

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

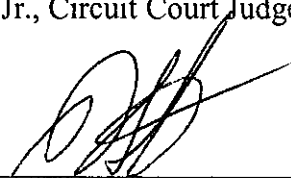
UTILITY PARTNERS, LLC

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. - of the law firm of Samson & Powers, PLLC, attorneys of record for Plaintiff/Appellant, Wastewater Plant Service Co., Inc.;
- C. City of Long Beach, Mississippi - Defendant/Appellee;
- D. James C. Simpson, Jr., Esq. - of the law firm of Montgomery Barnett, attorneys of record for Defendant/Appellee, City of Long Beach, Mississippi;
- E. Utility Partners, LLC - Intervenor;
- F. Paul Richard Lambert, Esq. - attorney of record for Intervenor, Utility Partners, LLC;
- G. Honorable Lawrence P. Bourgeois, Jr., Circuit Court Judge.



ROLAND F. SAMSON, III, Attorney for
Plaintiff/Appellant, Wastewater Plant
Service Co., Inc.

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STATEMENT OF THE ISSUES

1. Whether the City of Long Beach, Mississippi ("City of Long Beach") improperly and unlawfully selected the proposal submitted by Utility Partners, LLC ("UP") as the most qualified proposal on the basis of price, technology and other relevant factors regarding the City of Long Beach's December 2006 Request for Proposals ("December 2006 RFP"), rather than the proposal submitted by the Appellant, Wastewater Plant Service Company, Inc. ("WPSCO").

2. Whether the lower court properly denied/dismissed WPSCO's Bill of Costs and affirmed the decision of the City of Long Beach to select UP's proposal and to award the Public Works Professional Management Contract ("Public Works Contract") of the City of Long Beach to UP.

STATEMENT OF THE CASE

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

On January 11, 2007, WPSCO filed a Bill of Exceptions against the City of Long Beach in the Circuit Court of Harrison County, Mississippi, First Judicial District¹ alleging, *inter alia*, that the City of Long Beach unlawfully and improperly selected UP's proposal as the most qualified proposal in response to the December 2006 RFP and thereafter awarded the Public Works Contract of the City of Long Beach to UP.² (R. Vol. 1, pp. 7-94). The City of Long Beach filed its Reply to Bill of Exceptions on February 15, 2007. (R. Vol. 1, pp. 95-98). On March 9, 2007, UP filed a Motion to Intervene. (R. Vol. 1, p. 99-107). WPSCO filed its Opposition to UP's Motion to Intervene on April 9, 2007, and, following a hearing before Honorable Stephen B. Simpson, Circuit Court Judge, on July 11, 2007, the Court granted UP's Motion to Intervene by Order filed October 16, 2007. (R. Vol. 1, pp. 124-128; p. 140). Thereafter, UP filed its Answer to WPSCO's Bill of Exceptions on October 24, 2007. (R. Vol. 1, pp. 141-145). On or about May 1, 2007, WPSCO submitted its opening Brief for filing with the

¹Attached as Exhibit "B" to the instant Bill of Exceptions is WPSCO's Bill of Exceptions filed against Harrison County Utility Authority in the Circuit Court of Harrison County, Mississippi, First Judicial District on October 16, 2006 ("HCUA Bill of Exceptions"). (R. Vol. 1., pp. 16-88). WPSCO has also appealed an adverse ruling regarding the HCUA Bill of Exceptions, which is pending before the Mississippi Court of Appeals as Case No. 2008-CA-01815. Apparently, in 2006, some public entities along the Mississippi Gulf Coast were awarding public works contracts to UP, which was not the low bidder in response to respective RFPs.

²References to the record are designated "R." followed by the applicable volume of the record and page number(s). References to the Appellant's Record Excerpts are designated "Appellant's R.E." followed by the page number(s). The Administrative Record of the City of Long Beach ("Administrative Record"), which was filed with the Clerk of the lower court, consisting of 1 volume, is not paginated; however, the Administrative Record, in whole or in part, is included in Record Excerpts filed by WPSCO in the lower court. (R. Vol. 2, p. 207 - R. Vol. 4, p. 511).

