

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

No. 2010-CA-00717

FREDA HOWELL, d/b/a LICKITY SPLITZ

APPELLANT

vs.

BOARD OF SUPERVISORS OF
JEFFERSON DAVIS COUNTY

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON DAVIS COUNTY, MISSISSIPPI¹

BRIEF OF THE APPELLEE,
BOARD OF SUPERVISORS OF JEFFERSON DAVIS COUNTY

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¹ The Clerk's Cover on the Record in this action erroneously identifies the trial judge as the Hon. Prentiss Greene Harrell. In fact, the trial judge was the Honorable R.I. Prichard, III.

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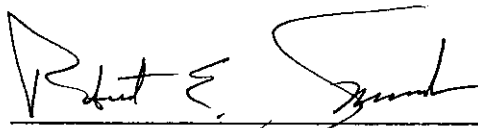
APPELLEE

APPELLEE'S 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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. The Board of Supervisors of Jefferson Davis County, Mississippi, Appellee
2. Macon C. Holliman, Jr., Board member
3. Charles Reid, Board member
4. John Thompson, Board member
5. Lee Price, Board member
6. Bobby Rushing, Board member
7. Robert E. Sanders, attorney for Appellee
8. Wes Daughdrill, attorney for Appellee
9. Freda Howell, d/b/a Lickity Splitz, Appellant
10. Al Shiyon, attorney for Appellant
11. Victor A. DuBose, attorney for Appellant

SO CERTIFIED, this 5th day of November, 2010.



Attorney of Record for the Appellee, Board
of Supervisors of Jefferson Davis County

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STATEMENT REGARDING ORAL ARGUMENT

The Appellee submits that the trial court's ruling is manifestly correct, and that, accordingly, oral argument herein would be wasteful of the resources of this Court and the parties.

APPELLEE'S COUNTER-STATEMENT OF THE ISSUES

Issue One

Whether the trial court's Order upholding the decision of the Board resulted from either (1) factual findings which were either manifestly wrong or clearly erroneous, or (2) a misapplication of applicable law.

Issue Two

Whether the result of the trial court's Order should be affirmed on the alternate basis that the Board's decision to use the alternate bidder to provide prisoner meals was legally sufficient without the entry of the *nunc pro tunc* Orders by reason of Miss. Code Ann. §31-7-13(f)

APPELLEE'S COUNTER-STATEMENT OF THE CASE

This case presents an appeal by a disappointed bidder for a contract to provide prisoner meals for Jefferson Davis County for the calendar year 2009. The advertisements for bids were placed in December, 2008. (Appellee's R.E. 14; R. 46) Several bids were received. On January 5, 2009, the Board of Supervisors (hereinafter, the "Board") opened the bids. (Appellee's R.E. 20; R. 55) The Board's Order named the Appellant the primary bidder, and named Bassfield Texaco the alternate bidder.

Representatives of the Board subsequently examined the Appellant's ability to fulfill the requirements of the job. This examination resulted in a January 20, 2009, decision by the Board to use the alternate bidder, Bassfield Texaco. (Appellee's R.E. 25; R. 60) The Appellant submitted its Bill of Exceptions to this decision and appealed the decision to the Circuit Court for Jefferson Davis County.

The trial court issued its Remand with instructions on December 29, 2009. (Appellee's R.E. 26; R. 123) The trial court instructed the Board to amend its minutes *nunc pro tunc* "to include the report presented to the Board by Sheriff McCullum and the representatives of the Board at the January 20, 2009 meeting," (Appellee's R.E. 30 ; R. 127), and to include "dollar amounts of the bids submitted by [the Appellant] and Bassfield Texaco." (Appellee's R.E. 29; R. 126) In response to this directive, the Board entered two *nunc pro tunc* Orders amending the January 5, 2009, minutes, and the January 20, 2009, minutes. (Appellee's R.E. 31 and 32; R. 169 and 175) The second of these *nunc pro tunc* Orders included the Affidavit of Board President, John Thompson, detailing the conditions found by the Board representatives at the examination of the Appellant's facilities.

After further briefing, the trial Court, on April 2, 2010, affirmed the Board's decision to use the alternate bidder. (Appellee's R.E. 3 -12; R. 199) The Appellant's Notice of Appeal to this Court was filed on April 30, 2010. (Appellee's R.E. 36; R. 209)

STATEMENT OF THE FACTS

In December, 2008, the Board advertised for bids to provide prisoner meals for the 2009 calendar year. Four bids were received. The bids were opened on January 5, 2009. The Appellant submitted the lowest bid. Bassfield Texaco submitted the second lowest bid. The Appellant's bid was accepted as the primary bid. Bassfield Texaco's bid was accepted as the alternate bid.

At the time the bids were opened and accepted, the Board and the Sheriff of Jefferson Davis County had never used the Appellant to provide prisoner meals. Meals must, of course, be furnished to prisoners promptly every day of the year. Understandably, the Sheriff and the members of the Board thought it prudent to visit the Appellant's facility. Accordingly, the Sheriff and two members of the Board visited the Appellant's facility before the Appellant's obligation to provide meals began. (Appellee's R.E. 34; R. 182) What they found was not encouraging to them. They found buildings that appeared to them to be akin to "snowball stands." While they were at the premises, the owner of the Appellant arrived at the facility and appeared to bring cooked food to be placed in Styrofoam plates. It appeared to them that the Appellant did not have the capacity to prepare meals at the facilities, and that meals were prepared somewhere else. They were concerned that the food might not have been prepared at a commercial food establishment. (Appellee's R.E. 34; R. 182)

The Sheriff and the Board members who visited the Appellant's facility thought it would be best to report their observations to the full Board. This was done at the January 20, 2009, meeting of the Board. At that meeting the Board decided to use the alternate bidder, Bassfield Texaco, to provide prisoner meals. (Appellee's R.E. 25; R. 60) In the interim between the visit and the January 20 Board meeting, the County Attorney wrote the Appellant to inform her that the alternate bidder would be used. The County Attorney's letter (Appellee's R.E. 24; R. 59) described the Board's instructions as a "decision," but there had been no Board meeting at that point and no Board

decision had been made.² The Appellant's brief relies in large part on the argument that a decision had been made by the Board outside a properly convened meeting, but that is simply incorrect. The decision by the Board to use the alternate bidder was not made until the regularly scheduled Board meeting of January 20, 2009.

The Appellant's appeal to the trial court followed, and the issues were briefed to that Court. The trial court issued an interim ruling on December 29, 2009. (Appellee's R.E. 26; R. 123) In that ruling the trial court determined that the Board record was insufficient, and instructed the Board to amend *nunc pro tunc* its minutes of January 5, 2009, and January 20, 2009, to include an affidavit from the Board President detailing the report the representatives gave to the Board at the January 20 meeting. The purpose of the affidavit was to cause the minutes to speak the original truth of the report and thereby further explain the original action of the Board when it decided to use the alternate bidder. The trial court also instructed the Board to amend *nunc pro tunc* the minutes of the January 5, 2009, meeting to reflect the dollar amounts of the primary and alternate bids.

The Board entered its *nunc pro tunc* orders amending the two January, 2009, minutes on January 19, 2010. The Appellant renewed its appeal to the trial court, and new briefs were presented to the trial court. On April 2, 2010, the trial court entered its Order affirming the action by the Board. (Appellee's R.E. 3; R. 199) The present appeal to this Court followed.

