution or agency is required to advertise and bid contracts for energy efficiency projects under Section 31-7-14 and advised that "the public purchase laws codified at Sections 31-7-1, *et seq.*, are not applicable to the acquisition of any services unless the services are a part of a contract which includes the purchase of commodities, equipment or furniture or construction." *Id.* at 2 (citing Miss. Att. Gen. Op., 1996 WL 508652 , Runnels (August 2, 1996); Miss. Att. Gen. Op., 1993 WL 669147 , Cronin (February 10, 1993); Miss. Att. Gen. Op., 1990 WL 547650 , Green (January 31, 1990); Miss. Att. Gen. Op., 1987 WL 121887 , Grubbs (December 14, 1987); Miss. Att. Gen. Op., 1986 WL 81632 , Campbell (March 11, 1986)).



Likewise, the City of Long Beach was not required to follow the competitive bidding process outlined in Miss. Code Ann. §31-7-13 as the subject contract is one for professional services. It involves the management, operations and maintenance of the City of Long Beach's Public Works Department. As stated in the Request for Proposals, "[t]his is a labor services agreement only and the work shall include management of the staff and any other services as specified in this statement of work". ( R. Vol 2, p.221). Further, as suggested by the Attorney General, the City of Long Beach solicited proposals in order to protect the public interest.

Although the City of Long Beach maintains that Miss. Code Ann, § 31-7-13 is inapplicable in the case *sub judice*, it should be noted that WPSCO argues that the City of Long Beach admittedly did not follow Miss. Code Ann. §31-7-13 ( r) by not seeking competitive bids, However, Miss. Code Ann. §31-7-13 ( r) does not require competitive bidding. To the contrary, it requires that the governing bodies issue a request for proposals and select the most qualified proposal on the basis of price, technology and other relevant factors. Further, Miss. Code Ann. § 31-7-13 (m)(xxii) specifically excludes the subject matter of Miss. Code Ann. §31-7-13 ( r) from the competitive bidding process.

Similarly, citing Miss. Code Ann. §§ 31-7-47 and 31-3-21, WPSCO argues that UP did not have a Certificate of Responsibility and thus preference should have been given to the resident contractor. However, these statutes specifically refer to bidders submitting bids and are inapplicable in the instant case as the competitive bidding laws do not apply to this contract.

Miss. Code Ann, § 31-7-47 provides:

In the letting of public contracts, preference shall be given to resident contractors, and a **nonresident bidder** domiciled in a state, city, county, parish, province, nation or political subdivision having laws granting preference to local contractors shall be awarded Mississippi public contracts only on the same basis as the **nonresident bidder's** state, city, county, parish, province, nation or political

subdivision awards contracts to Mississippi contractors **bidding** under similar circumstances. Resident contractors actually domiciled in Mississippi, be they corporate, individuals or partnerships, are to be granted preference over nonresidents in awarding of contracts in the same manner and to the same extent as provided by the laws of the state, city, county, parish, province, nation or political subdivision of domicile of the nonresident.

( Emphasis added). Miss. Code Ann. 31-3-21 provides, in part:

(1) It shall be unlawful for any person who does not hold a certificate of responsibility issued under this chapter, or a similar certificate issued by another state recognizing such certificate issued by the State of Mississippi, **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.** In addition, any person violating this section by knowingly and willfully submitting a **bid** for projects without holding a certificate of responsibility number issued under this chapter, as and if herein required, at the time of the submission or opening of such bid shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment for not more than six (6) months, or by both such fine and imprisonment.

(Emphasis added). Both of these statutes pertain to contractors bidding on a contract pursuant to the competitive bidding laws. As stated above, it is well established that contracts for professional services such as this one are not subject to the statutory bidding requirements.

Further, assuming arguendo that Miss. Code Ann. §31-7-13 ( r) does apply as WPSCO suggests, then the bidding requirements are still inapplicable as the services in §31-7-13 ( r) are exempted from the competitive bidding process by Miss. Code Ann § 31-7-13 (m)(xxii).

Judge Bourgeois found that contracts for services, only, do not require advertisement and invitation for bids. Judge Bourgeois was correct in affirming the decision of the City of Long Beach to award the Contract for Professional Management, Operation and Maintenance of

the Public Works Department to UP and his decision should, likewise, be affirmed.

**2. IF MISS. CODE ANN. § 31-7-13 ( r) APPLIES, THEN THE CITY OF LONG BEACH COMPLIED WITH MISS. CODE ANN. § 31-7-13 ( r) BY ISSUING A REQUEST FOR PROPOSAL, ACCEPTING THE PROPOSAL OF UTILITY PARTNERS, L.L.C. AND ENTERING INTO A CONTRACT WITH UTILITY PARTNERS, L.L.C.**

Assuming arguendo, if Miss Code Ann. §31-7-13 ( r) does apply to the case *sub judice*, then the City of Long Beach complied with the provisions of this section. The City of Long Beach published a notice or advertisement of Request for Proposals “for the professional management, operation and maintenance of the Public Works Department for the City of Long Beach” in the Sun Herald. ( R. Vol. 2, p. 218; Appellant’s R.E., p. 48).

