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

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

Al Shiyou, MB#[redacted]
Victor A. DuBose, MB#[redacted]
SHIYOU LAW FIRM
301 W. Pine Street
P. O. Box 310
Hattiesburg, MS 39403-0310
Telephone (601) 583-6040

Oral Argument Requested

CERTIFICATE OF INTERESTED PERSONS

The following have a possible interest in the outcome of this case:

Freda Howell, d/b/a Lickity Splitz [Appellant], and Michelle Howell

Their attorneys, Al Shiyou and Victor A. DuBose, Shiyou Law Firm

The Board of Supervisors of Jefferson Davis County, Mississippi; Appellee

Their attorneys, Wes Daughdrill, Robert E. Sanders, Young Williams Firm

Bassfield Texaco, 4110 Hwy 42, Bassfield, MS

STATEMENT AS TO ORAL ARGUMENT REQUESTED

The Appellant submits that oral argument is advisable in the instant case, as it contends the Board of Supervisors initially acted without legal authority in taking away the bid previously awarded to the Appellant, and that all subsequent attempts by the Board of Supervisors to "ratify" its improper action must likewise fail.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITY

STATEMENT OF THE ISSUES

I. The Jefferson Davis County Board of Supervisors acted outside of a properly noticed and convened board meeting in taking away the bid previously awarded to Lickity Splitz, the Appellant, in what constitutes an unlawful meeting;

II. The Circuit Court abused its discretion in both directing the Board to, in effect, "do over" and "correct" its previous improper action and in restricting the material considered to not include a hearing or any additional evidence or findings;

III. The Board improperly considered matters outside of the bid specifications, and at no time in the proceedings below did the Board afford an opportunity for the Appellant to address its putative concerns;

IV. In taking away the bid from Lickity Splitz and doing so outside of a proper meeting, the Board's actions were arbitrary and capricious, and were not "cured" by its attempted *nunc pro tunc* amendments;

V. Lickity Splitz was well qualified to provide the advertised service, prisoner meals, and had done so for the adjoining county's jail.

STATEMENT OF THE CASE

Freda Howell d/b/a Lickity Splitz [hereinafter, "Lickity Splitz"], the Appellant herein, appeals the order and decision of the Circuit Court of Jefferson Davis County, Mississippi filed April 5, 2010, denying the appeal of Lickity Splitz from the actions and decisions of the Board of Supervisors of Jefferson Davis County, Mississippi [hereinafter also referred to as "Board of Supervisors" or "the Board"].

Lickity Splitz was the lowest bidder to provide prisoners' meals for the Jefferson County jail following the Board of Supervisors' advertisement for bids for same, and was awarded said bid on January 5, 2009 at the Board's meeting. (R.E. 59, R. 163). However, four days later, on January 9, 2009, the Board's attorney sent a letter to Lickity Splitz which stated that the Board "has decided" to use the "alternate bidder," rather than Lickity Splitz, and stated that "[t]his decision is based on the personal inspection of your facility conducted by the Sheriff and representatives of the Board." (R.E. 61, R.165).

Eleven days later, on January 20, 2009, the Board issued an "Order Authorizing and Ratifying Use of Alternate Bidder to Provide Prisoner Meals", which purported to ratify the above January 9, 2009 letter from the Board's attorney to Lickity Splitz, and which "ordered" and "ratified" that the alternate bidder, Bassfield Texaco, provide the prisoner meals; the order stated that "based on the negative report received from Sheriff McCullum and the representatives of the Board regarding the conditions of said [Lickity Splitz] facilities, the

Board has found that Lickity Splitz cannot deliver the commodities contained in their bid." (R.E. 62, R. 166).

Lickity Splitz timely appealed the Board's order to the Circuit Court of Jefferson Davis County and filed its Bill of Exceptions and brief in support of its appeal. (R.E. 18, R. 9-11). By order filed December 29, 2009, the circuit court found that Lickity Splitz "was vested with a constitutionally protected property interest in the Prisoner Meals contract for 2009" and was "entitled to the requisite procedural due process provided under Mississippi law before its interest was terminated." (Order of December 29, 2009 at 3, R.E. 15, R.. 125). The circuit court "remanded" the matter back to the Board of Supervisors and stated that the Board's finding "is currently an unsupported conclusory assertion." (*Id.* at 5, R.E. 17, R.127). The circuit court ordered that: "The Board is hereby directed to *nunc pro tunc* amend its minutes to include the report presented to the Board by Sheriff McCullum and the representatives of the Board at the January 20, 2009 meeting. In the event the report cannot be incorporated into the minutes, the President of the Board is directed to submit a signed affidavit to be incorporated stating that the report was presented to the Board." (*Id.* at 5, emphasis by the circuit court, R.E. 17, R.127). The order gave further detail as to the expected content of the affidavit and amendment to the Board's minutes. (R.E. 17, R. 127). The order did not provide for an opportunity for a hearing or other means through which Lickity Splitz could address the Board or its concerns or present evidence.