SUMMARY OF THE ARGUMENT

1. There was no illegal meeting of the Board, and no action by the Board was taken outside a lawful and regularly scheduled meeting of the Board. Contrary to the argument made by the Appellant, the Board Attorney's January 9, 2009, letter to the Appellant (Appellee's R.E. 24; R. 59)

² The use of the words, "decided" and "decision," in the letter is merely an imprecise description of events. After the inspection, Board members separately expressed their beliefs that the Appellant could not adequately deliver the meals, but no decision on the issue was made until the January 20, 2009, Board meeting.

was not a report of a previous decision by the Board. The actual decision of the Board regarding use of the alternate bidder was not made until its regularly scheduled meeting on January 20, 2009. A board of supervisors can act only through its minutes. See, Lange v. City of Batesville, 972 So.2d 11, 18 (Miss. Ct. App. 2008)(quoting Thompson v. Jones County Community Hospital, 352 So.2d 795, 796 (Miss. 1977) The Board has acted only in properly called meetings, and has expressed itself only through its minutes.

2. The Board did not abuse its discretion in using the alternate bidder. The Appellant's assertion that the Board's action was "arbitrary and capricious" is mistaken, as reflected in the Board minutes. There was ample basis for the Board's action, and it is contained in the Record. The Board's decision was based on the good faith inspection of Appellant's facilities made by the Sheriff and representatives of the Board. The trial court was "not at liberty to set aside the decision of a Board of Supervisors unless that decision is 'clearly shown to be arbitrary [or] capricious...'", see, Billy E. Burnett, Inc. v. Pontotoc County Bd. of Supervisors, 940 So. 2d 241, 243 (Miss. Ct. App. 2006). As shown by the Board minutes, there was a sufficient basis to support the Board's decision. Therefore, the Board's decision is clearly not arbitrary or capricious.

3. The inspection of the Appellant's facility was proper and permitted by the Appellant.

4. The entry of the *nunc pro tunc* Orders was appropriate to show the true facts which supported the decision of the Board to use the alternate bidder. See, Huey Stockstill, Inc. v. Hales, 730 So.2d 539, 544 (Miss. 1998)

5. Even in the absence of the *nunc pro tunc* Orders, the decision by the Board to use the alternate bidder was proper. See, Miss. Code Ann. §31-7-13 (f).

ARGUMENT

I. Standard of Review

Factual findings of the trial court are not to be disturbed or rejected unless those findings are manifestly wrong or clearly erroneous. See, Zumwalt v. Jones County Board of Supervisors, 19 So.3d 672, 682 (Miss. 2009); In re Estate of Grubbs v. Woods, 753 So.2d 1043, 1046 (Miss. 2000). This Court's review of the legal conclusions made by the trial Court are de novo. See, Zumwalt, supra, at 682; In re Will of Clarice Temple Carney v. Carney, 758 So.2d 1017, 1019 (Miss. 2000).

The Appellant contends that this Court's standard of review of the trial court's decision is the same as the trial court's standard of review of the decision by the Board of Supervisors. This is correct in part only. The trial court's findings of fact are entitled to some deference by this Court. It is only the trial court's assessment of the legal conclusions which flow from those findings of fact which are to be reviewed de novo. In other words, this Court will review de novo whether the factual findings made by the trial court were sufficient to sustain the Board's decision, or whether the facts before the Board were so insufficient as to render the Board's decision arbitrary.

II. The Trial Court Correctly Affirmed the Board's Decision To Use the Alternate Bidder

(a) There Was No Illegal Meeting By The Board

The bulk of the Appellant's brief relies on the notion that the Board made the decision to use the alternate bidder at some undefined occasion other than at a properly convened meeting of the Board, and that the decision of the Board was evidenced by the January 9, 2009, letter to the Appellant from the County Attorney. This is not only incorrect, it is legally impossible. A board of supervisors can only act in properly called meetings, and it can speak only through its minutes. See,

Lange v. City of Batesville, 972 So.2d 11, 18 (Miss. Ct. App. 2008)(quoting Thompson v. Jones County Community Hospital, 352 So.2d 795, 796 (Miss. 1977).

The Appellant also constructs its arguments on the fact that the minutes of the January 20, 2009, Board meeting reflect, in part, that the Board ratified the County Attorney's letter. The important element of the minutes of that meeting, and the element that the Appellant does not discuss, is the positive finding by the Board that the Appellant "cannot deliver the commodities contained in their bid," and the positive decision by the Board "that the alternate bidder, Bassfield Texaco, shall provide prisoner meals for the County for the year 2009, or until further Order of the Board." The language in the minutes which purported to ratify the language of the letter was nothing more than surplusage. The ratification language in the minutes has no meaning in the context of this action. The Appellant's arguments to the contrary are little more than an attempt to create an issue where none exists.

(b) The Board's Decision Was Not Arbitrary or Capricious

The Appellant's argument that the Board's actions were arbitrary and capricious is little more than an argument that the Board reached an incorrect conclusion after reviewing the facts as it understood them. The Appellant's argument is refuted in the record by the Board minutes (Appellee's R.E. 32; R. 175) and by the Board President's affidavit (Appellee's R.E. 34; R. 182). The Board's decision was based on the good faith inspection of Appellant's facilities made by the Sheriff and representatives of the Board. Whether the assessments made by the Sheriff and the Board representatives were absolutely correct or not, those assessments provided ample basis for the decision made by the Board to use the alternate bidder.³ Acting on the basis of specific information, especially information conveyed to the Board by responsible public servants after an inspection

³ In her Brief, the Appellant argues at length about her qualifications. This argument is not relevant to the issues at hand. The critical issue is the Appellee's good faith assessment, on January 20, 2009, of the Appellant's ability to provide prisoner meals, and the extent to which the Board's decision on that date was supported by substantial evidence known to the Board at the time of the decision.

specially undertaken for the purpose of protecting the health and welfare of prisoners in the charge of the County, is the antithesis of arbitrary or capricious action.

The trial court was “not at liberty to set aside the decision of a Board of Supervisors unless that decision was ‘clearly shown to be arbitrary [or] capricious...’” See, Billy E. Burnett, Inc. v. Pontotoc County Bd. of Supervisors, 940 So. 2d 241, 243 (Miss. Ct. App. 2006). As shown by the record herein, there was a sufficient and clear basis to support the Board’s decision. Therefore, the Board’s decision was clearly not arbitrary or capricious. The Board’s decision does not need to be proven to be correct or sound. It is only necessary that the decision is based on findings that are reflected in the Record so that the basis for the decision is reviewable. Thus, “such a decision is not to be overturned if its validity is ‘fairly debatable.’” *Id.* at 243. The trial court used the correct standard of review in considering the Board’s actions. The trial court was correct in affirming the Board’s actions.

(c) The Inspection of the Appellant’s Facility
Was Proper and Permitted By the Appellant

The Appellant argues that the bid specifications did not permit an inspection of her facility. The short response to this argument is that there is no prohibition against a Board of Supervisors gathering information to satisfy itself on the issue of a bidder’s ability to provide commodities. The Appellee has an inherent right and duty to vigilantly maintain oversight over all areas for which it has responsibility. The citizens of Jefferson Davis County expect the Board to continually monitor the quality of goods and services for which it contracts, and the citizens rightfully expect the Board to do all things reasonably necessary to assure that contracts are adequately performed. The Board’s inherent right to inspect and maintain oversight regarding the ability to perform is particularly important where prisoners are to be fed three times a day every day.

