

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

W.G. YATES AND SONS CONSTRUCTION
COMPANY, INC.

APPELLANT

VERSUS

CASE NO. 2010-CA-01799

CITY OF WAVELAND, MISSISSIPPI

APPELLEE

ON APPEAL BY APPELLANT W.G. YATES AND SONS CONSTRUCTION
COMPANY, INC. FROM THE CIRCUIT COURT OF HANCOCK COUNTY,
MISSISSIPPI CIVIL ACTION NO. 09-0355

BRIEF OF APPELLEE THE CITY OF WAVELAND, MISSISSIPPI

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in Rule 28 of the M.R.A.P. have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Interested Parties and Persons:

1. Appellant, W.G. Yates and Sons Constructions Company, Inc.
2. Appellee, The City of Waveland, Mississippi
3. Reynolds, Inc.—the corporation awarded the subject contract,
who is a wholly owned subsidiary of Layne Christensen Company.
4. Layne Christensen Company—parent company of Reynolds.

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7. William G. Yates, III, President-Director of Appellant W.G. Yates, 512 East Main Street, Biloxi, MS 39530
8. Alinda J. Goss, Treasurer, Secretary, Director of Appellant W.G. Yates, 512 East Main Street, Biloxi, MS 39530
9. William G. Yates, Jr., Director and Registered Agent of Appellant W.G. Yates, 1 Gully Avenue, Philadelphia, MS 39350

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I. STATEMENT OF THE ISSUES

1. Whether Appellant Yates can meet its burden of showing by substantial evidence that the City of Waveland's June 2, 2009, decision to award the Sewer System Reconstruction North of Railroad Tracks Project to the lowest bidder, Reynolds, Inc., was arbitrary and capricious, when Reynolds is a resident bidder as per Mississippi Statute, Reynolds submitted the lowest actual bid, Reynolds bid conformed with the bidding requirements in all material ways and any discrepancies did not affect the commercial competitiveness of the bid, Waveland's decision complied with the purpose of the public bid law by obtaining the lowest cost for taxpayers, and the evidence before Waveland's Board of Mayor and Aldermen showed that Reynolds submitted all the required documents and was the lowest and best bidder.

2. Whether Yates' claim for monetary damages must be dismissed because there is no evidence in the record showing that Yates would have made a profit from the Sewer System Reconstruction North of Railroad Tracks Project even if it had been awarded that project, because the City of Waveland reserved the right to reject all bids, thus, making it speculative whether Yates would have been awarded the project even had Reynolds' bid been rejected, and when Yates sought and obtained a protective order seeking and obtaining protection from having to produce financial information related to the subject project.

3. Whether Yates' damage claim fails as speculative and whether Yates is otherwise judicially estopped from seeking to recover monetary damages from Waveland.

4. Whether an award of monetary damages to Yates in regards to this Bill of Exceptions would violate the City of Waveland's due process and confrontation clause rights, because Yates sought and obtained a protective order stopping it from having to produce financial information related to the subject project, and there is no evidence in the record of lost profits or other damages suffered by Yates.

5. Whether the preference statute is unconstitutional if, as Yates argues, it would require rejection of a bid even in the absence of a finding that bids are equal or substantially equal.

6. Whether FEMA and MEMA are necessary and indispensable parties to this action, and whether Yates' appeal must be dismissed for failure to name FEMA and MEMA as parties.

II. STATEMENT OF THE CASE

A. Nature of the Case and Course of the Proceedings.

On June 11, 2009, Appellant W.G. Yates & Sons Construction Company (hereinafter "Yates" or "Appellant") filed its *Notice of Appeal* to the Circuit Court of Hancock County, Mississippi pursuant to Miss. Code § 11-51-75 (the "Bill of Exception" statute). (R.3-7). Yates thereby appealed the City of Waveland's Board

of Mayor and Aldermen's June 2, 2009 award of the Sewer System Reconstruction North of Railroad Tracks Project to Reynolds, Inc. (R.3-7). The Sewer System Reconstruction North of Railroad Tracks Project will hereinafter be referred to as the "FEMA Sewer North Project" or "the subject project." The FEMA Sewer North Project is FEMA Project Worksheet No. 8070 and is a project funded by FEMA as part of a vast rebuilding effort to reconstruct the City of Waveland following the city's devastation by Hurricane Katrina. (*Agreed Bill of Exceptions* at p. 222; R.233; R.253; and R.786-87).