Clerk of the lower court.³ (R. Vol. 2, pp. 176-206). The City of Long Beach filed its Reply Brief (to WPSCO's opening Brief) on June 18, 2007, and UP filed a Joinder to the City of Long Beach's Reply Brief on November 7, 2007. (R. Vol. 1, pp. 129-139; pp. 146-147). On November 26, 2007, WPSCO filed its Reply Brief in the lower court. (R. Vol. 1, p. 148 - Vol. 2, p. 164). On August 21, 2008, Honorable Lawrence P. Bourgeois, Jr., Circuit Court Judge, heard oral argument on WPSCO's Bill of Exceptions. (R. Vol. 6). By Order filed February 17, 2009, the lower court affirmed "the decision of the City of Long Beach to award the Contract for Professional Management, Operation & Maintenance for the Public Works Department to" UP and denied WPSCO's appeal. (Appellant's R.E., pp. 5-6; R. Vol. 2, pp. 166-167). On March 16, 2008, WPSCO timely filed a Notice of Appeal of the lower court's February 17, 2009, Order to this Court. (R. Vol. 2, pp. 169-170).

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

According to the Mississippi Secretary of State's website, WPSCO was incorporated under the laws of the State of Mississippi on April 7, 1972. Simply put, WPSCO is a resident contractor of the State of Mississippi. WPSCO is an eminently qualified contractor, and, as noted by Alderman Richard Notter in his 2007 letter to the taxpayers of the City of Long Beach, WPSCO has been in business "since 1969 with past contracts with Harrison County and present contracts with the City of Pass Christian as well as other private and public utility contracts." (Appellant's R.E., p. 7; R. Vol. 2, p. 164).

³Notwithstanding that undersigned's May 1, 2007, letter reflects that WPSCO's opening Brief and Record Excerpts were hand-delivered to the Clerk of the lower court on May 1, 2007, the opening Brief and Record Excerpts were filed on March 25, 2009, during compilation of the appeal record for this case. (R. Vol. 2, p. 176).

UP is a non-resident contractor organized and existing under the laws of the State of Georgia. UP filed an Application for Registration as Foreign Limited Liability Company with the Mississippi Secretary of State's Office on September 20, 2006. (Appellant's R.E., pp. 8-13; R. Vol. 2, pp. 201-206.).

On December 23, 1997, the City of Long Beach entered into an Agreement for Professional Utility Management Services with Operations Technologies, Inc.⁴ ("OpTech Contract"). (Appellant's R.E., pp. 14-18; R. Vol. 2, pp. 212-216). The OpTech Contract was for an initial 4-year term and was subsequently amended to provide, inter alia, a 2006 (Year Nine) and 2007 (Year Ten) contract price of \$1,558,532 and \$1,597,495, respectively. Id. At its meeting on December 5, 2006, the City of Long Beach, concerned with a reduction of ad valorem tax revenues, reduction in water and service revenues and increased insurance costs as a result of Hurricane Katrina, voted to terminate the OpTech Contract effective January 1, 2007. The City of Long Beach also voted to request that OpTech continue its services on a month-to-month basis after December 31, 2006, until such time as the City had acted upon proposals for an annual contract. Lastly, the City of Long Beach voted to issue a RFP 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. Id.

On December 12, 2006, the City of Long Beach published a notice/RFP in The Sun Herald for the professional management, operation and maintenance of the Public Works

⁴As noted in UP's proposal, senior employees of OpTech left OpTech to form and/or join UP. (R. Vol. 2, p. 152). Additionally, as noted in the HCUA Bill of Exceptions, S.H. Anthony, Inc., in association with UP, submitted a proposal in response to the HCUA's August 2006 RFP and its proposal was ultimately selected by the HCUA. (R. Vol. 1, p. 7-10). Thereafter, the HCUA awarded a public works contract to UP. Id. Sean Anthony, a long-time employee of WPSCO, left WPSCO and formed S.H. Anthony, Inc. on or about March 1, 2005.