The Appellant cites no authority for the proposition that the Board of Supervisors needs special authorization to call upon a place of business. In any event, the visit was authorized by the

person who attended the Board meeting on behalf of the Appellant. That person was Michelle Howell, the Appellant's daughter. The daughter's affidavit, attached to the Appellant's Record Excerpts at R.E. 47-48, expressly states that the Sheriff of Jefferson Davis County told the daughter "that he might drive to Collins to visit with us, which I said would be fine." The Appellant's own affidavit, Appellant's R.E. 43, shows that the daughter conveyed that information to the Appellant. The Appellant's affidavit reflects no objection to the visit by the Sheriff. The notion that the visit was somehow improper, or that it violated some right belonging to the Appellant, is simply a post hoc attempt by the Appellant to create an issue where none exists.

(d) The Nunc Pro Tunc Minute Amendments Were Proper

The Appellant challenges the trial court's directive that the Board minutes be amended, and the effect of the amendments after they were made. For its argument on this point⁴, the Appellant relies on Sunland Publishing Co., Inc. v. City of Jackson, 710 So.2d 879 (Miss. 1998), and Lopez v. Jackson County Board of Supervisors, 375 F.Supp. 1194, 1199 (S.D. Miss. 1974). Both cases are inapposite for the same reason.

The Sunland case presented a dispute about bids for the publication of legal notices. The City of Jackson awarded the contract to a newspaper which was not the low bidder. After a Complaint by the newspaper which submitted the lowest bid, the City amended its earlier minutes to change the low bidder's status from qualified to not qualified. The City's amended minutes did not reflect the gathering of any additional facts or any new understanding of the low bidder's status. The City simply disqualified the low bidder after its challenge. The Lopez case presented a dispute about boat slips in a harbor controlled by Jackson County. The Ocean Springs Harbor Committee decided to restrict rental of boat slips to residents of Jackson County. Notices were sent to non-residents to vacate their slips. Prior to this notice, the Jackson County Board of Supervisors had

⁴ The Appellant's argument on this point is contained in two separate parts of her Brief. The first section starts on page 14 of the Brief. The second section starts on page 21 of the Brief.

nothing in its minutes which provided authority to the Committee to do what it did. After the non-residents filed a Complaint, the Board of Supervisors entered a *nunc pro tunc* Order approving the action of the Committee.

In both the Sunland and Lopez cases, the defendants attempted, by *nunc pro tunc* orders, to create facts or authorizations that did not exist at the time the original minutes were entered. The Supreme Court properly held that the whole cloth inventions of such facts and authorizations could not be accomplished by *nunc pro tunc* orders. In the present case, the *nunc pro tunc* Orders were used for a perfectly lawful purpose as explained in Huey Stockstill, Inc. v. Hales, 730 So.2d 539 (Miss. 1998). In Stockstill, this Court explained that boards of supervisors may amend their minutes by *nunc pro tunc* orders where the purpose of the amendments is to cause the minutes “to reflect what actually occurred on the first occasion.” *Id.*, at 544 This Court also explained in Stockstill that

a trial court sitting in an appellate capacity from a decision by a government body may remand the matter to that body for more detailed findings where the record does not adequately support the governmental decision. (*Id.*, at 544)

The Stockstill scenario precisely fits the present case. At the January 20, 2009, Board meeting, the Board heard the verbal report by the Sheriff and the representatives of the Board concerning their observations of the Appellant’s facilities. The original minutes of that meeting (Appellee’s R.E. 25; R. 60), however did not reflect the details of that verbal report. The amended minutes for that meeting (Appellee’s R.E. 32; R. 175) did nothing but add a true account of the verbal report. This was accomplished by adding the affidavit of the Board President (Appellee’s R.E. 34 ; R. 182). In the affidavit, the Board President set forth, as closely as he could, the actual report which was delivered verbally at the original Board meeting. This is precisely what is permitted by Stockstill.

The amended minutes for the January 5, 2009, Board meeting (Appellee’s R.E. 31; R. 169) did one other thing. The amended minutes reflect the actual dollar amounts of the Appellant’s bid

and Bassfield Texaco's bid. Those dollar amounts were, obviously, presented to the Board members at that meeting, but the original minutes did not reflect the dollar amounts. Again, this amendment was in keeping with Stockstill because the amended minutes merely reflected in more detail what was actually viewed and considered by the Board members at the January 5 meeting.

Stockstill is the controlling case on this point. The trial court based its ruling on this point entirely on Stockstill. Tellingly, the Appellant does not mention Stockstill once in her Brief. The amended minutes do not create anything. The amendments merely make a more detailed account of the facts which were actually presented to the Board at the January 5 and January 20 meetings. The trial court committed no error in directing the Board to amend its minutes or in relying on the amended minutes in affirming the Board's decision to use the alternate bidder. The Appellant's arguments to the contrary are empty.

(e) No Violation of Miss. Code Ann. §31-7-13(d)(i) Exists

Miss. Code Ann. §31-7-13(d)(i)⁵ provides, in pertinent part, that if a board of supervisors,

accepts a bid other than the lowest bid actually submitted, it shall place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid, including the dollar amount of the accepted bid and the dollar amount of the lowest bid.

The language of the statute clearly contemplates that a low bid has been rejected, and that the governing body has chosen to select a higher bidder. This is not what happened in the present case.

Here, the Board did not reject the lowest bidder. To the contrary, it accepted the low bid submitted

⁵ Miss. Code Ann. §31-7-13(d)(i) provides: "Decision procedure. Purchases may be made from the lowest and best bidder. In determining the lowest and best bid, freight and shipping charges shall be included. Life-cycle costing, total cost bids, warranties, guaranteed buy-back provisions and other relevant provisions may be included in the best bid calculation. All best bid procedures for state agencies must be in compliance with regulations established by the Department of Finance and Administration. If any governing authority accepts a bid other than the lowest bid actually submitted, it shall place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid, including the dollar amount of the accepted bid and the dollar amount of the lowest bid. No agency or governing authority shall accept a bid based on items not included in the specifications."

by the Appellant. The dispute arose when the Board subsequently determined that the low bidder would not be able to properly provide the commodity bid upon. It is doubtful, therefore, that the statute has any actual application here.

However, at the direction of the trial court, and out of an abundance of caution, the Board amended its minutes to reflect the dollar amounts viewed and considered by the Board at its January 5, 2009 meeting. To the extent the statute applies, Stockstill makes it clear that the amendment to the January 5 meeting is lawful. Stockstill presented a dispute regarding a bid for the construction of a bridge. The Board of Supervisors for Pearl River County rejected the low bidder because of an ethics concern about kinship between a former employee of the low bidder and a member of that Board. The minutes of the meeting at which the low bidder was rejected did not reflect the dollar amounts submitted by the low bidder and the bidder selected. After the low bidder complained, the board amended its minutes to reflect the dollar amounts of the competing bids. This Court, in Stockstill, affirmed the trial court's affirmance of the board's action. This Court explained, *id.*, at 543, that the omission was a "technical defect," and ruled that the amendment to the minutes to reflect the dollar amounts was proper. The Appellant's argument on this point is empty as well.

