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I. THE DECEMBER 2006 RFP IS GOVERNED BY MISS. CODE ANN. § 31-7-13(r), AND THE CITY OF LONG BEACH DID NOT FOLLOW THE MANDATES OF THE LAW

The City of Long Beach begins its Brief¹ with the same argument advanced in the trial court – that the subject Public Works Contract is a "contract for professional services and does not require competitive bidding under Miss. Code Ann. § 31-7-13."² (City of Long Beach's Br., pp. 10-11). In support of this argument, the City of Long Beach cites opinions from the Mississippi Attorney General's Office which state that contracts for services are not subject to the statutory competitive bidding requirements of Miss. Code Ann. § 31-7-13. The December 2006 RFP provides, in pertinent part, as follows regarding the scope of services:

5. Provide and pay for routine vehicle and equipment maintenance, and pay for all fuel, oil, grease, filters, and other maintenance consumables needed for the vehicles and equipment provided by City for Contractors' use.
7. . . . Operator shall provide computer and required software. The cost of this system shall be included in the Operator's price proposal and the equipment shall remain the property of the City.
12. . . . Any repair parts purchased on behalf of the Owner will be reimbursed to the Operator upon presentation of a receipt and an invoice.

(Appellant's R.E., pp. 54-55; R. Vol.2, pp. 225-226). Based upon a review of the December 2006 RFP, including the "Scope of Services" defined in Exhibit 2, it is not for a services only contract that is exempt from Miss. Code Ann. § 31-7-13. Assuming for purposes of argument

¹In its opening Brief, WPSCO's Statement of the Issues, No. 2, should obviously refer to its "Bill of Exceptions", rather than its "Bill of Costs."

²Miss. Code Ann. § 31-7-13 is a lengthy statute that is titled "Bidding requirements" and governs everything from purchases not over \$5,000 (see subsection (a)) to clarifying purchase authorizations (see subsection (v)), all as relate to agencies and governing authorities in the State of Mississippi.

only that the December 2006 RFP is for a services only or quasi-services only contract (which is expressly denied), it is nevertheless governed by Miss. Code Ann. 31-7-13(r) which directed that the City of Long Beach comply with certain terms and conditions "before entering into [a] . . . contract" with UP, including but not limited to, publicly issuing a RFP.

The City of Long Beach also argues that garbage, solid waste and sewage contracts are exempt from the bidding requirements of Miss. Code Ann. § 31-7-13. See Miss. Code Ann. 31-7-13(m)(xxii). However, since the December 2006 RFP clearly involved more than an expenditure of \$50,000, and, assuming that the subject RFP and attendant Public Works Contract is a contract for garbage, solid waste or sewage collection or disposal, Miss. Code Ann. § 31-7-13(r) applies³, rather than Miss. Code Ann. § 31-7-13(m)(xxii). Stated another way, Miss. Code Ann. § 31-7-13(m)(xxii) does not apply, assuming the Court finds that the December 2006 RFP and Public Works Contract is a "contract for garbage collection or disposal, contract for solid waste collection or disposal or contract for sewage collection or disposal."

Importantly, in its Brief, the City of Long Beach did not address or attempt to distinguish Miss. Att. Gen. Op., 2004 WL 1833096, Mullins (July 30, 2004), wherein the Mississippi Attorney General's Office opined as follows:

As you indicate in your letter, this office has previously held that provisions of Section 31-7-13(r), which requires a governing body to issue publicly a request for proposals prior to contracting for sewage

³Although undersigned agrees that there may be differences between a bid and proposal, including within Miss. Code Ann. § 31-7-13 itself, those terms both appear in Miss. Code Ann. § 31-7-13(r). For example, Miss. Code Ann. § 31-7-13(d) addresses the lowest and best bid decision procedure relative to purchases. Cf. Miss. Code Ann. § 31-7-13(r) ("[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."). When reviewing legal authority discussing Miss. Code Ann. § 31-7-13 or related statutes, many times the terms "bid" and "proposal" are used interchangeably.

collection or disposal services in excess of \$50,000.00, applies to contracts for water and wastewater facility and operation and maintenance. MS Ag Op., Cole (April 5, 2002); MS AG Op., Jones (November 8, 2002).

* * *

As we stated in the opinions cited above, "a contract between a municipality and a company to operate and manage a city wastewater treatment plant, to maintain and repair water and sewer lines, pumps and wells, to read meters and to assist the water department with customer relations falls within the ambit of Section 31-7-13(r).