Department for the City of Long Beach. The notice provided that the City of Long Beach intended on awarding a one-year contract, with an option to renew on a year-to-year basis. Proposals were to be received by the City Clerk not later than December 20, 2006, at 4:00 p.m. The notice also provided, in part, as follows:

The City 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. The City intends to make a decision in regard to award within thirty (30) days of the proposal submission date.

(R. Vol. 2, p. 218; pp. 220-226).

In response to the RFP, the City of Long Beach received three bids – WPSCO – \$1,391,333), OpTech – \$1,516,306 and UP – \$1,526,781). WPSCO's bid was \$135,448 less than UP's bid. (R. Vol. 2, pp. 228-289; R. Vol. 2, p. 291 - R. Vol. 3, p. 342; R. Vol. 3, pp. 344-414).

Interestingly, during the relevant time frame, the City of Long Beach also advertised for bids for Katrina Water & Sewer Replacement – Phase 3, Drainage Ditch Reconditioning, Restoration of Drainage Structures and Drainage System Cleaning. By letter dated December 29, 2006, the engineer for the City of Long Beach, A. Garner Russell & Associates, Inc. ("City Engineer") recommended that the City of Long Beach award the Katrina Water & Sewer Replacement – Phase 3 contract to the low bidder, Onyx, Inc. but recommended that the Notice to Proceed be withheld until receipt of FEMA's concurrence on the legitimacy of the project as bid. By letters dated December 29, 2006, the City Engineer noted that Hemphill Construction was low bidder on the Drainage Ditch Reconditioning project, that Twin L Construction was low bidder on the Restoration of Drainage Structures project⁵, and that Compliance EnviroSystems,

⁵Since the bids from Hemphill and Twin L Construction were greater than the allocation on the FEMA Project Worksheet, the City Engineer recommended that the City of Long Beach withhold an Award of Contract to Hemphill and Twin L Construction until FEMA signified the acceptability of the

LLC was the low bidder on the Drainage Systems Cleaning project.⁶ (Appellant's R.E., pp. 19-22; R. Vol. 3, pp. 417, 420, 422 and 424).

At its meeting on January 2, 2007, the City of Long Beach considered the ranking report forms from the Selection Committee, "Public Works Professional Management Contract Proposals" as follows:

Ranking Form -
PUBLIC WORKS PROFESSIONAL MANAGEMENT CONTRACT
(Lowest Score Ranks Highest)

	WPSCO	OpTech	Utility Partners
Understanding of Requirements	2	3	1
Experience and Reputation	3	3	1
Price	1	3	2
Total Score	6	9	4

Ranking Form -
PUBLIC WORKS PROFESSIONAL MANAGEMENT CONTRACT
(Lowest Score Ranks Highest)

Total	WPSCO	OpTech	Utility Partners
	6	9	4
Understanding of Requirements	7	8	4
Experience and Reputation	5	9	4
Price	4	5	6
Total Score	5	9	4
	27	40	22 ⁷

projects, including the bid prices and scopes of work.

⁶The City Engineer recommended that the City of Long Beach reject Compliance EnviroSystems' bid and re-advertise the project for bid, since Compliance EnviroSystems did not receive Addendum No. 1, did not acknowledge Addendum No. 1 on its bid and informed the City Engineer that it could not complete the project (including the scope of work on Addendum No. 1) for the bid price.

⁷This Ranking Form appears to be a cumulative form, containing the rankings for the five (5) Selection Committee members.