(f) The Appellant's Request For An
Award Of Damages Is Unsupportable

The Appellant asks this Court to reverse and render judgment in her favor, and to award damages to her at the same time. Even if this Court were to accept the Appellant's view that the trial court's ruling should, for some reason, be reversed, there is nothing in the record which would support an award of damages here. Before damages could be awarded, the matter would have to be remanded to the trial court for development of proof on the issue of damages. The Appellant's request that this Court award damages should be rejected.

III. Alternatively, The Trial Court's Result Should

Be Upheld Pursuant To Miss. Code Ann. §31-7-13(f)

Even if this Court were to find some error in the trial court's directive to enter *nunc pro tunc* amendments to the Board Orders, or if the Court were to find that the *nunc pro tunc* minutes were somehow unsupportable, the trial court's result should be affirmed. As stated earlier in this Brief, the Board did not reject the Appellant's bid. Accordingly, Miss. Code Ann. §31-7-13(d)(i) is not implicated by actions taken by the Board. The simple fact remains that the Appellant's bid was selected as the primary bid, while Bassfield Texaco's bid was selected as the alternate bid. The effect of these selections is controlled by a different subsection of Miss. Code Ann. §31-7-13. The applicable subsection is Miss. Code Ann. §31-7-13(f). This subsection provides:

Alternate bid authorization. When necessary to ensure ready availability of commodities for public works and the timely completion of public projects, no more than two (2) alternate bids may be accepted by a governing authority for commodities. No purchases may be made through use of such alternate bids procedure unless the lowest and best bidder cannot deliver the commodities contained in his bid. In that event, purchases of such commodities may be made from one (1) of the bidders whose bid was accepted as an alternate.

Clearly, prisoner meals are commodities for which alternate bids must be accepted because prisoners must be fed every day. This code section provides ample authority for the Board's use of the alternate bidder even without reference to the *nunc pro tunc* Orders or the amended minutes. After the Board determined, at its January 20 meeting, that the Appellant could not deliver the commodities upon which she bid, the Board chose to use the alternate bidder, in the words of the statute, "to ensure ready availability of commodities." The choice to use the alternate bidder is simply a different event than the choice to reject a low bidder. This choice was properly made, pursuant to Miss. Code Ann. §31-7-13(f), by the Board in its January 20, 2009, meeting.

The Mississippi public purchasing statutory construct does not require that a Board of Supervisors hold or conduct a hearing before choosing to use an alternate bidder or rejecting a low bidder. The Appellee does not contest the trial court's finding that the Appellant had a short-lived

property interest in the bid award, but the Appellant's contention regarding a failure of due process is without merit. She was accorded the process due her under the applicable statutes. Accordingly, the result of the trial court, *i.e.*, the affirmance by the trial court of the Board's use of the alternate bidder, should be affirmed on the basis of Miss. Code Ann. §31-7-13(f) even if this Court determines that the trial court's ruling or rationale otherwise contains reversible error.



Conclusion

For all of the reasons contained above, this Court should affirm the Order of the Circuit Court for Jefferson Davis County.

Dated: November 5, 2010

Respectfully submitted,

BOARD OF SUPERVISORS
OF JEFFERSON DAVIS COUNTY

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CERTIFICATE OF SERVICE

It is hereby certified that I have this date served, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing to:

Hon. R.I. Prichard, III
Circuit Judge
P.O. Box 1075
Picayune, MS 39466

Al Shiyou
Victor A. Dubose
Shiyou Law Firm
P.O. Box 310
Hattiesburg, MS 39403

SO CERTIFIED, this 5th day of November, 2010.

A handwritten signature in black ink, appearing to read "Robert E. Sanders", written over a horizontal line.

Robert E. Sanders

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Statute Addendum

Miss. Code Ann. § 31-7-13

§ 31-7-13. Bid requirements and exceptions; public auctions [Subsection (c)(i)(2) repealed on July 1, 2011]

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.

(a) *Bidding procedure for purchases not over \$5,000.00.* Purchases which do not involve an expenditure of more than Five Thousand Dollars (\$ 5,000.00), exclusive of freight or shipping charges, may be made without advertising or otherwise requesting competitive bids. However, nothing contained in this paragraph (a) shall be construed to prohibit any agency or governing authority from establishing procedures which require competitive bids on purchases of Five Thousand Dollars (\$ 5,000.00) or less.

(b) *Bidding procedure for purchases over \$5,000.00 but not over \$50,000.00.* Purchases which involve an expenditure of more than Five Thousand Dollars (\$ 5,000.00) but not more than Fifty Thousand Dollars (\$ 50,000.00), exclusive of freight and shipping charges may be made from the lowest and best bidder without publishing or posting advertisement for bids, provided at least two (2) competitive written bids have been obtained. Any state agency or community/junior college purchasing commodities or procuring construction pursuant to this paragraph (b) may authorize its purchasing agent, or his designee, to accept the lowest competitive written bid under Fifty Thousand Dollars (\$ 50,000.00). Any governing authority purchasing commodities pursuant to this paragraph (b) may authorize its purchasing agent, or his designee, with regard to governing authorities other than counties, or its purchase clerk, or his designee, with regard to counties, to accept the lowest and best competitive written bid. Such authorization shall be made in writing by the governing authority and shall be maintained on file in the primary office of the agency and recorded in the official minutes of the governing authority, as appropriate. The purchasing agent or the purchase clerk, or their designee, as the case may be, and not the governing authority, shall be liable for any penalties and/or damages as may be imposed by law for any act or omission of the purchasing agent or purchase clerk, or their designee, constituting a violation of law in accepting any bid without approval by the governing authority. The term "competitive written bid" shall mean a bid submitted on a bid form furnished by the buying agency or governing authority and signed by authorized personnel representing the vendor, or a bid submitted on a vendor's letterhead or identifiable bid form and signed by authorized personnel representing the vendor. "Competitive" shall mean that the bids are developed based upon comparable identification of the needs and are developed independently and without knowledge of other bids or prospective bids. Any bid item for construction in excess of Five Thousand Dollars (\$ 5,000.00) shall be broken down by components to provide detail of component description and pricing. These details shall be submitted with the written bids and become part of the bid evaluation criteria. Bids may be submitted by facsimile, electronic mail or other generally accepted method of information distribution. Bids submitted by electronic transmission shall not require the signature of the vendor's representative unless required by agencies or governing authorities.

(c) Bidding procedure for purchases over \$50,000.00.

(i) Publication requirement.

1. Purchases which involve an expenditure of more than Fifty Thousand Dollars (\$ 50,000.00), exclusive of freight and shipping charges, may be made from the lowest and best bidder after advertising for competitive bids once each week for two (2) consecutive weeks in a regular newspaper published in the county or municipality in which such agency or governing authority is located. However, all American Recovery and Reinvestment Act projects in excess of Twenty-five Thousand Dollars (\$ 25,000.00) shall be bid. All references to American Recovery and Reinvestment Act projects in this section shall not apply to programs identified in Division B of the American Recovery and Reinvestment Act.