Yates' appeal sought monetary damages from the City of Waveland (hereinafter "Appellee" or "Waveland"). (R. 3-7 and R. 219-1008). On September 11, 2009, Waveland propounded interrogatories and requests for production upon Yates; Waveland then also served a subpoena *duces tecum* upon Yates' employee, Todd Bradford. (R. 115A-115F). Yates filed a motion for a protective order seeking to avoid having Yates and Bradford respond to that discovery. (R. 115G-115L). The Circuit Court granted that protective order. (R. 1082-84).

On November 24, 2009, Waveland's Mayor signed and the City of Waveland filed the bill of exceptions in this cause, as per Miss. Code § 11-51-75. (R. 219-1008). Yates filed its *Brief* on December 22, 2009. (R. 1011-1030). Waveland filed its *Brief* on January 22, 2010. (R. 1031-1062). Yates filed its *Reply Brief* on February 8, 2010. (R. 1063-1078).

On May 6, 2010, the Parties held oral argument before the Honorable Circuit Court Judge Lawrence Bourgeois, Jr. (See Yates' Record Excerpts, R.E. 3). On July 9, 2010, the Circuit Court granted Yates' *Motion for Protective Order* regarding Waveland's discovery requests. (R. 1082-1084). After oral argument, the Honorable Judge Bourgeois requested that the Parties submit a letter brief regarding the issue concerning whether Layne Construction (of which Reynolds is an affiliate) had an office in Mississippi. Yates submitted their additional letter brief on July 26, 2010. (R. 1085-1095). Waveland submitted its additional letter brief on July 27, 2010. (R. 1096-1098).

On September 29, 2010, the Circuit Court issued its *Order Affirming Decision of City of Waveland's Board of Mayor and Aldermen*. (R. 1099-1102; Yates' R.E. 2). On October 29, 2010, Yates filed its *Notice of Appeal* of the Circuit Court's *Order*, which affirmed Waveland's decision. (R. 1103-1109).

B. Statement of the Facts

i. Facts concerning Waveland's acceptance of bids and award of the subject project.

On May 14, 2009, Waveland received and opened bids for the FEMA Sewer North Project. (R.961). That project is part of the massive rebuilding of Waveland from damage caused by Hurricane Katrina. (R.786-87; R.233; R.300). FEMA is paying for said project, and the project is titled FEMA PW # 8070. (R.222; R.233; R.253; and R.786-87).

On May 14, 2009, Reynolds, Inc. (hereinafter "Reynolds"), Appellant Yates and six (6) other companies submitted sealed bids for the FEMA Sewer North Project. (R.907-915). Reynolds' bid amount, which totaled \$9,356,601.65, was the lowest bid actually submitted; Yates' bid amount, which totaled \$9,471,859.12, was the second lowest bid submitted. (Id.). Reynolds submitted a five percent (5%) bid bond with its bid, as was required by the bid documents. (R.763-64; R.687-690). That bid bond served as security for the performance of the project by Reynolds for the bid amount of \$9,356,601.65. (Id.).

On June 1, 2009, Waveland's City Engineer, Bruce Newton, submitted to Waveland's Mayor and Aldermen a letter recommending that it award the FEMA Sewer North Project to Reynolds as the lowest and best bidder. (R.907-15).

Newton's letter of recommendation stated:

Based on our review, and after consultation with the City Attorney, we recommend award of this contract to Reynolds, Inc. who we believe submitted the lowest and best base bid, in the amount of \$9,356,601.65.

(Id.). The *Certified Bid Tabulation* attached to Newton's letter showed that Reynolds' bid amount, which totaled \$9,356,601.65, was the lowest actual bid submitted, and that Yates' bid amount, which totaled \$9,471,859.12, was the second lowest actual bid submitted. (Id.). Before the June 2, 2009 meeting, Newton also submitted to Waveland's Board of Mayor and Aldermen a *Bid Tabulation*

Sheet, which demonstrated that Reynolds was the lowest bidder and that Reynolds submitted all required documents with its bid. (R.763-64).