Ranking Form -
PUBLIC WORKS PROFESSIONAL MANAGEMENT CONTRACT
(Lowest Score Ranks Highest)

	Southwest	Utility Partners	WPSCO
Understanding of Requirements	2	1	3
Experience and Reputation	3	1	3
Price	3	2	1
Total Score	8	4	7

Ranking Form -
PUBLIC WORKS PROFESSIONAL MANAGEMENT CONTRACT
(Lowest Score Ranks Highest)

	Utility Partners	WPSCO	Optech
Understanding of Requirements	1	2	3
Experience and Reputation	1	2	3
Price	2	1	3
Total Score	4	5	9

Ranking Form -
PUBLIC WORKS PROFESSIONAL MANAGEMENT CONTRACT
(Lowest Score Ranks Highest)

	Operations Technologies	Utility Partners	WPSCO
Understanding of Requirements	1	1	1
Experience and Reputation	1	3	2
Price	3	2	1
Total Score	5	6	4

Ranking Form -
PUBLIC WORKS PROFESSIONAL MANAGEMENT CONTRACT
(Lowest Score Ranks Highest)

	WPSCO	Southwest ECO Optech	Utility Part.
Understanding of Requirements	2	3	1
Experience and Reputation	2	3	1
Price	1	3	2
Total Score	5	9	4

(Appellant's R.E., pp. 23-25; R. Vol. 3, pp. 426-428).

The minutes from the January 2, 2007, meeting reflect that "[u]pon discussion of the aforesaid reports, discussion was held to preliminarily determine whether or not to declare an executive session." Alderman Holder made a motion, seconded by Alderman Bennett, "to meet in executive session for the transaction of public business, to wit: to discuss with and seek the legal advice and counsel of the City Attorney regarding potential litigation."⁸ There was an insufficient vote for executive session, and, in open session, Alderman Holder made a motion, seconded by Alderman Bennett, to award the Public Works Professional Management Contract to Utility Partners, LLC. (Appellant's R.E., pp. 25-26; R. Vol. 3, pp. 428-429).

The minutes from the January 2, 2007, meeting further reflect as follows:

Upon further discussion, Alderman Boggs offered substitute motion seconded by Alderman Notter to spread a copy of the contract with Operations Technologies, Inc. and a letter dated December 28, 2006, from Phelps Dunbar LLP, Counselors at Law, upon the minutes of this meeting in words and figures; and in order to avoid litigation

⁸A copy of the lawsuit filed by OpTech against S.H. Anthony, Utility Partners, LLC, Robert Monette, Bobby Berry, Barry Walker, and Robert J. Knesal, being Cause No. A2401-06-399 filed in the Circuit Court of Harrison County, Mississippi, First Judicial District, is part of the January 2, 2007, minutes. This lawsuit by OpTech involves, in part, the awarding of a public works contract by Harrison County Utility Authority ("HCUA") to UP, which was not the low bidder in response to the RFP issued by the HCUA. See also reference to WPSCO's Bill of Exceptions against the Harrison County Utility Authority in paragraphs III-IV of the subject Bill of Exceptions. (R. Vol. 1, pp. 7-10).

problems, to table any action on the public works contract until August 2007, during the budget process.

The question being put to a roll call vote by the Mayor, the result was as follows:

Alderman Richard Notter	voted	Aye
Alderman Richard Burton	voted	Aye
Alderman Charles Boggs	voted	Nay
Alderman Richard Bennett	voted	Nay
Alderman Allen D. Holder, Jr.	voted	Nay
Alderman Mark Lishen	voted	Nay
Alderman Joseph McNary	voted	Nay

The question having received the NEGATIVE vote of a majority of the Aldermen present and voting, the Mayor declared the motion NOT CARRIED.

Alderman Holder withdrew his motion to award the Public Works Contract to Utility Partners, LLC, and Alderman Bennett withdrew the second.

Alderman Holder made motion seconded by Alderman Lishen to terminate the Public Works Contract with Operations Technologies, Inc., effective January 16, 2007.