On or about February 2, 2010, counsel for Lickity Splitz received copies of two *nunc pro tunc* amendments to the January 20, 2009 [and January 5, 2009, as to one of the

amendments] minutes of the Board of Supervisors, said amendments dated January 19, 2010, though said minutes were not timely assigned a book and page number. (Order of circuit court of April 5, 2010 at 4, R.E. 6, R. 202). The *nunc pro tunc* amendments purported to (1) incorporate an affidavit of the Board president dated January 19, 2010 into the minutes, which allegedly gave the details directed by the circuit court in its order of December 29, 2009, and (2) stated the amounts of the bids of the low bidder, Lickity Splitz, which was $11.00 per day per inmate, and the "alternate" bidder, Bassfield Texaco, which was $13.50 per day per inmate. (R.E. 64-66, R. 169, 175-76). On February 8, 2010, Lickity Splitz submitted its second notice of appeal in this matter.[1] (R. 128-29).

On April 5, 2010, the circuit court's order deciding this second appeal was filed and entered by the circuit clerk. In that order, the circuit court held that the decision of the Board of Supervisors was affirmed. (R.E. 11-12, R. 207-08). To the argument by Lickity Splitz that the January 9, 2009 Board attorney's letter reflected improper Board action, the circuit court held that the Board's "decision" to award the contract to the alternate bidder "did not occur until the Board entered the minutes from its January 20, 2009 meeting," and also stated that "[u]ntil the Board entered its minutes from the January 20, 2009 meeting, [Lickity Splitz] still had a right to perform the prisoner meals contract for 2009." (order of April 5, 2010 at 8, 9; R.E. 10, 11, R. 206-07). The circuit court also held that the *nunc pro tunc* amendments of the Board of January 19, 2010 were proper and related back to the January 20, 2009 minutes of

[1]Counsel for Lickity Splitz was directed by the law clerk of the circuit court to submit the second appeal under the same cause number as the first [and existing] appeal.

a year earlier. (order at 6, R.E. 8, R. 204).

STATEMENT OF THE FACTS

The appellant, Lickity Splitz, was the low bidder to provide prisoner meals for the Jefferson Davis County Jail for the calendar year 2009, following the opening of bids by the Board of Supervisors on January 5, 2009, and was accepted and approved by unanimous vote of the Board that same day. (January 5, 2009 Board Order, "Order Accepting Bids and Awarding Contracts for County Supplies and Services"; R.E. 57-60, R. 161-64). Lickity Splitz was identified in said order as the "Primary Bid" and Bassfield Texaco was the "Alternate Bid." Lickity Splitz is located in adjacent Covington County, and has provided prisoner meals for the Covington County Jail and City of Collins for a number of years. (R.E. 46, 47, 49; R.s 143, 144, 146).

Four days later, the Board Attorney for the Board of Supervisors sent a letter dated January 9, 2009 to Lickity Splitz, in which he stated that the Board "***has decided*** to use the alternate bidder to provide prisoner meals for the Jefferson Davis County Jail. ***This decision*** is based on the personal inspection of your facility conducted by the Sheriff and representatives of the Board." [emphasis added](January 9, 2009 letter from Board Attorney to Lickity Splitz, R.E. 61, R. 165) . Lickity Splitz was given no prior notice of "this decision" and no notice of a duly-authorized meeting at which said "decision" was made, and thus had no opportunity to address any concerns of the Board or even hear the purported basis for the

"decision."

Lickity Splitz timely filed its notice of appeal on January 20, 2009. (R. 9, 10). That same day, unknown at that time to Lickity Splitz, the Board of Supervisors adopted an "Order Authorizing and Ratifying Use of Alternate Bidder to Provide Prisoner Meals. (R.E. 62, R. 166). The order states that "Sheriff McCullum and representatives of the Board have personally inspected the facilities of Lickity Splitz...and...based on the negative report received from Sheriff McCullum and the representatives of the Board regarding the conditions of said facilities, the Board has found that Lickity Splitz cannot deliver the commodities contained in their bid." The order states that it is "ordered" and "ratified" that the alternate bidder, Bassfield Texaco, shall provide the prisoner meals for the year 2009. The order also stated that it is "further ordered" that the Board Attorney's January 9, 2009 letter to Lickity Splitz "is hereby ratified." (*Id.*).