Id. at *2 (emphasis added). Pursuant to the teachings of Mullins and the express language of Miss. Code Ann. § 31-7-13(r), the City of Long Beach was required to publicly issue a RFP as relates to the management, operation and maintenance of its Public Works Department.

Having established that the City of Long Beach was required to issue publicly a request for proposals,⁴ the inquiry should next focus on whether the City of Long Beach selected the "most qualified proposal on the basis of price, technology and other relevant factors." Against this backdrop is "the mandate[] of public policy [which] require[s] that the public receive the best possible service for the lowest possible price. . . ."⁵ Miss. Att. Gen. Op., 2008 WL 445795, Jones (January 11, 2008).

Turning now to the December 2006 RFP, it provides as follows regarding the selection of the most qualified proposal:

⁴Indeed, the City of Long issued the subject RFP in December 2006.

⁵After all, the purported reason that the City of Long Beach voted to terminate the OpTech Contract effective January 1, 2007, was due to concerns over a reduction of ad valorem tax revenues, reduction in water and service revenues and increased insurance costs as a result of Hurricane Katrina. Armed with these concerns, the City of Long Beach selected UP's proposal (which was \$135,448 higher than WPSCO's proposal)? And the Harrison County Utility Authority also selected UP's proposal (which was approximately \$27,000 a year more than WPSCO's proposal, and, with a contract term of 5 years, WPSCO's proposal would have saved the citizens of Harrison County approximately \$135,000)? See Wastewater Plant Service Co., Inc. v. Harrison County Utility Authority, 2008-CA-01815.

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.

(Appellant's R.E., pp. 49-55; R. Vol. 2, pp. 220-226).

In its Brief, the City of Long Beach is not able to direct the Court to any credible evidence, let alone substantial evidence, to support the selection of UP's proposal as the most qualified proposal. The reason is that there is no credible or substantial evidence to support the City of Long Beach's decision. In fact, the City of Long Beach's decision appears to be result-oriented, rather than based on an objective and legitimate comparison of the actual proposals and the contractors. The first 2 factors in Paragraph VIII Evaluation Factors for Award contemplate that the City of Long Beach would interview the contractors, or at least call and obtain references. No one ever interviewed WPSCO, and there is nothing in the record that the City of Long Beach ever called the contractors' references. The Ranking Forms completed by the members of the Selection Committee⁶ have already been exposed for what they really are – subjective, unreliable, etc.

If the City of Long Beach was really interested in the contractor's experience, it would have noted that WPSCO has been providing services to wastewater and water and sewer clients

⁶Without belaboring the point, the Selection Committee, which made its recommendation to the City of Long Beach, was never delegated with authority to review and consider the proposals.

since 1969. (Appellant's R.E., p. 7; R. Vol. 2, p. 164). The City of Long Beach states out of one side of its mouth that it needs a more cost-efficient operations and maintenance contract for the Public Works Department due to the uncertainty of its financial situation following Hurricane Katrina and then selects the highest proposal, UP. Maybe the most telling commentary regarding this political charade to first oust OpTech and, in turn, to award the Public Works Contract to UP, rather than WPSCO as the most qualified proposal, is the letter sent by Alderman Notter to the Long Beach taxpayers which provides, in part, as follows:

The city's attorney . . . was instructed to find justification which would allow the city a means to get out of our present contract [with OpTech]. He was able to find what he believed to be legal clause which would allow the city to terminate its present contract with OPTEC based upon our cities lack of funding to pay our existing contract. We advertised for qualified contractors to handle the work in an attempt to save taxpayers money.

Id.

The purpose of the December 2006 RFP and Miss. Code Ann. § 31-7-13(r) will be thwarted if the City of Long Beach is allowed to issue a meaningless RFP, contract with any respondent or contractor, and then commit to that contract. The statute is for the benefit of the citizens of the City of Long Beach, and they are entitled to have their public officials follow their own RFP and the applicable law. Bottom line – the credible evidence in this case demonstrates that the City of Long Beach's apparent pre-determined selection of UP's proposal as the most qualified proposal in response to the December 2006 RFP is the product of collusion, favoritism, extravagance or improvidence. See Oxford Asset Partners, LLC v. City of Oxford, 970 So. 2d 116, 125 (Miss. 2007).