Alderman Notter offered substitute motion seconded by Alderman Boggs to continue the Public Works Contract with Operation Technologies, Inc., and negotiate a reduction in fees.

The question being put to a roll call vote by the Mayor, the result was as follows:

Alderman Richard Notter	voted	Aye
Alderman Richard Burton	voted	Aye
Alderman Charles Boggs	voted	Aye
Alderman Richard Bennett	voted	Nay
Alderman Allen D. Holder, Jr.	voted	Nay
Alderman Mark Lishen	voted	Nay
Alderman Joseph McNary	voted	Nay

The question having received the NEGATIVE vote of a majority of the Aldermen present and voting, the Mayor declared the motion NOT CARRIED.

The question on the motion to terminate the Public Works Contract with Operations Technologies, Inc., effective January 16, 2007, being put a roll call vote by the Mayor, the result was as follows:

Alderman Richard Notter	voted	Nay
Alderman Richard Burton	voted	Nay

Alderman Charles Boggs	voted	Nay
Alderman Richard Bennett	voted	Aye
Alderman Allen D. Holder, Jr.	voted	Aye
Alderman Mark Lishen	voted	Aye
Alderman Joseph McNary	voted	Aye

The question having received the Affirmative vote of a majority of the Aldermen present and voting, the Mayor declared the motion carried.

Alderman Notter left the room and was temporarily absent the meeting.

Alderman Holder made motion seconded by Alderman Bennett authorizing the Mayor to enter into negotiations with Utility Partners, LLC, for the Public Works Contract, to include, but not limited to, the following conditions:

- ▶ Maintain current Long Beach personnel for a period of twelve (12) months.
- ▶ Maintain current key personnel in Long Beach office.
- ▶ Prohibit assignment or sale of contract without prior consent from the City of Long Beach, noting that such consent will not be unreasonably withheld.

The question being put a roll call vote by the Mayor, the result was as follows:

Alderman Richard Notter	voted	Absent, Not Voting
Alderman Richard Burton	voted	Nay
Alderman Charles Boggs	voted	Nay
Alderman Richard Bennett	voted	Aye
Alderman Allen D. Holder, Jr.	voted	Aye
Alderman Mark Lishen	voted	Aye
Alderman Joseph McNary	voted	Aye

The question having received the Affirmative vote of a majority of the Aldermen present and voting, the Mayor declared the motion carried.

(Appellant's R.E., pp. 27-29; R. Vol. 4, pp. 476-478).

On January 12, 2007, the City of Long Beach convened a Special Meeting to consider and take action on the Public Works Professional Management Contract with UP.

The minutes from the January 12, 2007, Special Meeting provide as follows:

Upon discussion, Alderman Holder made motion seconded by Alderman Bennett to approve the contract as set forth above, authorizing the Mayor to execute same.

After considerable discussion, Alderman Boggs offered substitute motion seconded by Alderman Burton, that in view of the lawsuit filed in federal court by Operations Technologies, Inc., (OPTECH)⁹, and litigation filed by Wastewater Plant Services Company (WPSCO), to rescind the action taken [January 2, 2007] terminating the OPTECH contract, to recognize said contract as it stands and attempt renegotiations with OPTECH on their contract.

The Mayor recognized representatives from Utility Partners, LLC, to answer questions and provide additional information.

After considerable discussion, the question on the substitute motion being put to roll call vote by the Mayor, the result was as follows:

Alderman Richard Notter	voted	Aye
Alderman Richard Burton	voted	Aye
Alderman Charles Boggs	voted	Aye
Alderman Richard Bennett	voted	Nay
Alderman Allen D. Holder, Jr.	voted	Nay
Alderman Mark Lishen	voted	Nay
Alderman Joseph McNary	voted	Nay

The question having received the NEGATIVE vote of a majority of the Aldermen present and voting, the Mayor declared the motion NOT CARRIED.