Just prior to filing its Bill of Exceptions, submitted on January 30, 2009, Lickity Splitz received a letter dated January 27, 2009 from the Board Attorney transmitting a copy of the Board's above-referenced January 20, 2009 "ratifying" order. (R.E. 63, R. 167). Lickity Splitz timely filed its Bill of Exceptions and submitted same to the Board of Supervisors, which filed a response to the Bill of Exceptions with an index of record. (R.E. 18-32, R.s 11-25, 45-62).

SUMMARY OF THE ARGUMENT

Longstanding Mississippi law holds that decisions made by Boards of Supervisors or contracts awarded by them must be done so only in lawfully convened sessions. It is undisputed in the instant case that the bid of Lickity Splitz was initially "approved and accepted" by the Jefferson Davis County Board of Supervisors in its meeting of and through its Order dated January 5, 2009. (R.E. 57-60, R. 161-64). However, on January 9, 2009, the attorney for the Board of Supervisors sent a letter to Lickity Splitz stating that the Board "*has* decided to use the alternate bidder." (R.E. 61, R. 165). The Board Attorney's letter references previous purported action of the Board of Supervisors, sometime after the bid acceptance of January 5, 2009 and prior to the attorney's letter of January 9, though it is undisputed that no legally-noticed Board meeting took place during that interim.

Any "substantial action" taken by a board of supervisors "must be evidenced by entries on their minutes, and can be evidenced in no other way." *Lee County v. James*, 174 So. 76, 178 Miss. 554, at 559 (Miss. 1937). The Board's "decision" to use the alternate bidder was, therefore, improper, and must be reversed. The Board's actions also violated Miss. Code Ann. § 31-7-13(d)(i) and were arbitrary and capricious. The Board of Supervisors did not comply with this statute, either via the "letter" of January 9, 2009 or its attempted "ratification" order of January 20, 2009.

The circuit court initially remanded this matter back to the Board of Supervisors, via its order filed December 29, 2009. However, both the circuit court's remand and the

subsequent action by the Board were flawed, and the case should be reversed as a result. On January 19, 2010, almost one year to the day from its previous "ratified" order of January 20, 2009, the Board purported to provide its "basis" for its action via *nunc pro tunc* amendments to its minutes of a year prior. However, no hearing was conducted and no *new* evidence or findings were taken or permitted by the Board or circuit court. As a result, the Board's actions were arbitrary and capricious. The Board cannot take "after the fact" action to make legitimate that which was illegitimately done in the first place. No amount of "ratifying" improper and invalid actions of the Board by that Board can make what is unlawful, lawful. The circuit court's failure to recognize this improper Board action constitutes an abuse of discretion and requires reversal.

The Board of Supervisors also based its actions upon matters and items not included in the bid specifications, in violation of § 31-7-13(d)(i). The scant specifications contained no language whatsoever that would have permitted the Board, or anyone on its behalf, to "inspect" the successful bidder, in order for that bidder to "retain" its award. (R.E. 51, 52; R. 152-53). The Board acted improperly in considering items not included in the specifications, in plain violation of the above statute. The methods employed by the Board cannot be allowed to "circumvent" public purchase laws and impair their "broad public importance."

In addition, Lickity Splitz was experienced and well-qualified to provide the awarded service. Lickity Splitz provided said meals for the adjoining county's jail, i.e., Covington County, in both 2007 and 2009, without incident. It did not provide said food for Covington

County in 2008 or 2010 because it was not the low bidder–that county awarded its prisoner meals contract to the low bidder in 2007, 2008, 2009, and 2010. Lickity Splitz was the lowest and successful bidder for the 2010 meals contract for the City of Collins and is presently providing those meals. Thus, it is clear that Lickity Splitz had the capacity to fulfill the contract with Jefferson Davis County.

This Honorable Court should award full contractual damages to Lickity Splitz, including the profits it would have gained had the contract been fulfilled, as well as consequential and penal damages, and attorney's fees and expenses, interest, and all costs of court.

ARGUMENT

Standard of Review

Under the law of this state, the decision of a board of supervisors "is not to be disturbed unless the [board's] order was unsupported by substantial evidence; was arbitrary or capricious; was beyond the [board's] scope or powers; or violated the constitutional or statutory rights of the aggrieved party." *Lee County Bd. of Supervisors v. Scott*, 909 So 2d 1223, 1225 (Miss. Ct. App. 2005) (quoting *Board of Law Enforcement Officers Standards & Training v. Butler*, 672 So. 2d 1196, 1199 (Miss. 1996)). As to questions of law, the Court's review is de novo. *A & F Properties, LLC v. Madison Co. Bd. Of Supervisors*, 933 So. 2d 296, 300 (Miss. 2006).

The Board Attorney's letter of January 9, 2009 and the actions it references cannot constitute proper Board action.