2. The purchasing entity may designate the method by which the bids will be received, including, but not limited to, bids sealed in an envelope, bids received electronically in a secure system, bids received via a reverse auction, or bids received by any other method that promotes open competition and has been approved by the Office of Purchasing and Travel. The provisions of this item 2 of subparagraph (i) shall be repealed on July 1, 2011.

3. The date as published for the bid opening shall not be less than seven (7) working days after the last published notice; however, if the purchase involves a construction project in which the estimated cost is in excess of Fifty Thousand Dollars (\$ 50,000.00), such bids shall not be opened in less than fifteen (15) working days after the last notice is published and the notice for the purchase of such construction shall be published once each week for two (2) consecutive weeks. However, all American Recovery and Reinvestment Act projects in excess of Twenty-five Thousand Dollars (\$ 25,000.00) shall be bid. For any projects in excess of Twenty-five Thousand Dollars (\$ 25,000.00) under the American Recovery and Reinvestment Act, publication shall be made one (1) time and the bid opening for construction projects shall not be less than ten (10) working days after the date of the published notice. The notice of intention to let contracts or purchase equipment shall state the time and place at which bids shall be received, list the contracts to be made or types of equipment or supplies to be purchased, and, if all plans and/or specifications are not published, refer to the plans and/or specifications on file. If there is no newspaper published in the county or municipality, then such notice shall be given by posting same at the courthouse, or for municipalities at the city hall, and at two (2) other public places in the county or municipality, and also by publication once each week for two (2) consecutive weeks in some newspaper having a general circulation in the county or municipality in the above provided manner. On the same date that the notice is submitted to the newspaper for publication, the agency or governing authority involved shall mail written notice to, or provide electronic notification to the main office of the Mississippi Procurement Technical Assistance Program under the Mississippi Development Authority that contains the same information as that in the published notice. Submissions received by the Mississippi Procurement Technical Assistance Program for projects funded by the American Recovery and Reinvestment Act shall be displayed on a separate and unique Internet Web page accessible to the public and maintained by the Mississippi Development Authority for the Mississippi Procurement Technical Assistance Program. Those American Recovery and Reinvestment Act related submissions shall be publicly

posted within twenty-four (24) hours of receipt by the Mississippi Development Authority and the bid opening shall not occur until the submission has been posted for ten (10) consecutive days. The Department of Finance and Administration shall maintain information regarding contracts and other expenditures from the American Recovery and Reinvestment Act, on a unique Internet Web page accessible to the public. The Department of Finance and Administration shall promulgate rules regarding format, content and deadlines, unless otherwise specified by law, of the posting of award notices, contract execution and subsequent amendments, links to the contract documents, expenditures against the awarded contracts and general expenditures of funds from the American Recovery and Reinvestment Act. Within one (1) working day of the contract award, the agency or governing authority shall post to the designated Web page maintained by the Department of Finance and Administration, notice of the award, including the award recipient, the contract amount, and a brief summary of the contract in accordance with rules promulgated by the department. Within one (1) working day of the contract execution, the agency or governing authority shall post to the designated Web page maintained by the Department of Finance and Administration a summary of the executed contract and make a copy of the appropriately redacted contract documents available for linking to the designated Web page in accordance with the rules promulgated by the department. The information provided by the agency or governing authority shall be posted to the Web page for the duration of the American Recovery and Reinvestment Act funding or until the project is completed, whichever is longer.

(ii) *Bidding process amendment procedure.* If all plans and/or specifications are published in the notification, then the plans and/or specifications may not be amended. If all plans and/or specifications are not published in the notification, then amendments to the plans/specifications, bid opening date, bid opening time and place may be made, provided that the agency or governing authority maintains a list of all prospective bidders who are known to have received a copy of the bid documents and all such prospective bidders are sent copies of all amendments. This notification of amendments may be made via mail, facsimile, electronic mail or other generally accepted method of information distribution. No addendum to bid specifications may be issued within two (2) working days of the time established for the receipt of bids unless such addendum also amends the bid opening to a date not less than five (5) working days after the date of the addendum.

(iii) *Filing requirement.* In all cases involving governing authorities, before the notice shall be published or posted, the plans or specifications for the construction or equipment being sought shall be filed with the clerk of the board of the governing authority. In addition to these requirements, a bid file shall be established which shall indicate those vendors to whom such solicitations and specifications were issued, and such file shall also contain such information as is pertinent to the bid.

(iv) *Specification restrictions.*

1. Specifications pertinent to such bidding shall be written so as not to exclude comparable equipment of domestic manufacture. However, if valid justification is presented, the Department of Finance and Administration or the board of a governing authority may approve a request for specific equipment necessary to perform a specific job. Further, such justification, when placed

on the minutes of the board of a governing authority, may serve as authority for that governing authority to write specifications to require a specific item of equipment needed to perform a specific job. In addition to these requirements, from and after July 1, 1990, vendors of relocatable classrooms and the specifications for the purchase of such relocatable classrooms published by local school boards shall meet all pertinent regulations of the State Board of Education, including prior approval of such bid by the State Department of Education.

2. Specifications for construction projects may include an allowance for commodities, equipment, furniture, construction materials or systems in which prospective bidders are instructed to include in their bids specified amounts for such items so long as the allowance items are acquired by the vendor in a commercially reasonable manner and approved by the agency/governing authority. Such acquisitions shall not be made to circumvent the public purchasing laws.

(v) Agencies and governing authorities may establish secure procedures by which bids may be submitted via electronic means.

(d) Lowest and best bid decision procedure.

(i) *Decision procedure.* Purchases may be made from the lowest and best bidder. In determining the lowest and best bid, freight and shipping charges shall be included. Life-cycle costing, total cost bids, warranties, guaranteed buy-back provisions and other relevant provisions may be included in the best bid calculation. All best bid procedures for state agencies must be in compliance with regulations established by the Department of Finance and Administration. If any governing authority accepts a bid other than the lowest bid actually submitted, it shall place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid, including the dollar amount of the accepted bid and the dollar amount of the lowest bid. No agency or governing authority shall accept a bid based on items not included in the specifications.

(ii) *Decision procedure for Certified Purchasing Offices.* In addition to the decision procedure set forth in paragraph (d)(i), Certified Purchasing Offices may also use the following procedure: Purchases may be made from the bidder offering the best value. In determining the best value bid, freight and shipping charges shall be included. Life-cycle costing, total cost bids, warranties, guaranteed buy-back provisions, documented previous experience, training costs and other relevant provisions may be included in the best value calculation. This provision shall authorize Certified Purchasing Offices to utilize a Request For Proposals (RFP) process when purchasing commodities. All best value procedures for state agencies must be in compliance with regulations established by the Department of Finance and Administration. No agency or governing authority shall accept a bid based on items or criteria not included in the specifications.

(iii) *Construction project negotiations authority.* If the lowest and best bid is not more than ten percent (10%) above the amount of funds allocated for a public construction or renovation project, then the agency or governing authority shall be permitted to negotiate with the lowest bidder in order to enter into a contract for an amount not to exceed the funds allocated.