After considerable discussion, the question on the original motion being put to a roll call vote by the Mayor, the result was as follows:

Alderman Richard Notter	voted	Nay
Alderman Richard Burton	voted	Nay
Alderman Charles Boggs	voted	Nay
Alderman Richard Bennett	voted	Aye
Alderman Allen D. Holder, Jr.	voted	Aye
Alderman Mark Lishen	voted	Aye
Alderman Joseph McNary	voted	Aye

The question having received the affirmative vote of a majority of the Aldermen present and voting, the Mayor declared the motion carried and the public works professional management contract with Utility Partners, LLC, approved as submitted and set forth above.

⁹In the City Attorney's report at the January 12, 2007, meeting, he notified the Mayor and Aldermen of WPSCO's Bill of Exceptions and the lawsuit filed by OpTech in federal court. (R. Vol. 4, p. 495)

(Appellant's R.E., pp. 30-46; R. Vol. 4, pp. 481-497).

The City of Long Beach and UP executed the Public Works Contract effective January 17, 2007. (R. Vol. 4, pp. 499-511).

SUMMARY OF THE ARGUMENT

The record is clear that WPSCO is an eminently qualified contractor to provide the services identified in the December 2006 RFP and has been a party to and continues to be a party to public works contracts along the Mississippi Gulf Coast. Equally clear is the fact that WPSCO was the low bidder in response to the December 2006 RFP, a process that was initiated because the City of Long Beach was concerned about a reduction in ad valorem tax revenues, a reduction in water and service revenues and increased costs as a result of Hurricane Katrina. So, armed with a concern about declining revenues and increasing costs, the City of Long Beach decided to select the proposal submitted by UP, the most costly of the three proposals? Was the entire RFP process a sham? Before initiating the December 2006 RFP, had the City of Long Beach already predetermined, come Katrina or high water, that it was going to award the Public Works Contract to UP? To at least to one interested observer, the answer is that the City of Long Beach, whether blinded by favoritism or otherwise, acted arbitrarily, capriciously, discriminatorily, unlawfully and without substantial basis in selecting UP's proposal, rather than WPSCO's proposal.

First, the City of Long Beach was apparently unaware that a request for the furnishing of "all labor and supervision for the professional management, operation and maintenance of the Public Works Department for the City" is governed by Miss. Code Ann. § 31-7-13(r) and admittedly did not follow the procedures of Section 31-7-13(r) in selecting UP's proposal and awarding the Public Works Contract to UP. Additionally, there is nothing in the record or the minutes from the meetings of the City of Long Beach reflecting that the Selection Committee was delegated with reviewing the proposals and making its recommendation to the City of Long Beach.

Further, in completing the Ranking Forms, five (5) members of the Selection Committee erroneously ranked UP as the middle bidder, when, in fact, UP was the high bidder and OpTech was the middle bidder. In so doing, and given that the "Lowest Score Ranks Highest," the Selection Committee improperly assigned UP at Total Score of "22", instead of "27". Had the Selection Committee properly completed the Ranking Forms, UP would have received a Total Score of 27, tying it with WPSCO (rather than allegedly bettering WPSCO by 5 Total points), and preference should have been given to WPSCO, the resident contractor pursuant to Miss. Code Ann. §§ 31-7-47 and 31-3-21. Other than the Selection Committee Ranking Forms, which are erroneous and therefore unreliable, there is nothing in the record or the minutes from the meetings of the City of Long that supports the selection of UP's proposal as the most qualified proposal in response to the December 2006 RFP.

Lastly and most importantly, it appears that the City of Long Beach was unaware, overlooked or intentionally ignored Miss. Code Ann. § 31-3-21(2), which mandates that all bidders and/or contractors submitting a proposal in response to the December 2006 RFP have a certificate of responsibility issued by the Mississippi State Board of Contractors. Where in the record is there any mention of the bidders' certificate of responsibility numbers? The reason is simple – UP did not have a certificate of responsibility at the time of the December 2006 RFP.