At the June 2, 2009 Meeting of Waveland's Board of Mayor and Aldermen, Waveland's Board, consistent with the recommendation of its city engineers, awarded the FEMA Sewer North Project to Reynolds as the lowest and best bidder. (R.954).

ii. The Instructions to Bidders for the FEMA Sewer North Project

In its Instructions to Bidders, Waveland specifically retained the right to waive bid irregularities. (R.248-49). The instructions stated in relevant part:

16. BASIS OF AWARD OF CONTRACT

16.1 The Owner reserves the right to reject any and all Bids, to waive any and all informalities not involving price, time or changes in the Work with the Successful Bidder,...Discrepancies in the multiplication of units of Work and unit prices will be resolved in the favor of the unit prices.

(Id.).

As per those contract terms, Waveland's engineers corrected all miscalculations of bid prices in favor of the unit prices submitted. (R.907-15; R.677-90; R.648-657).

iii. Reynolds is a wholly owned subsidiary of Layne Christensen.

Reynolds is a company incorporated and with its principal place of business in the State of Indiana. (R.699; R.707; R.709-61; R.817; R.821). As Yates admitted

in its *Brief* and during oral argument, Reynolds is a wholly owned affiliate of Layne Christensen Company. (Id. and R.819-904; See also Yates' Brief in the Circuit Court, at R.1023). Layne Christensen Company is incorporated in the State of Delaware. (R.817-19). Layne Christensen Company and its predecessor companies, namely Layne-Central and Layne-Western, have conducted business and had offices in Mississippi since 1976. (R.817-904). Reynolds' bid indicates that Reynolds is a bidder highly qualified in the type of work and construction needed to successfully complete the subject project. (R.677-761).

iv. Reynolds' bid complied with the bidding instructions in all material ways.

Reynolds bid complied with the instructions to bidders in all material ways. Reynolds bid on each line item and acknowledged receipt of all addenda. (R.677-689). Reynolds also submitted with its bid a five percent (5%) bid bond, thereby indicating its intent to be bound to the project at the price of their bid. (R.763-64; R.687-690).

III. SUMMARY OF THE ARGUMENT

The City of Waveland properly and appropriately awarded the subject project to Reynolds. Waveland's award of the bid to Reynolds complied with the stated purpose of the public bid law, being to secure the lowest possible bid for taxpayers. Waveland acted within its discretion and municipal powers. Yates'

argument that Waveland's June 2, 2009 decision was arbitrary and capricious is unfounded.

Yates argues that Waveland's award of the subject project to Reynolds was arbitrary and capricious in two ways. First, Yates argues that Waveland was required to reject Reynolds' bid because Reynolds is a nonresident contractor.

Yates' fallacious argument is based on Yates' incorrect reading of Mississippi's contractor preference laws. The contractor preference statute (Miss. Code § 31-3-21 (3)) does not apply to Reynolds because Reynolds is not a "nonresident contractor" within the meaning of Miss. Code § 31-3-21 (3). ~~Because Reynolds is a resident bidder, it was not required to submit a preference statute with its bid.~~

~~Yates' argument is unsupported and Yates cannot meet its burden.~~

Second, Yates asserts that Reynolds failed to submit its bid on the proper bid forms. Yates claims that Waveland was, thus, required to reject Reynolds' bid. This argument is unsupported. Waveland specifically reserved the right to waive bid informalities, and Waveland acted within its rights by accepting Reynolds' bid. Reynolds acknowledged receipt of all bid addenda, showing it understood and agreed to be bound by those addenda. Reynolds also submitted a five percent (5%) bid bond with its bid, giving security to Waveland for the performance of the project at the price of Reynolds' bid. Reynolds' use of one page of the first bid form (rather than the addendum) did not affect the competitiveness of the bidding process, did not affect the price of Reynolds' bid, and in no way put Reynolds at an

advantage. Reynolds materially complied with the bid requirements, and Yates cannot meet its burden of demonstrating that it was placed at a commercial disadvantage.

Waveland properly awarded the subject bid to Reynolds, the lowest and best bidder. Yates cannot meet its burden of showing by substantial evidence that Waveland's award to Reynolds was arbitrary and capricious. Yates also cannot show by substantial evidence that the bid form Reynolds used placed Yates at a commercial disadvantage. Further, even assuming *arguendo* that Yates could meet that burden, Yates cannot be awarded monetary damages as there is no record evidence to support those claims and an award of damages would deprive Waveland of its due process rights.