II. UP'S CERTIFICATE OF AUTHORITY

The City of Long Beach also contends that UP was not required to have a certificate of responsibility (i.e., effectively acknowledging that UP did not have a certificate of responsibility), since Miss. Code Ann. § 31-3-21 does not apply to the December 2006 RFP. (City of Long Beach's Br., p. 15). A "contractor" is defined as "any person contracting or undertaking as a 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 contract." Miss. Code Ann. § 31-3-1. "Public project" is any "project for erection, building, construction, repair, maintenance or related work which is funded in whole or in part with public funds." Id. It is undisputed that UP was a contractor, and that the Public Works Contract was a public project within the meaning of Miss. Code Ann. § 31-3-1. It is equally undisputed that the subject project or contract exceeded the sum of \$50,000. See Miss. Code Ann. § 31-3-21(2). Accordingly, UP was required to have a certificate of responsibility in order to submit a bid or proposal in response to the December 2006 RFP and to enter into the Public Works Contract with the City of Long Beach and/or to otherwise engage or continue in this state in the business of a contractor. Moreover, absent UP's certificate of responsibility appearing on the outside of its bid or proposal, the City of Long Beach was prohibited from opening or considering UP's bid or proposal. Id. See also City of Durant v. Laws Construction Co., Inc., 721 So. 2d 598, 602 (Miss. 1998).

The City of Long Beach is correct on one note – "WPSCO is . . . aggrieved that it wasn't awarded the contract despite submitting the lowest price." (City of Long Beach's Br., p. 17). WPSCO is aggrieved because it is an eminently qualified contractor that has been incorporated under the laws of the State of Mississippi since 1972 and been in business since 1969 with past

public project contracts and present contracts with the City of Pass Christian as well as other private and public utilities. WPSCO is aggrieved because the City of Long Beach declared that its need for a new Public Works Contract was based solely on the need to save money. WPSCO is aggrieved that its proposal was \$135,448 less than UP's proposal. WPSCO is aggrieved that it was a puppet in a process that was more interested in the end than the means. WPSCO is aggrieved that the December 2006 RFP process was not objective or rational. WPSCO is aggrieved that the December 2006 RFP was a sham. And ultimately, WPSCO is aggrieved because the City of Long Beach acted arbitrarily, capriciously, discriminatorily, illegally or without substantial evidentiary basis when selecting UP's proposal as the most qualified proposal in response to the December 2006 RFP.

CONCLUSION

This Court should find, that in selecting UP's proposal submitted in response to the December 2006 RFP and thereafter awarding the Public Works Contract to UP, the City of Long Beach acted arbitrarily, capriciously, discriminatorily, illegally and without substantial evidentiary basis. Accordingly, this Court should reverse the Circuit Court's February 17, 2009, Order, remand this action to the Circuit Court of Harrison County, Mississippi, First Judicial District with instructions to allow WPSCO to amend its Bill of Exceptions to allege a claim(s) for damages against the City of Long Beach.

RESPECTFULLY SUBMITTED, this the 11th day of November, 2009.

WASTEWATER PLANT SERVICE CO., INC.

BY: SAMSON & POWERS, PLLC

BY: 

ROLAND F. SAMSON, III
Mississippi Bar No. 8764

CERTIFICATE OF SERVICE

I, ROLAND F. SAMSON, III, of the law firm of Samson & Powers, PLLC, do hereby
certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy
of the above and foregoing to the following:

Honorable Lawrence P. Bourgeois, Jr.
Circuit Court Judge
Post Office Box 1461
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THIS, the 1st day of November, 2009.



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MISS. R. APP. P. 25(a) CERTIFICATE OF FILING

The undersigned, Robin Gipson of the law firm of Samson & Powers, PLLC, certifies that on November 11, 2009, I delivered the following documents to Federal Express to be delivered to the Clerk of the Mississippi Supreme Court: (1) Letter to the Mississippi Supreme Court Clerk; (2) original and three (3) copies of Appellant's Reply Brief; and (3) CD containing the Appellant's Reply Brief in PDF format. Additionally, on November 11, 2009, I delivered a copy of the following documents to the United States Postal Service to be delivered to Honorable Lawrence P. Bourgeois, Jr. and all counsel of record by regular mail: (1) copy of letter to the Mississippi Supreme Court Clerk; and (2) copy of Appellant's Reply Brief.

THIS, the 11th day of November, 2009.


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