It has long been the law in this state that "the decisions to be executed or the contracts to be awarded by the board [of supervisors] *must* be determined or decided upon *only in or at* a lawfully convened session, and the proceedings must be entered upon the minutes, of the board or commission." *Lee County v. James*, 174 So. 76, 178 Miss. 554, 558 (Miss. 1937) [emphasis added]. It is undisputed in the instant case that the bid of Lickity Splitz was "approved and accepted" by the Board of Supervisors of Jefferson Davis County by its Order dated January 5, 2009. (R.E. 57-60; R. 161-64).

Four days later the attorney for the Jefferson Davis County Board of Supervisors sent a letter dated *January 9*, 2009 to Lickity Splitz stating that the Board of Supervisors ***"has decided*** to use the alternate bidder..." The letter also states that "[t]his ***decision is*** based upon the personal inspection of your facility conducted by the Sheriff and representatives of the Board." (R.E. 61; R. 165).

Clearly, the Board Attorney's letter references *previous purported action* of the Board of Supervisors, sometime after the bid acceptance of January 5, 2009 and prior to the attorney's letter of January 9, yet it is undisputed that no legally-noticed Board meeting took place during that interim. In addition, the language of the above letter plainly evidences actions *already* taken, and there is ***no*** reference to any future Board action. Further, on the basis of the record that existed at the time the letter was sent, there is not even an indication of the number of "representatives of the Board" who were present at the purported "inspection" of Lickity Splitz's facility.

What can be clearly concluded is that the Board's Attorney reported to Lickity Splitz a "decision" of the Board before a legally-noticed meeting of the Board had taken place. *"We have consistently held that a board of supervisors can only act through its minutes."* *Lee County Bd. Of Supervisors v. Scott*, 909 So. 2d 1223, 1226 (Miss. Ct. App. 2005) [emphasis added] (citing cases, including *Martin v. Newell*, 198 Miss. 809, 815, 23 So. 2d 796, 797 (Miss. 1945)).

The Mississippi Supreme Court has long held that any "substantial action" taken by a board of supervisors "*must* be evidenced by entries on their minutes, and can be evidenced

in *no other way*." *Lee County v. James*, 174 So. 76, 178 Miss. 554, at 559 (Miss. 1937) [emphasis added], *see also Thompson v. Jones County Community Hospital*, 352 So. 2d 795, 796 (Miss. 1977); *George County v. Davis*, 721 So. 2d 1101, 1107 (Miss. 1998); *Lange v. City of Batesville*, 972 So. 2d 11, 18 (Miss. Ct. App. 2008) (citing *Thompson*).

A letter from the Board Attorney plainly does not meet that requirement.

Here, the Board has attempted to "act" via the Board attorney's letter, or at a prior Board meeting that was not legally noticed. Either of those cannot constitute legitimate action by the Board of Supervisors. Lickity Splitz respectfully but strongly submits that on that basis alone, the decision of the circuit court should be reversed and rendered by this Court.

In its order affirming the Board's action, the circuit court gave too little significance to the Board Attorney's letter of January 9, 2009, and incorrectly held that "[u]ntil the Board entered its minutes from the January 20, 2009 meeting, the Appellant [Lickity Splitz] still had a right to perform the prisoner meals contract for 2009." (Order of April 5, 2010 at 9; R.E. 11; R. 207). To the contrary, by January 9, 2009, the Board had *already made* the "decision" to give the meals contract to the second bidder, Bassfield Texaco.

The Board's actions violate Miss. Code Ann. § 31-7-13(d)(i).

The Board's action was arbitrary and capricious.

The Board's advertisement for bids gave notice that the Board would take sealed bids for a number of items, including "10. Maintenance and operation of county offices, jail

facilities, equipment, buildings, and grounds *including prisoner meals* and pest control of Jefferson Davis County." [emphasis added](R.E. 51, 52; R. 152-53). No other items of consideration specific to the prisoner meals were included in the advertisement. That advertisement did not provide for "inspections" of the bidders' facilities by the Sheriff and unnamed representatives of the Board (or anyone else), either before or after the bid was awarded by the Board.

Mississippi law requires that if the Board wished to accept a bid other than the lowest bid, the Board "*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." Miss. Code Ann. § 31-7-13(d)(i) [emphasis added] . Clearly, in the instant case, the Board of Supervisors did not comply with this statute. The only basis for the Board's purported rescission of the award was one brief sentence: "...based on the negative report received from Sheriff McCullum and the representatives of the Board regarding the conditions of said facilities, the Board has found that Lickity Splitz cannot deliver the commodities contained in their bid." (R.E. 62; R. 166).

In addition to failing to state the amount of the two bids in its order of January 20, 2009, the Board stated no real basis for its purported rescission, save the unauthorized and improper "visit" to Lickity Splitz by the Sheriff and unnamed board representatives. Such action is clearly "arbitrary and capricious" and should not be allowed to stand. *Canton Farm Equip., Inc. v. Richardson*, 501 So. 2d 1098, 1104 (Miss. 1987).