IV. ARGUMENT

A. Standard of Review for Bill of Exceptions

A municipality's decision must not be overturned on a bill of exceptions unless it is beyond the scope of power granted to the municipality's board by statute, violates the constitutional or statutory rights of the aggrieved party, is not supported by substantial evidence, or is arbitrary and capricious. *Hinds County Board of Supervisors v. Leggette*, 833 So.2d 586, 590 (Miss. 2002). On a bill of exceptions alleging arbitrary and capricious acts, the appellant has the burden of proving by "substantial evidence" that the actions of the governing body were arbitrary and capricious. *Nelson v. City of Horn Lake*, 968 So.2d 938, 942 (Miss.

2007). A court deciding a bill of exceptions appeal is “not at liberty to set aside the decision of a [governing body] unless that decision is ‘*clearly shown*’ to be arbitrary, capricious or discriminatory or is illegal or without substantial evidentiary basis.” *Billy E. Burnett, Inc. v. Pontotoc County Board of Supervisors*, 940 So.2d 241, 242 (Miss. Ct. App. 2006), *citing Stockstill v. Hales*, 730 So.2d 539, 544-45 (Miss. 1998).

B. Reynolds was the lowest and best bidder on the subject project. Waveland’s award to Reynolds complied with Mississippi Law.

As per the language of the preference statute, Reynolds is a resident bidder. Accordingly, Reynolds was not required to submit a preference statute with its bid. Reynolds was the lowest bidder and best bidder on the subject sewer project. This is indicated by Waveland’s engineer’s recommendation and was a finding made by Waveland’s Board on its minutes. Waveland’s Board of Mayor and Aldermen did not act arbitrarily and capriciously in awarding Reynolds the bid. Yates’ assertion that Waveland was required to reject Reynolds’ bid relies on Yates’ misreading of the plain language of Mississippi’s preference statute.

As a resident contractor, Reynolds was not required to submit a copy of any state’s preference law with its bid.

Miss. Code § 31-3-21 (3) provides in relevant part as follows:

In the letting of public contracts preference shall be given to resident contractors... When a nonresident contractor submits a bid for a public project, he shall attach thereto a copy of his resident state's current law pertaining to such state's treatment of nonresident contractors. As used in this section, the term "resident contractors" includes a nonresident person, firm or corporation that has been qualified to do business in this state and has maintained a permanent full-time office in the State of Mississippi for two (2) years prior to January 1, 1986, **and the subsidiaries and affiliates of such a person, firm or corporation.**

Miss. Code § 31-3-21 (3) (emphasis added).

Reynolds is an affiliate of Layne Christensen Company (hereinafter "Layne Christensen"). (R.699; R.707; R.709-61; R.817; R.819-904; See also Yates' Brief in the Circuit Court, at R.1023). Layne Christensen is a Delaware corporation that has been qualified to do business in Mississippi since 1976 and has maintained a permanent full-time office in Mississippi since then. (Id. [See particularly R.817-19]).

Thus, applying the language of the preference statute to this situation, Layne Christensen is a "nonresident...corporation that has been qualified to do business in [Mississippi] and has maintained a permanent full-time office in [Mississippi] for two (2) years prior to January 1, 1986." As such, by statute Layne Christensen is a "resident contractor." (See Miss. Code § 31-3-21 (3)).

Reynolds is a subsidiary of Layne Christensen. (R.699; R.707; R.709-61; R.817; R.819-904). As such, Reynolds is also a "resident contractor" as per the plain reading of Miss. Code § 31-3-21(3). As a "resident contractor," Reynolds

was not required to submit a copy of Indiana's preference law with its bid. (Miss. Code § 31-3-21(3)). That requirement only applies to "nonresident contractors." (Id.).

Reynolds' bid was the lowest bid actually submitted, in an amount \$115,257.47 less than Yates' bid. (R.907-15). Reynolds properly submitted a sealed bid that contained all required bid documents; Reynolds is also highly qualified to perform the tasks associated with the FEMA Sewer North Project. Id.; R.763-64 and R.677-761).

The evidence that was presented to Waveland's Board of Mayor and Aldermen, which it relied upon to make its determination, represented the above facts. (R.677-681 and R.533-34). Waveland's Board of Mayor and Aldermen relied on the facts presented to it by its engineer and attorney, and properly awarded the bid to Reynolds based on the documents and recommendations it received. (R.907-15 and R.763-64; R.954). Waveland's award to Reynolds was not an arbitrary and capricious act. Yates cannot meet its burden of showing otherwise.