(e) *Lease-purchase authorization.* For the purposes of this section, the term "equipment" shall mean equipment, furniture and, if applicable, associated software and other applicable direct costs associated with the acquisition. Any lease-purchase of equipment which an agency is not required to lease-purchase under the master lease-purchase program pursuant to Section 31-7-10 and any lease-purchase of equipment which a governing authority elects to lease-purchase may be acquired by a lease-purchase agreement under this paragraph (e). Lease-purchase financing may also be obtained from the vendor or from a third-party source after having solicited and obtained at least two (2) written competitive bids, as defined in paragraph (b) of this section, for such financing without advertising for such bids. Solicitation for the bids for financing may occur before or after acceptance of bids for the purchase of such equipment or, where no such bids for purchase are required, at any time before the purchase thereof. No such lease-purchase agreement shall be for an annual rate of interest which is greater than the overall maximum interest rate to maturity on general obligation indebtedness permitted under Section 75-17-101, and the term of such lease-purchase agreement shall not exceed the useful life of equipment covered thereby as determined according to the upper limit of the asset depreciation range (ADR) guidelines for the Class Life Asset Depreciation Range System established by the Internal Revenue Service pursuant to the United States Internal Revenue Code and regulations thereunder as in effect on December 31, 1980, or comparable depreciation guidelines with respect to any equipment not covered by ADR guidelines. Any lease-purchase agreement entered into pursuant to this paragraph (e) may contain any of the terms and conditions which a master lease-purchase agreement may contain under the provisions of Section 31-7-10(5), and shall contain an annual allocation dependency clause substantially similar to that set forth in Section 31-7-10(8). Each agency or governing authority entering into a lease-purchase transaction pursuant to this paragraph (e) shall maintain with respect to each such lease-purchase transaction the same information as required to be maintained by the Department of Finance and Administration pursuant to Section 31-7-10(13). However, nothing contained in this section shall be construed to permit agencies to acquire items of equipment with a total acquisition cost in the aggregate of less than Ten Thousand Dollars (\$ 10,000.00) by a single lease-purchase transaction. All equipment, and the purchase thereof by any lessor, acquired by lease-purchase under this paragraph and all lease-purchase payments with respect thereto shall be exempt from all Mississippi sales, use and ad valorem taxes. Interest paid on any lease-purchase agreement under this section shall be exempt from State of Mississippi income taxation.

(f) *Alternate bid authorization.* When necessary to ensure ready availability of commodities for public works and the timely completion of public projects, no more than two (2) alternate bids may be accepted by a governing authority for commodities. No purchases may be made through use of such alternate bids procedure unless the lowest and best bidder cannot deliver the commodities contained in his bid. In that event, purchases of such commodities may be made from one (1) of the bidders whose bid was accepted as an alternate.

(g) *Construction contract change authorization.* In the event a determination is made by an agency or governing authority after a construction contract is let that changes or modifications to the original contract are necessary or would better serve the purpose of the agency or the governing authority, such agency or governing authority may, in its discretion, order such changes pertaining to the construction that are necessary under the circumstances without the

necessity of further public bids; provided that such change shall be made in a commercially reasonable manner and shall not be made to circumvent the public purchasing statutes. In addition to any other authorized person, the architect or engineer hired by an agency or governing authority with respect to any public construction contract shall have the authority, when granted by an agency or governing authority, to authorize changes or modifications to the original contract without the necessity of prior approval of the agency or governing authority when any such change or modification is less than one percent (1%) of the total contract amount. The agency or governing authority may limit the number, manner or frequency of such emergency changes or modifications.

(h) *Petroleum purchase alternative.* In addition to other methods of purchasing authorized in this chapter, when any agency or governing authority shall have a need for gas, diesel fuel, oils and/or other petroleum products in excess of the amount set forth in paragraph (a) of this section, such agency or governing authority may purchase the commodity after having solicited and obtained at least two (2) competitive written bids, as defined in paragraph (b) of this section. If two (2) competitive written bids are not obtained, the entity shall comply with the procedures set forth in paragraph (c) of this section. In the event any agency or governing authority shall have advertised for bids for the purchase of gas, diesel fuel, oils and other petroleum products and coal and no acceptable bids can be obtained, such agency or governing authority is authorized and directed to enter into any negotiations necessary to secure the lowest and best contract available for the purchase of such commodities.

(i) *Road construction petroleum products price adjustment clause authorization.* Any agency or governing authority authorized to enter into contracts for the construction, maintenance, surfacing or repair of highways, roads or streets, may include in its bid proposal and contract documents a price adjustment clause with relation to the cost to the contractor, including taxes, based upon an industry-wide cost index, of petroleum products including asphalt used in the performance or execution of the contract or in the production or manufacture of materials for use in such performance. Such industry-wide index shall be established and published monthly by the Mississippi Department of Transportation with a copy thereof to be mailed, upon request, to the clerks of the governing authority of each municipality and the clerks of each board of supervisors throughout the state. The price adjustment clause shall be based on the cost of such petroleum products only and shall not include any additional profit or overhead as part of the adjustment. The bid proposals or document contract shall contain the basis and methods of adjusting unit prices for the change in the cost of such petroleum products.

(j) *State agency emergency purchase procedure.* If the governing board or the executive head, or his designee, of any agency of the state shall determine that an emergency exists in regard to the purchase of any commodities or repair contracts, so that the delay incident to giving opportunity for competitive bidding would be detrimental to the interests of the state, then the provisions herein for competitive bidding shall not apply and the head of such agency shall be authorized to make the purchase or repair. Total purchases so made shall only be for the purpose of meeting needs created by the emergency situation. In the event such executive head is responsible to an agency board, at the meeting next following the emergency purchase, documentation of the purchase, including a description of the commodity purchased, the purchase price thereof and the nature of the emergency shall be presented to the board and placed

on the minutes of the board of such agency. The head of such agency, or his designee, shall, at the earliest possible date following such emergency purchase, file with the Department of Finance and Administration (i) a statement explaining the conditions and circumstances of the emergency, which shall include a detailed description of the events leading up to the situation and the negative impact to the entity if the purchase is made following the statutory requirements set forth in paragraph (a), (b) or (c) of this section, and (ii) a certified copy of the appropriate minutes of the board of such agency, if applicable.

(k) *Governing authority emergency purchase procedure.* If the governing authority, or the governing authority acting through its designee, shall determine that an emergency exists in regard to the purchase of any commodities or repair contracts, so that the delay incident to giving opportunity for competitive bidding would be detrimental to the interest of the governing authority, then the provisions herein for competitive bidding shall not apply and any officer or agent of such governing authority having general or special authority therefor in making such purchase or repair shall approve the bill presented therefor, and he shall certify in writing thereon from whom such purchase was made, or with whom such a repair contract was made. At the board meeting next following the emergency purchase or repair contract, documentation of the purchase or repair contract, including a description of the commodity purchased, the price thereof and the nature of the emergency shall be presented to the board and shall be placed on the minutes of the board of such governing authority.

(l) Hospital purchase, lease-purchase and lease authorization.

(i) The commissioners or board of trustees of any public hospital may contract with such lowest and best bidder for the purchase or lease-purchase of any commodity under a contract of purchase or lease-purchase agreement whose obligatory payment terms do not exceed five (5) years.