In its order of January 20, 2009, the Board utterly failed to follow the mandates of the relevant statute, § 31-7-13. That order gave no dollar amounts of either bid, and did not state *any* "detailed calculations" or a "narrative summary" showing that the Bassfield Texaco bid was indeed determined to be the lowest and best bid.

The circuit court's remand effort was inadequate and the Board action taken thereafter also must fail.

In its order filed December 29, 2009, the circuit court remanded this matter back to the Board of Supervisors, and directed the Board to put on its minutes both the missing bid amounts and the missing calculations and narrative summary. (R.E. 17; R. 127). On January 19, 2010, almost one year to the day from its previous "ratified" order of January 20, 2009, the Board purported to provide its "basis" for its action via the *nunc pro tunc* amendments to its minutes of a year prior. (R.E. 64, 65-66; R. 169, 175-76). This action was improper and inadequate and should not be permitted to stand.

In *Sunland Publishing Co., Inc. v. City of Jackson*, 710 So. 2d 879 (Miss. 1998), the circuit court therein had remanded the matter back to the City Council with instructions for further findings to be included in an order. However, on remand, the council did not conduct a hearing "and no additional evidence or testimony which could constitute further findings occurred." *Sunland Publishing*, 710 So. 2d at 881. The Mississippi Supreme Court reversed the circuit court's affirmance of the council's amended order, and noted that "the judge affirmed the Council's amended order without the council having conducted any further

hearings or making additional findings of fact." *Id.* at 883. The Court held that the failure of the City Council to follow the circuit court's earlier order was "arbitrary and capricious." *Id.* at 884.

In the instant case, the circuit court did not even give the opportunity for a hearing to be conducted or for additional evidence or testimony to be taken which could have constituted further findings–instead, the circuit court dictated that the Board use the *"nunc pro tunc"* modus in an apparent attempt to "unring the bell." Lickity Splitz respectfully but strongly submits that the circuit court erred in this attempt, and that any such effort to "correct" the Board's arbitrary and capricious "unsupported conclusory assertion" must fail. (Order of December 29, 2009 at 5, R.E. 17; R. S127).

The circuit court erred in giving the Board of Supervisors what was, in operation and effect, a "do over," allowing the Board *after the fact* to attempt to justify a decision that was, itself, originally done *after the fact.* The circuit court's action constitutes an abuse of discretion and reversible error. *See, e.g., Gannett River States Publishing Corp. v. Jackson Advocate*, 856 So. 2d 247, 249 (Miss. 2003).

The *original* "revocation" action of the Board took place sometime after the Board's meeting of January 5, 2009–in which Lickity Splitz was awarded the meals contract as low bidder–and before the Board Attorney's letter of January 9, 2009 addressed to the appellant, informing her that the Board "has decided" to use the alternate bidder. It is also clear that such "action" by the Board is unlawful and void, as this "action" took place without a properly convened Board meeting and without any notice whatsoever to the appellant. The

appellant respectfully but strongly submits that the Board cannot take "after the fact" action to make legitimate that which was illegitimately done in the first place. The additional bite at the apple, i.e., the Board's *nunc pro tunc* order of January 19, 2010, should fare no better.

In addition, by the terms of the circuit court's order of December 29, 2009, no "new" evidence or testimony was to be permitted or considered by the Board–the circuit court specifically stated that any report received by the Board was to reflect only the "actual occurrences" at the year-earlier meeting of January 20, 2009. (Order of December 29, 2009 at 5, R.E. 17; R. S127). Therefore, the circuit court's order did not provide the opportunity called for in *Sunland Publishing* for a hearing and the receipt of additional evidence (though, ultimately, that circuit court affirmed that council's failure to do such, which led to the reversal by the Mississippi Supreme Court). *Sunland Publishing*, 710 So. 2d at 883-84.

"No agency or governing authority shall accept a bid based on items not included in the specifications."

Obviously, the Board of Supervisors based its actions upon matters and items not included in the bid specifications, and did not comply with § 31-7-13(d)(i). Scant as they were, those specifications did not provide for an "inspection" of any facilities of putative bidders. This action was even more egregious in that the "inspection" took place *after* the primary bid had already been awarded to Lickity Splitz, and the Board's "decision" was made outside a properly noticed meeting.