In accordance with Miss. Code Ann. §31-7-13, the City specified the evaluation criteria. In the notice or advertisement for the Request for Proposals, the City of Long Beach specified that it “reserves the right to award the contract to the Contractor whose proposal represents the best overall value taking into consideration public works operations experience, local knowledge of the Project team, client references and last, price.” ( R. Vol. 2, p. 218; Appellant’s R.E., p. 48). The City further specified its requirements in the Evaluation Factors listed in the Request for Proposals:

The award will be made to the responsible Contractor whose proposal conforms to the solicitation requirements and demonstrates the following factors:

1. A sound understanding of the requirements of the Project
2. Sufficient Management Organization Experience and Reputation
3. Competitive Price Proposal

( R. Vol. 2, p. 223; Appellant’s R.E., p. 52). Although WPSCO argues that the verbiage in the notice or advertisement for Request for Proposal and the Request for Proposal is not identical, it covers the same criteria: price, experience, knowledge of the project and reputation.

After receiving three proposals, the city evaluated the proposals and selected the most qualified proposal on the basis of price, technology and other relevant factors as evidenced by the minutes of the January 2, 2007 meeting of the Mayor and Board of Aldermen and the ranking forms submitted by the selection committee which were included in the minutes. ( R. Vol. 3, pp. 426-429; R. Vol. 4, pp. 476- 478; Appellant's R.E. pp 23-26; Appellant's R.E., pp. 27-29). Thereafter, the terms of contract were negotiated with UP, the company whose proposal was deemed the most qualified, and the City of Long Beach and UP entered into a contract effective January 17, 2007. ( R. Vol. 4, pp. 499-511; Appellant's R.E., pp. 483-495).

WPSCO places much focus on an alleged mistake pertaining to price in the Selection Committee's ranking forms. Assuming for the purpose of argument, and only the purpose of argument, that WPSCO is correct that there is an error, it is somewhat inconsequential as correcting that mistake would give WPSCO and UP equal scores, and when reviewing the other categories, understanding of requirements and experience and reputation, Utility Partners ranked higher on all the forms except the one that appears to have been submitted by Aldermen Richard Notter. ( R. Vol. 3, pp. 426-428; Appellant's R.E., pp. 23-25). Further, a review of the proposals themselves further supports the decision of the City of Long Beach to award the contract to UP rather than WPSCO. ( R. Vol 2, pp. 228-290; R. Vol 3, pp. 344-415)

Although the City of Long Beach maintains that Miss. Code Ann. § 31-7-13 ( r) is inapplicable, the City of Long Beach nonetheless complied with Miss. Code Ann. § 31-7-13 ( r) in the selection of the proposal of UP as the most qualified proposal and the award of the contract to UP. Thus, the City of Long Beach's decision to award the contract to UP is supported by substantial evidence, is not arbitrary and capricious, discriminatory or illegal. WPSCO is simply aggrieved that it wasn't awarded the contract despite submitting the lowest price.

## CONCLUSION

The City of Long Beach's decision to award the contract for "the professional management, operation and maintenance of the Public Works Department" to UP is supported by substantial evidence, is not arbitrary and capricious, discriminatory or illegal. ( R. Vol. 2, p. 218; Appellant's R.E., p. 48). The subject contract is a contract for professional services and the City of Long Beach is not required to competitively bid a contract for professional services pursuant to Miss. Code Ann. §31-7-13. Assuming arguendo that Miss. Code Ann. § 31-7-13 ( r) does apply, as alleged by WPSCO, competitive bidding is still not required and is specifically exempted by Miss. Code Ann. §31-7-13(m)(xxii). Lastly, although the City of Long Beach maintains that Miss. Code Ann. §31-7-13 ( r) is inapplicable, the City of Long Beach nonetheless complied with the requirements of Miss. Code Ann §31-7-13( r) by issuing an Request for Proposals, receiving proposals, evaluating them on the basis of price, technology and other relevant factors, and then negotiating and entering into the contract with the UP, the firm submitting the most qualified proposal. Therefore this Court should affirm Judge Bourgeois' February 17, 2009 Order affirming the City of Long Beach's award of the contract to UP.

RESPECTFULLY SUBMITTED this the 28<sup>th</sup> day of October, 2009.

CITY OF LONG BEACH, MISSISSIPPI

BY: MONTGOMERY, BARNETT, BROWN,  
READ, HAMMOND & MINTZ, L.L.P.

BY: 

James G. Simpson, Jr.  
Mississippi Bar Number 

**CERTIFICATE OF SERVICE**

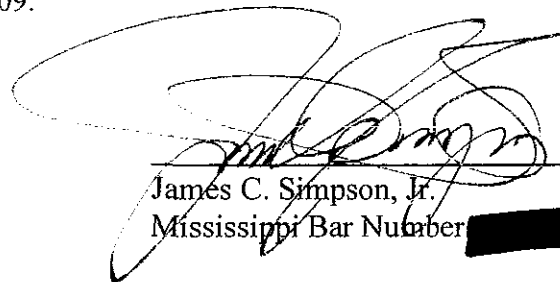
I, JAMES C. SIMPSON, JR., of the law firm of Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P., do hereby certify that I this day mailed, by First Class, United States Postal Mail, postage prepaid, an original and 3 copies of the above Brief of Appellee, City of Long Beach, Mississippi, to the Supreme Court of Mississippi, Post Office Box 249, Jackson, Mississippi, 39205, and a true and correct copy, to the following:

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Honorable Lawrence P. Bourgeois, Jr.  
Circuit Court Judge  
Post Office Box 1461  
Gulfport, MS 39502

THIS the 28<sup>th</sup> day of October, 2009.



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