ARGUMENT

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

In the lower court, the City of Long Beach argued in its Reply Brief that the "contract award to UP by the City is a contract for services, only. Award of a contract for services, only, does not require competitive bidding under Mississippi Code Ann., 31-7-13. Not only is the City . . . not required by law to bid out contracts for services only, it may negotiate such contracts, as it has done in [the] instant case." (Appellant's R.E., p. 47; R. Vol. 1, p. 132). If the City of Long Beach is not required to seek competitive bids (see Miss. Code Ann. §31-7-13(r) – "[A] governing authority . . . 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.") for the professional management, operation and maintenance of the Public Works Department, this begs the question – why did the City of Long Beach published a notice/RFP in The Sun Herald on December 12, 2006? The answer is simple and very clear under the laws of the State of Mississippi – the City of Long Beach was and is required to follow the procedures of Miss. Code Ann. § 31-7-13 when entering into contracts with third parties to operate and manage its wastewater treatment plant, to maintain and repair its water and sewer lines, pumps and wells, to read meters and otherwise assist the water department with customer relations.

The significance of the City of Long Beach's admission cannot be overstated. In fact, this very issue was considered and addressed by the Mississippi Attorney General's Office. In

Miss. Att. Gen. Op., 2004 WL 1833096, Mullins (July 30, 2004), 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 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).¹⁰

* * *

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).¹¹

It is clear that the December 2006 RFP is governed by Miss. Code Ann. § 31-7-13(r).

More importantly, the City of Long Beach admitted that it did not comply with the statutory mandates of § 31-7-13(r). In fact, based upon statements in its Reply Brief filed in the lower court, the City of Long Beach appears ambivalent to the applicable law and its obligations thereunder.

II. THE CITY OF LONG BEACH DID NOT SELECT THE MOST QUALIFIED PROPOSAL ON THE BASIS OF PRICE, TECHNOLOGY AND OTHER RELEVANT FACTS AS PROVIDED IN MISS. CODE ANN. § 31-7-13(r)

¹⁰Interestingly, the opinion to Malcolm Jones on November 8, 2002, involved the City of Pass Christian, which currently has an agreement with WPSCO for the operation and maintenance of the city's water and sewer utilities and utility billing and collections, including meter reading.

¹¹The December 2006 RFP provided, in pertinent part, as follows regarding the scope of services: "The Contractor shall furnish all labor and supervision for the professional management, operation and maintenance of the Public Works Department for the City." (R. Vol. 2, p. 220).

Notwithstanding that the City of Long Beach admittedly did not follow the mandates of Miss. Code Ann. § 31-7-13(r), the undisputed facts of this case demonstrate that the City of Long Beach did not select the most qualified proposal on the basis of price, technology and other relevant factors. Indeed, had the City of Long Beach selected the most qualified proposal, it would have selected WPSCO's proposal, not UP's proposal.

The notice published in The Sun Herald stated that "[t]he City 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." (Appellant's R.E., p. 48; R. Vol. 2, p. 218). The RFP provides, in part, 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.

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

The criteria and/or factors identified by the City of Long Beach in the notice published in The Sun Herald and the RFP are not identical. More importantly, with regard to the Ranking Forms completed by the members of the Selection Committee¹² (i.e., utilizing the following