Lickity Splitz strongly submits that the Board's consideration of items outside the bid

specifications, along with its "double" after-the-fact attempts to "ratify" its actions, were improper and cannot be allowed to stand. Lickity Splitz also contends that this Board's actions are no better than the governing authority's unsuccessful attempt to "ratify" a faulty bid in *Hemphill Construction Company, Inc. v. City of Laurel*, 760 So. 2d 720 (Miss. 2000). The issue in that case was "whether allowing a bidder to amend its bid price after bids are opened to correct an error not readily apparent on the face of the bid is such a deviation from the statute's public purchase procedure as to render the action unlawful. We hold that it is." *Hemphill*, 760 So. 2d at 721-22.

In the instant case, the brief specifications contained no language whatsoever that would have permitted the Board, or anyone on its behalf, to "inspect" the successful bidder, in order for that bidder to "retain" its award. The Board acted improperly in considering items not included in the specifications, in plain violation of the above statute.

Under statute, there are three methods of feeding prisoners which the Board of Supervisors is allowed to consider, and is to choose one of those three. Under Miss. Code Ann. § 19-25-73(1), the Board may either (a) contract with a local caterer or restaurant owner to bring in food, following the taking of bids as normally done for other county contracts, or (b) the sheriff may purchase the necessary food and supplies in the name of the county, in accordance with the other provisions of that subsection, or (c) the Board may negotiate a contract with a local public community hospital to provide the food.

In the instant case, the Board of Supervisors chose option (a) above, and originally awarded the bid to the lowest bidder, Lickity Splitz, which operates a local catering service,

and is experienced in furnishing such services. As noted, Lickity Splitz has had the contract to provide food for prisoners at the jail of the bordering county of Covington County, with that county's Board of Supervisors, and the City of Collins.

There is no provision in Miss. Code Ann. § 19-25-73 that authorizes, directs, or allows the Sheriff and members of the Board of Supervisors to visit the premises of a successful bidder, to which that Board had already made a valid award of said bid, to purportedly "inspect" said premises, and said visit was improper and inappropriate, and cannot serve as a basis for the supposed "rescission" later done by the full Board. There was likewise no such provision for a purported "inspection" in the bid specifications.[2]

The Board's actions circumvent the public purpose of § 31-7-13(d)(i).

In *Hemphill*, the Mississippi Supreme Court recognized that "...the procedures for awarding public contracts [are] a matter of broad public importance. Because the actions of the City are not authorized by the controlling statute, we are compelled to reverse"... *Id.* at 722. The Court added, "the broader public will lose in the long run if the public purchase laws are circumvented." *Id.* at 724.

2

Michelle Howell of Lickity Splitz, in her affidavit included in the record, recounted that at the January 5, 2009 meeting, as soon as Lickity Splitz was announced as low bidder, "Sheriff Henry McCullum appeared to have a problem with Lickity Splitz being awarded that contract. He told the Board that he did not think [we] could handle the bid. I then spoke up and told the Board that our company was experienced in providing meals to inmates, and had done so for Covington County...and were bidding to handle that county's prisoner meals again." The Jefferson Davis Board still choose to award the bid to Lickity Splitz at that January 5, 2009 meeting.[R.E. 47, R. 147].

In the instant case, Lickity Splitz had provided prisoner meals for the Covington County Jail for the years 2007 and 2009 (it did not get the contract for 2008 because it was not the low bidder in that county's process). Covington County, where Lickity Splitz is domiciled, is adjacent to Jefferson Davis County. Lickity Splitz had the requisite food permits from the Mississippi State Department of Health. There is simply no basis to conclude that Lickity Splitz was not qualified to deliver prisoner meals for the Jefferson Davis County Jail. Whatever the motivation of the Board or its members might have been, those and the methods employed by the Board cannot be allowed to "circumvent" public purchase laws and impair that "broad public importance."

The purposes of competitive bidding are to "secure economy," and to "protect the public from collusive contracts; to prevent favoritism, fraud, extravagance, and improvidence" so that the lowest cost to taxpayers is obtained. *Oxford Asset Partn. LLC v. City of Oxford*, 970 So. 2d 116, 125 (Miss. 2007). Those purposes will have been thwarted in this instance if the Board's actions are allowed to stand.

The awarding of contracts must be decided only at a lawfully convened session of the Board.

Longstanding Mississippi law states that "the decisions to be executed or the contracts to be awarded by the board must be determined or decided upon only in or at a lawfully convened session, and the proceedings must be entered upon the minutes, of the board or commission." *Lee County v. James*, 174 So. 76, 178 Miss. 554, 558 (Miss. 1937). "The

individuals composing the board cannot act for the county, nor officially in reference to the county's business, except as authorized by law." *Thompson v. Jones County Community Hospital*, 352 So. 2d 795, 796 (Miss. 1977).

