

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

NO. 2010-CA-00717

FREDA HOWELL d/b/a LICKITY SPLITZ

APPELLANT

vs.

JEFFERSON DAVIS COUNTY BOARD OF SUPERVISORS

APPELLEE

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

REPLY BRIEF OF THE APPELLANT
FREDA HOWELL d/b/a LICKITY SPLITZ

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ARGUMENT

A. The Board's action was invalid.

Apparently, the Board's response to the clear evidence that the Board acted outside of a properly noticed meeting is to simply declare that no such thing happened--despite the Board's attorney's letter which plainly speaks of the Board's "*decision*" to use the alternate bidder [the "...Board of Supervisors *has decided* to use the alternate bidder..."; R.E. 28]. The board attorney's letter clearly references action which had already taken place, and that action took place outside of a lawful meeting.

Such action is supposed to take place only in properly noticed meetings. Board decisions "must be determined or decided upon only in or at a lawfully convened session." Thompson v. Jones County Community Hospital, 352 So. 2d 795, 796 (Miss. 1977).

As the Board points out, "it can speak only through its minutes." [Appellee's brief at 10]. However, when a board, such as here, attempts to act otherwise, and does so outside of a properly noticed meeting--as the Board attorney's letter clearly evidences-- that action must be declared invalid. Lee County v. James, 174 So. 76, 178 Miss. 554, at 559 (Miss. 1937)(action of a board "must" be through its minutes, can be evidenced "in no other way."). Here, the Board has acted outside of a properly noticed meeting, then claims that it is impossible to do so, and propounds that as a defense. Not only is that not a defense, it is illogical and without foundation.

No matter how the Board attempts to dance around the obvious, what is clear is that

the Board made the *decision* to use someone other than the low bidder *outside* of a “lawfully convened session.” As such, that “decision” was invalid, and the Board’s entire “house of cards” must come tumbling down, as the purported actions taken by the Board thereafter were invalid as well.

Without repeating the arguments in its original brief, Lickity Splitz submits that the fact that the board acted outside a properly noticed meeting also constitutes “arbitrary and capricious” action by the board.

The “visit” to Lickity Splitz’s premises by certain Board members and the sheriff was not proper. The visit occurred *after* the bid had already been awarded by the Board. If the Board had questions as to Lickity Splitz’s ability to carry out the service, then the Board could have taken the bids under advisement and scheduled planned “visits” to the various bidders before awarding the bid—although such a procedure should have been contained in the bid specifications to actually be valid. As it were, the Board never even gave Lickity Splitz the chance to carry out its duties, despite the fact that it had done so and continues to do so for public entities in the adjoining county.

B. Stockstill is not the controlling case in this matter.

The Board bases much of its argument on the case of Huey Stockstill, Inc. v. Hales, 730 So. 2d 539 (Miss. 1998). The Board’s observation that Lickity Splitz did not mention the *Stockstill* case in its brief is of no consequence. The *Stockstill* case is clearly distinguishable from the instant case on multiple fronts.

First, the factual differences are telling. In *Stockstill*, the low bidder's bid was prepared by an employee who was a former supervisor who had been out of office for only some three and a half months. *Id.*, 730 So. 2d at 541. The Mississippi Ethics Commission issued a written opinion stating that a former supervisor, as an employee of the (bidding) corporation, has a "prohibited interest" in all contracts between the county and that corporation during his term *and* for one year thereafter. *Id.* Therefore, the board of supervisors in *Stockstill* awarded the bid to the next lowest bidder, and the legal challenge from the low bidder then ensued. That case was further complicated by the fact that one board member was the brother of the majority stockholder of the complaining (and low) bidder.

Second, in *Stockstill*, the Board amended a decision made in a properly noticed meeting—not a "decision" made prior to and outside of such a meeting. *Id.* at 542.

Third, in *Stockstill*, the Court noted that "the supervisors here followed at least the spirit of the bid process requirements and adhered in most respects to the letter of the law." *Id.* at 543. That conclusion cannot be drawn in the instant case, given the Board Attorney's letter referencing the "decision" of the Board made some eleven days prior to the meeting which purportedly "ratified" this decision. The *Stockstill* case involved a "technical defect" in the bid process. The Board's attempt to equate the instant case with *Stockstill* falls short and has no merit.

Fourth, in *Stockstill*, the Court quoted the general rule as to amendments of council meeting minutes as stated in an Alabama case, *City of Guntersville v. Walls*, 252 Ala. 66, 39

So. 2d 567 (1949). The Alabama court noted that, generally, a council may at a subsequent meeting correct the minutes of a previous meeting. However, that court also stated: “On the other hand, an erroneous record of the proceeding...cannot be corrected or amended to the destruction of rights acquired under it in good faith, without notice of the error.” *Walls*, 39 So. 2d at 569.

In the instant case, the board has attempted to “correct” an invalid “decision” at its later meeting of January 20, 2009, a meeting of which Lickity Splitz received no notice. In no way did Lickity Splitz receive “the requisite procedural due process provided under Mississippi law before its interest was terminated” and to which it was entitled. (Circuit Court’s Order of December 29, 2009 at 3, R.E. 15, R. 125). Due to the board’s actions, Lickity Splitz has suffered “the destruction of rights” it had acquired in good faith by virtue of being the lowest bidder.

C. Miss. Code Ann. § 31-7-13(f) is not applicable to this matter.

As to this dispute, the applicable provision from Miss. Code Ann. § 31-7-13 is § 31-7-13(d)(i), not § 31-7-13(f). By its own language, subsection (f) applies to “public works” and “public projects,” including commodities “for” public works. That subsection is not applicable to the provision of prisoners’ meals for a county jail. There is likewise no justification under that subsection for affirming the trial court’s ruling. As stated in the original brief of Lickity Splitz, the relevant subsection is (d)(i), which clearly states that “[n]o agency or governing authority shall accept a bid based on items not included in the

specifications.”

D. Damages should be awarded in this case.

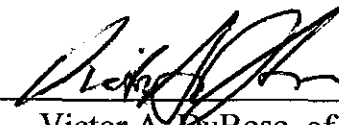
Lickity Splitz submits that it is entitled to an award of damages in this case, including contractual damages equal to lost profits from the bid, and penal and consequential damages, including attorneys’ fees. Lickity Splitz did not state in its original brief that an award of some specific amount or amounts should be made by this Court. Lickity Splitz submits that the proper course of action would be a rendering that Lickity Splitz is entitled to those damages and the remand of this matter to the circuit court for a determination of the particular damage amounts.

CONCLUSION

The improper actions of the Board of Supervisors of Jefferson Davis County deprived appellant Lickity Splitz of its opportunity to perform the 2009 prisoner meals service. The decision of the Circuit Court of Jefferson Davis County should be reversed, and damages awarded to Lickity Splitz, including contractual damages, consequential and penal damages, and attorneys’ fees.

Respectfully submitted this the 19th day of November, 2010.

FREDA HOWELL d/b/a LICKITY SPLITZ,
Appellant

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CERTIFICATE OF SERVICE

I, Victor A. DuBose, certify that I have this day sent via U. S. Mail, postage paid and properly addressed, a copy of the above Reply Brief of the Appellant to:

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