(ii) In addition to the authority granted in subparagraph (i) of this paragraph (l), the commissioners or board of trustees is authorized to enter into contracts for the lease of equipment or services, or both, which it considers necessary for the proper care of patients if, in its opinion, it is not financially feasible to purchase the necessary equipment or services. Any such contract for the lease of equipment or services executed by the commissioners or board shall not exceed a maximum of five (5) years' duration and shall include a cancellation clause based on unavailability of funds. If such cancellation clause is exercised, there shall be no further liability on the part of the lessee. Any such contract for the lease of equipment or services executed on behalf of the commissioners or board that complies with the provisions of this subparagraph (ii) shall be excepted from the bid requirements set forth in this section.

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

(i) *Purchasing agreements approved by department.* Purchasing agreements, contracts and maximum price regulations executed or approved by the Department of Finance and Administration.

(ii) *Outside equipment repairs.* Repairs to equipment, when such repairs are made by repair facilities in the private sector; however, engines, transmissions, rear axles and/or other such components shall not be included in this exemption when replaced as a complete unit instead of being repaired and the need for such total component replacement is known before disassembly of the component; however, invoices identifying the equipment, specific repairs made, parts identified by number and name, supplies used in such repairs, and the number of hours of labor and costs therefor shall be required for the payment for such repairs.

(iii) *In-house equipment repairs.* Purchases of parts for repairs to equipment, when such repairs are made by personnel of the agency or governing authority; however, entire assemblies, such as engines or transmissions, shall not be included in this exemption when the entire assembly is being replaced instead of being repaired.

(iv) *Raw gravel or dirt.* Raw unprocessed deposits of gravel or fill dirt which are to be removed and transported by the purchaser.

(v) *Governmental equipment auctions.* Motor vehicles or other equipment purchased from a federal agency or authority, another governing authority or state agency of the State of Mississippi, or any governing authority or state agency of another state at a public auction held for the purpose of disposing of such vehicles or other equipment. Any purchase by a governing authority under the exemption authorized by this subparagraph (v) shall require advance authorization spread upon the minutes of the governing authority to include the listing of the item or items authorized to be purchased and the maximum bid authorized to be paid for each item or items.

(vi) *Intergovernmental sales and transfers.* Purchases, sales, transfers or trades by governing authorities or state agencies when such purchases, sales, transfers or trades are made by a private treaty agreement or through means of negotiation, from any federal agency or authority, another governing authority or state agency of the State of Mississippi, or any state agency or governing authority of another state. Nothing in this section shall permit such purchases through public auction except as provided for in subparagraph (v) of this section. It is the intent of this section to allow governmental entities to dispose of and/or purchase commodities from other governmental entities at a price that is agreed to by both parties. This shall allow for purchases and/or sales at prices which may be determined to be below the market value if the selling entity determines that the sale at below market value is in the best interest of the taxpayers of the state. Governing authorities shall place the terms of the agreement and any justification on the minutes, and state agencies shall obtain approval from the Department of Finance and Administration, prior to releasing or taking possession of the commodities.

(vii) *Perishable supplies or food.* Perishable supplies or food purchased for use in connection with hospitals, the school lunch programs, homemaking programs and for the feeding of county or municipal prisoners.

(viii) *Single source items.* Noncompetitive items available from one (1) source only. In connection with the purchase of noncompetitive items only available from one (1) source, a

certification of the conditions and circumstances requiring the purchase shall be filed by the agency with the Department of Finance and Administration and by the governing authority with the board of the governing authority. Upon receipt of that certification the Department of Finance and Administration or the board of the governing authority, as the case may be, may, in writing, authorize the purchase, which authority shall be noted on the minutes of the body at the next regular meeting thereafter. In those situations, a governing authority is not required to obtain the approval of the Department of Finance and Administration.

(ix) *Waste disposal facility construction contracts.* Construction of incinerators and other facilities for disposal of solid wastes in which products either generated therein, such as steam, or recovered therefrom, such as materials for recycling, are to be sold or otherwise disposed of; however, in constructing such facilities, a governing authority or agency shall publicly issue requests for proposals, advertised for in the same manner as provided herein for seeking bids for public construction projects, concerning the design, construction, ownership, operation and/or maintenance of such facilities, wherein such requests for proposals when issued shall contain terms and conditions relating to price, financial responsibility, technology, environmental compatibility, legal responsibilities and such other matters as are determined by the governing authority or agency to be appropriate for inclusion; and after responses to the request for proposals have been duly received, the governing authority or agency may 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.

(x) *Hospital group purchase contracts.* Supplies, commodities and equipment purchased by hospitals through group purchase programs pursuant to Section 31-7-38.

(xi) *Information technology products.* Purchases of information technology products made by governing authorities under the provisions of purchase schedules, or contracts executed or approved by the Mississippi Department of Information Technology Services and designated for use by governing authorities.

(xii) *Energy efficiency services and equipment.* Energy efficiency services and equipment acquired by school districts, community and junior colleges, institutions of higher learning and state agencies or other applicable governmental entities on a shared-savings, lease or lease-purchase basis pursuant to Section 31-7-14.

(xiii) *Municipal electrical utility system fuel.* Purchases of coal and/or natural gas by municipally owned electric power generating systems that have the capacity to use both coal and natural gas for the generation of electric power.

(xiv) *Library books and other reference materials.* Purchases by libraries or for libraries of books and periodicals; processed film, video cassette tapes, filmstrips and slides; recorded audio tapes, cassettes and diskettes; and any such items as would be used for teaching, research or other information distribution; however, equipment such as projectors, recorders, audio or video equipment, and monitor televisions are not exempt under this subparagraph.

(xv) *Unmarked vehicles.* Purchases of unmarked vehicles when such purchases are made in accordance with purchasing regulations adopted by the Department of Finance and Administration pursuant to Section 31-7-9(2).

(xvi) *Election ballots.* Purchases of ballots printed pursuant to Section 23-15-351.

(xvii) *Multichannel interactive video systems.* From and after July 1, 1990, contracts by Mississippi Authority for Educational Television with any private educational institution or private nonprofit organization whose purposes are educational in regard to the construction, purchase, lease or lease-purchase of facilities and equipment and the employment of personnel for providing multichannel interactive video systems (ITSF) in the school districts of this state.

(xviii) *Purchases of prison industry products.* From and after January 1, 1991, purchases made by state agencies or governing authorities involving any item that is manufactured, processed, grown or produced from the state's prison industries.

(xix) *Undercover operations equipment.* Purchases of surveillance equipment or any other high-tech equipment to be used by law enforcement agents in undercover operations, provided that any such purchase shall be in compliance with regulations established by the Department of Finance and Administration.

(xx) *Junior college books for rent.* Purchases by community or junior colleges of textbooks which are obtained for the purpose of renting such books to students as part of a book service system.

(xxi) *Certain school district purchases.* Purchases of commodities made by school districts from vendors with which any levying authority of the school district, as defined in Section 37-57-1, has contracted through competitive bidding procedures for purchases of the same commodities.

(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.

(xxiii) *Municipal water tank maintenance contracts.* Professional maintenance program contracts for the repair or maintenance of municipal water tanks, which provide professional services needed to maintain municipal water storage tanks for a fixed annual fee for a duration of two (2) or more years.

(xxiv) *Purchases of Mississippi Industries for the Blind products.* Purchases made by state agencies or governing authorities involving any item that is manufactured, processed or produced by the Mississippi Industries for the Blind.

(xxv) *Purchases of state-adopted textbooks.* Purchases of state-adopted textbooks by public school districts.