Further, this Board is required to exercise its authority by a legal quorum, and the "visit" by the two Board representatives and the sheriff to the Lickity Splitz property did not constitute a quorum. Whatever means was thereafter used–prior to the Board Attorney's letter to the appellant of January 9, 2009–to purportedly take the bid award away from Lickity Splitz and give it to the alternate bidder, was unlawful: "the decisions to be executed or the contracts to be awarded by the board must be determined or decided upon ***only in or at a lawfully convened session***." *Id.*, at 796 [emphasis added]. Therefore, no amount of "ratifying" improper and invalid actions of the Board by that Board can make what is unlawful, lawful. Obviously, as evidenced in the Board Attorney's letter of January 9, 2009, the Jefferson Davis Board of Supervisors took action to revoke the bid award to Lickity Splitz without doing so in a lawfully convened meeting, and without spreading that decision upon its minutes at the time of said decision. Thus, the belated and ineffective attempt to do so some eleven days later with its "ratifying" order of January 20, 2009.

The circuit court's failure to recognize this improper and illegal Board action constitutes an abuse of discretion and requires reversal. *See, e.g., Gannett River States Publishing Corp. v. Jackson Advocate*, 856 So. 2d 247, 249 (Miss. 2003) ("in reviewing the city council's decision, the circuit court abused its discretion").

Through its order of January 19, 2010, the Board of Supervisors has attempted to

"ratify" its previous and unlawful action of action of taking the bid away from the low bidder [Lickity Splitz] at an improperly noticed meeting of said board, following an unauthorized visit to that bidder's premises by the Sheriff and two Board members, and purportedly awarding said bid to a higher bidder, with no prior notice to the low bidder. That effort should not be allowed to stand by the Court.

The Board's year-later attempt to "amend" its earlier action must also fail.

The later ratification attempt by the Board, i.e., the *nunc pro tunc* order of January 19, 2010, is meritless. First, it is nothing more than a second attempt to "ratify" unlawful action taken by the Board, as addressed above. Second, longstanding Mississippi authority has held that such nunc pro tunc orders are invalid. Such orders "cannot breathe life into the actions of [the Board of Supervisors] at a time when they had none." *Lopez v. Jackson Co. Board of Supervisors*, 375 F. Supp. 1194, 1199 (S. D. Miss. 1974)(citing *Martin v. Newell*, 23 So. 2d 796, 198 Miss. 809, 815 (Miss. 1946)(Court has held to the contrary that board could enter original order nunc pro tunc), *Board of Supervisors of Lafayette Co. v. Parks*, 96 So. 466, 132 Miss. 752, 757 (Miss. 1923)(board's attempt to give the order a retroactive effect failed, the board having no power to do so)).

Since the Jefferson Davis County Board of Supervisors had no valid authority to make the decision to revoke and change bidders *at the time it did so*, i.e., while not in a lawfully convened board meeting, then subsequent ratification attempts must fail, regardless of the subject titles assigned to same.

Lickity Splitz was well-qualified to provide the awarded service.

The appellant Lickity Splitz submits that the above is dispositive of the instant case, that the decision of the circuit court should be reversed and rendered, and that Lickity Splitz should be awarded the appropriate damages. However, because the belatedly-presented claims of the Board and its president are largely false and highly inaccurate, Lickity Splitz is compelled to address those assertions.

The Board's nunc pro tunc order of January 19, 2010 is based upon the affidavit of its president, also dated January 19, 2010, over a year after the president's "visit" to the Lickity Splitz facility. Therein, the board president claims there was no food, cooking utensils, or pots and pans in either of the two Lickity Splitz buildings, and also compared those buildings to "snowball stands" or "outdoor storage buildings similar to those used for storage of lawn equipment" and that there was a sink outside one of the buildings "exposed to the elements."

Those assertions are false and misleading. As the affidavit of Freda Howell states, the Lickity Splitz location consists of two buildings, both of which are insulated and wired. The main building, which is 16' x 24', has counter space, a stove, vent, three compartment sink and a small restroom. The other building is a 10' x 12' storage building. Both buildings have air conditioning and heat. Neither can be fairly described as a "snowball stand" or outside lawn equipment storage building. The outside sink referenced in the board president's affidavit is a "mop sink" that is a Mississippi Department of Health requirement, and was placed outside of the building as per instructions of that department. (R.E. 43-46,

47-50; R. 140-43, 147-50).

Each of the buildings are regularly inspected by the Health Department and have passed those inspections. There *are* pots and pans and utensils on site, as those are kept on shelves under the counters, and not simply left in the open on top of the counters. Food is ordered once a week, and only the amount needed for that given week is ordered. (*Id.*).

As to the other inaccurate claims asserted by the board president, the two board representatives and the sheriff were allowed to enter the buildings, and three people can easily fit into these buildings. Ms. Howell's vehicle did not contain cooked food at the time of this visit. All of the food prepared and delivered by Lickity Splitz is prepared at the Lickity Splitz location. (*Id.*).