¹²Conspicuously absent from the record or the minutes from the meetings of the City of Long Beach is any finding or action wherein the proposals received in response to the December 2006 RFP were referred to the Selection Committee for consideration and review and its recommendation to the

criteria: (1) Understanding of Requirements; (2) Experience and Reputation; and (3) Price), there is absolutely no backup documentation in the record or the minutes of the City of Long Beach supporting its findings/conclusions. The members of the Selection Committee did not interview the bidders (at least, no one interviewed WPSCO representatives). There is no record of the members of the Selection Committee having consulted the bidders' references. With regard to "Price" (the only objective criteria) from the three bidders, all Ranking Forms ranked "Price" for UP and OpTech at "2" and "3", respectively. Clearly, OpTech's bid was lower than UP's bid, and the Ranking Form expressly states that the "Lowest Score Ranks Highest."¹³ Based upon a review of the Ranking Forms, it appears that five (5) members of the Selection Committee each completed a Ranking Form, and that the Total Score for WPSCO and UP was 27 and 22, respectively. Assuming for purposes of argument that the subjective criteria on the Ranking Form, Understanding of Requirements and Experience and Reputation, were scored without collusion, favoritism, extravagance, improvidence, etc., had the members of the Selection Committee (also assuming that it had been lawfully delegated with reviewing the proposals and making a recommendation to the City of Long Beach) correctly ranked "Price" as between UP and OpTech (i.e., giving OpTech a "2" and UP a "3" based upon their respective bids), WPSCO would have received a Total of "27" and UP a Total of "27", and preference should have been given to the resident contractor, WPSCO. See Miss. Code Ann. §§ 31-7-47 and 31-3-21. (Appellant's R.E., pp. 23-25; R. Vol. 3, pp. 426-428).

City of Long Beach. Absent delegation by the City of Long Beach, the Selection Committee essentially had no authority to do anything with regard to the proposals.

¹³In completing the Ranking Forms, 5 members of the Selection Committee erroneously ranked UP as the middle bidder with respect to price, when, in fact, UP was the high bidder and OpTech was the middle bidder.

III. IT DOES NOT APPEAR THAT UP HAD (OR HAS) A CERTIFICATE OF RESPONSIBILITY AT THE TIME OF THE DECEMBER 2006 RFP

Miss. Code Ann. § 31-3-21(2) provides, in pertinent part, as follows:

All bids . . . where said bid is in excess of Fifty Thousand Dollars (\$50,000.00) with respect to public projects . . . shall contain on the outside or exterior of the envelope or container of such bid the contractor's current certificate number, and no bid shall be opened or considered unless such contractor's current certificate number appears on the outside or exterior of said envelope or container, or unless there appears a statement on the outside or exterior of such envelope or container to the effect the bid enclosed therewith did not exceed Fifty Thousand Dollars (\$50,000.00) with respect to public projects

The Mississippi Supreme Court held that Section 31-3-21(2) "clearly and unambiguously states that a bid may not be opened, the bid may not be considered, and the bid may not be awarded [on] the contract if the contractor fails to include the certificate of responsibility number on the exterior of the envelope." City of Durant v. Laws Construction Company, Inc., 721 So. 2d 598, 602 (Miss. 1998). Curiously, the Mississippi State Board of Contractors' website indicates that UP does not currently hold a certificate of responsibility, and further investigation revealed that UP has never held a certificate of responsibility in the State of Mississippi. Surely, the City of Long Beach is not so temerarious as to intentionally ignore Miss. Code Ann. § 31-3-21(2) and/or overlook UP's lack of a certificate of responsibility?

CONCLUSION


For the reasons set forth hereinabove, 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

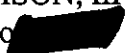
County, Mississippi, First Judicial District with instructions to allow WPSCO to amend its Bill of Exceptions to allege a claim(s) for damages against the City of Long Beach.

RESPECTFULLY SUBMITTED, this the 29th day of August, 2009.

WASTEWATER PLANT SERVICE CO., INC.

BY: SAMSON & POWERS, PLLC

BY: 

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Mississippi Bar No. 

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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
Gulfport, MS 39502-1461

James C. Simpson, Jr., Esq.
Montgomery Barnett
2310 19th Street
Gulfport, MS 39501

Paul Richard Lambert, Esq.
Paul Richard Lambert, PLLC
119 Hardy Street
Hattiesburg, MS 39401

THIS, the 25th day of August, 2009.



ROLAND F. SAMSON, III
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