(xxvi) *Certain purchases under the Mississippi Major Economic Impact Act.* Contracts entered into pursuant to the provisions of Section 57-75-9(2), (3) and (4).

(xxvii) *Used heavy or specialized machinery or equipment for installation of soil and water conservation practices purchased at auction.* Used heavy or specialized machinery or equipment used for the installation and implementation of soil and water conservation practices or measures purchased subject to the restrictions provided in Sections 69-27-331 through 69-27-341. Any purchase by the State Soil and Water Conservation Commission under the exemption authorized by this subparagraph shall require advance authorization spread upon the minutes of the commission to include the listing of the item or items authorized to be purchased and the maximum bid authorized to be paid for each item or items.

(xxviii) *Hospital lease of equipment or services.* Leases by hospitals of equipment or services if the leases are in compliance with paragraph (1)(ii).

(xxix) *Purchases made pursuant to qualified cooperative purchasing agreements.* Purchases made by certified purchasing offices of state agencies or governing authorities under cooperative purchasing agreements previously approved by the Office of Purchasing and Travel and established by or for any municipality, county, parish or state government or the federal government, provided that the notification to potential contractors includes a clause that sets forth the availability of the cooperative purchasing agreement to other governmental entities. Such purchases shall only be made if the use of the cooperative purchasing agreements is determined to be in the best interest of the governmental entity.

(xxx) *School yearbooks.* Purchases of school yearbooks by state agencies or governing authorities; provided, however, that state agencies and governing authorities shall use for these purchases the RFP process as set forth in the Mississippi Procurement Manual adopted by the Office of Purchasing and Travel.

(xxxi) *Design-build method and dual-phase design-build method of contracting.* Contracts entered into under the provisions of Section 31-7-13.1, 37-101-44 or 65-1-85.

(xxxii) *Toll roads and bridge construction projects.* Contracts entered into under the provisions of Section 65-43-1 or 65-43-3.

(xxxiii) *Certain purchases under Section 57-1-221.* Contracts entered into pursuant to the provisions of Section 57-1-221.

(n) *Term contract authorization.* All contracts for the purchase of:

(i) All contracts for the purchase of commodities, equipment and public construction (including, but not limited to, repair and maintenance), may be let for periods of not more than sixty (60) months in advance, subject to applicable statutory provisions prohibiting the letting of contracts during specified periods near the end of terms of office. Term contracts for a period exceeding twenty-four (24) months shall also be subject to ratification or cancellation by governing authority boards taking office subsequent to the governing authority board entering

the contract.

(ii) Bid proposals and contracts may include price adjustment clauses with relation to the cost to the contractor based upon a nationally published industry-wide or nationally published and recognized cost index. The cost index used in a price adjustment clause shall be determined by the Department of Finance and Administration for the state agencies and by the governing board for governing authorities. The bid proposal and contract documents utilizing a price adjustment clause shall contain the basis and method of adjusting unit prices for the change in the cost of such commodities, equipment and public construction.

(o) *Purchase law violation prohibition and vendor penalty.* No contract or purchase as herein authorized shall be made for the purpose of circumventing the provisions of this section requiring competitive bids, nor shall it be lawful for any person or concern to submit individual invoices for amounts within those authorized for a contract or purchase where the actual value of the contract or commodity purchased exceeds the authorized amount and the invoices therefor are split so as to appear to be authorized as purchases for which competitive bids are not required. Submission of such invoices shall constitute a misdemeanor punishable by a fine of not less than Five Hundred Dollars (\$ 500.00) nor more than One Thousand Dollars (\$ 1,000.00), or by imprisonment for thirty (30) days in the county jail, or both such fine and imprisonment. In addition, the claim or claims submitted shall be forfeited.

(p) *Electrical utility petroleum-based equipment purchase procedure.* When in response to a proper advertisement therefor, no bid firm as to price is submitted to an electric utility for power transformers, distribution transformers, power breakers, reclosers or other articles containing a petroleum product, the electric utility may accept the lowest and best bid therefor although the price is not firm.

(q) *Fuel management system bidding procedure.* Any governing authority or agency of the state shall, before contracting for the services and products of a fuel management or fuel access system, enter into negotiations with not fewer than two (2) sellers of fuel management or fuel access systems for competitive written bids to provide the services and products for the systems. In the event that the governing authority or agency cannot locate two (2) sellers of such systems or cannot obtain bids from two (2) sellers of such systems, it shall show proof that it made a diligent, good-faith effort to locate and negotiate with two (2) sellers of such systems. Such proof shall include, but not be limited to, publications of a request for proposals and letters soliciting negotiations and bids. For purposes of this paragraph (q), a fuel management or fuel access system is an automated system of acquiring fuel for vehicles as well as management reports detailing fuel use by vehicles and drivers, and the term "competitive written bid" shall have the meaning as defined in paragraph (b) of this section. Governing authorities and agencies shall be exempt from this process when contracting for the services and products of fuel management or fuel access systems under the terms of a state contract established by the Office of Purchasing and Travel.

(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 into 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.

(s) *Minority set-aside authorization.* Notwithstanding any provision of this section to the contrary, any agency or governing authority, by order placed on its minutes, may, in its discretion, set aside not more than twenty percent (20%) of its anticipated annual expenditures for the purchase of commodities from minority businesses; however, all such set-aside purchases shall comply with all purchasing regulations promulgated by the Department of Finance and Administration and shall be subject to bid requirements under this section. Set-aside purchases for which competitive bids are required shall be made from the lowest and best minority business bidder. For the purposes of this paragraph, the term "minority business" means a business which is owned by a majority of persons who are United States citizens or permanent resident aliens (as defined by the Immigration and Naturalization Service) of the United States, and who are Asian, Black, Hispanic or Native American, according to the following definitions:

(i) "Asian" means persons having origins in any of the original people of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.

(ii) "Black" means persons having origins in any black racial group of Africa.

(iii) "Hispanic" means persons of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race.

(iv) "Native American" means persons having origins in any of the original people of North America, including American Indians, Eskimos and Aleuts.

(t) *Construction punch list restriction.* The architect, engineer or other representative designated by the agency or governing authority that is contracting for public construction or renovation may prepare and submit to the contractor only one (1) preliminary punch list of items that do not meet the contract requirements at the time of substantial completion and one (1) final list immediately before final completion and final payment.

(u) *Procurement of construction services by state institutions of higher learning.* Contracts for privately financed construction of auxiliary facilities on the campus of a state institution of higher learning may be awarded by the Board of Trustees of State Institutions of Higher Learning to the lowest and best bidder, where sealed bids are solicited, or to the offeror whose proposal is determined to represent the best value to the citizens of the State of Mississippi, where requests for proposals are solicited.

(v) *Insurability of bidders for public construction or other public contracts.* In any solicitation for bids to perform public construction or other public contracts to which this section applies including, but not limited to, contracts for repair and maintenance, for which the contract will require insurance coverage in an amount of not less than One Million Dollars (\$ 1,000,000.00), bidders shall be permitted to either submit proof of current insurance coverage in the specified amount or demonstrate ability to obtain the required coverage amount of insurance if the contract is awarded to the bidder. Proof of insurance coverage shall be submitted within five (5) business days from bid acceptance.

(w) *Purchase authorization clarification.* Nothing in this section shall be construed as authorizing any purchase not authorized by law.