As Ms. Howell's affidavit further states, there is nothing about the Lickity Splitz facilities that is unsanitary. Lickity Splitz has received all "A's" except for one "B" on the Health Department's inspections. The "B" was because one of the permits was laying on a shelf and not hanging on a wall, and that was promptly corrected.

The board president's and board's assertion that Lickity Splitz could not fulfill the duties of the prisoner meals contract is totally without merit. Lickity Splitz provided said meals for the adjoining county's jail, i.e., Covington County, in both 2007 and 2009, without incident. It did not provide said food for Covington County in 2008 or 2010 because it was not the low bidder–that county awarded its prisoner meals contract to the low bidder in 2007, 2008, 2009, and 2010. Lickity Splitz was the lowest and successful bidder for the 2010 meals contract for the City of Collins and is presently providing those meals. Thus, it is clear

that Lickity Splitz had the capacity to fulfill the contract with Jefferson Davis County, had that bid award not been unlawfully taken away by the Board of Supervisors.

In light of the experience of the appellant in fulfilling contracts of this type, its lowest and best bid, and the improper and invalid actions on the part of the Board herein, the Board's actions were plainly "arbitrary and capricious" and should not be allowed to stand. *Canton Farm Equip., Inc. v. Richardson*, 501 So. 2d 1098, 1104 (Miss. 1987).

Lickity Splitz should be awarded all applicable damages in this case.

In this case, the circuit court was supposed "to render the judgment which [the Board] ought to have rendered." *City of Durant v. Laws Construction Company, Inc.*, 721 So. 2d 598, 600 (Miss. 1998) (citing Miss. Code Ann. § 11-51-75). Clearly, it did not do so. In *Durant*, the Mississippi Supreme Court affirmed an award for contract damages and attorneys' fees awarded by the circuit court, and Lickity Splitz seeks the same relief herein. Further, the improper and untimely actions of the Board justify the assessment of penal damages by the Court. If penal damages are justified, then the Court has the authority to award attorneys' fees. *Richardson v. Canton Farm Equipment, Inc.*, 608 So. 2d 1240, 1256 (Miss. 1992).

The conduct of the Board of Supervisors in this matter justifies the awarding of attorneys' fee and expenses to the Appellant. Lickity Splitz must reiterate that it respectfully but strongly submits that the improper as well as untimely actions of the Board justify the assessment of penal damages by the Court. If penal damages are justified, then the Court has

the authority to award attorneys' fees. *Richardson v. Canton Farm Equipment, Inc.*, 608 So. 2d at 1256.

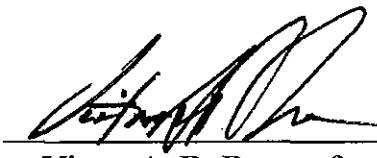
Appellant Howell respectfully submits that this Honorable Court should "render the judgment which the [Board of Supervisors] ought to have rendered," *Durant*, 721 So. 2d at 600, and award contractual damages equal to the profits lost by Lickity Splitz from the loss of this bid, as well as all penal and consequential damages, including attorneys' fees for the cost of bringing these appeals.

CONCLUSION

Due to the improper and illegal acts of the Board of Supervisors of Jefferson Davis County, the Appellant, Lickity Splitz, was denied its rightful opportunity to provide prisoner meals for the county jail for the calendar year 2009. The Circuit Court of Jefferson Davis County failed to reverse the actions of the Board and render the judgment that the Board should have entered. This Honorable Court should award full contractual damages to Lickity Splitz, including the profits it would have gained had the contract been fulfilled, as well as consequential and penal damages, and attorney's fees and expenses, interest, and all costs of court, as well as any other relief which may be appropriate.

Respectfully submitted, this the 4th day of October, 2010.

FREDA HOWELL d/b/a LICKITY SPLITZ,
Appellant

By: 
Victor A. DuBose, of counsel

AL SHIYOU, MB#[redacted]
VICTOR A. DuBOSE, MB#[redacted]
SHIYOU LAW FIRM
P. O. BOX 310
HATTIESBURG, MS 39403-0310
Telephone: (601) 583-6040
Facsimile: (601) 583-6041

Attorneys for Freda Howell d/b/a Lickity Splitz, Appellant

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 Brief of the Appellant to:

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

Circuit Court Judge

Wes Daughdrill, Esq.
Board Attorney
Jefferson Davis Co. Bd. Of Supervisors
P. O. Box 1317
Prentiss, MS 39474

Robert E. Sanders, Esq.
Wes Daughdrill, Esq.
Young Williams P.A.
P. O. Box 23059
Jackson, MS 39225-3059

Attorneys for Appellees

This the 4th day of October, 2010.

Victor A. DuBose