C. Yates' argument that Reynolds is a nonresident contractor is contrary to law and otherwise irrelevant.

Yates argues that Waveland was required to reject Reynolds' bid because of the preference statute. Yates' argument is fallacious and must be rejected. Reynolds is a "resident contractor" and was not required to submit any preference law with its bid. Even if Reynolds was a "nonresident contractor," the preference

statute is inapplicable because the preference statute only applies when bids are “equal or substantially equal.” Such is not the case here, and Waveland’s Board made no finding to that effect.

As shown in section “A” supra, Reynolds is a “resident contractor” as defined in Miss. Code § 31-3-21(3). Accordingly, Reynolds was not required to submit a copy of Indiana’s preference law with its bid, and Yates’ argument to the contrary is unfounded. (Miss. Code § 31-3-21(3)).¹

Further, Mississippi’s “preference statute” (Miss. Code § 31-7-47) is only applicable in a situation where: 1) There is a finding that the lowest two bids are “equal or substantially equal;” and 2) The lowest bidder is a nonresident, and the second lowest bidder is a resident. Here, Yates’ and Reynolds’ bids are not “equal or substantially equal,” and Waveland’s Board of Mayor and Aldermen made no finding to that effect. (R.921-959).

The preference statute is only applicable in situations where a nonresident and resident contractors’ bids are “equal or substantially equal.” (MS AG Op., Winfield (January 29, 2004); *Billy E. Burnett, Inc. v. Pontotoc County Bd. of Supervisors*, 940 So.2d 241, 245 (Miss. App., 2006), citing MS AG Op., Winfield (January 29, 2004)). If the bids are not “equal or substantially equal,” there is no

¹ Also unfounded is Yates’ argument that Reynolds is not a “resident contractor” because they were not a subsidiary of Layne Christensen two years before January 1, 1986. Miss. Code § 31-3-21 (3) imposes no such requirement. In this instance, the plain terms of that statute only require that Reynolds be a subsidiary of Layne Christensen, and that Layne Christensen have been licensed to do business in Mississippi and have had an office in Mississippi since two years prior to January 1, 1986. Both Layne Christensen and Reynolds fulfill those requirements.

requirement by nonresident bidders to provide a copy of its state's preference statute. (Id.).²

Bids are only deemed to be "equal or substantially equal" by a specific finding by the governing body in its minutes, with an explanation in the minutes of the basis for the finding. (MS AG Op., Winfield [January 29, 2004]). If the bids are not declared "equal or substantially equal," a public board can award the bid to a nonresident bidder who it deems the "lowest and best bidder." (MS AG Op.,

² Article IV, Section 2 of the United States Constitution provides in relevant part that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Such clause is meant to put the citizens of different states on the "same footing" as citizens of different states, it inhibits discriminating legislation against them, it "insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness, and it secures to them in other States the equal protection of their laws. *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978).

Though the privileges and immunities clause does not preclude all discrimination against out of state citizens/residents, it does bar discrimination against citizens of different States where there is no "substantial reason for the discrimination." *Id.* at 525 (citing *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). A substantial reason for the discrimination would not exist "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed." *Id.* The state must show that its solution is "substantially related" to solving that "peculiar evil." *Id.*

The legislative intent cited for Chapter 3, Title 31 (in which Miss. Code § 31-3-21 is included) is "to protect the health, safety and general welfare of all persons dealing with those who are engaged in the vocation of contracting and to afford such persons an effective and practical protection against incompetent, inexperienced, unlawful and fraudulent acts of contractors. Miss. Code § 31-3-2. Also, the public bid law is enacted to obtain the lowest prices for the taxpayers. *Hill Brothers Construction & Engineering Co. v. Mississippi Transportation Commission*, 909 So.2d 58, 69 (Miss. 2005).

Should Yates argue that the preference statute and any requirement of submitting a preference statute with a bid is applicable in instances where there is no finding of bids being "equal or substantially equal," such an interpretation would render the preference statutes violative of the Privileges and Immunities Clause. If that reading was accepted, governing bodies would be required to, for instance, disqualify a nonresident bidders bid if he failed to attach his state's preference law, even, for instance, if his bid was 50% lower than the resident bidders. Such certainly does not comply with the legislative intent as stated in the preference statutes. That reading of the preference statute and any requirement for a nonresident contractor to submit a copy of his state's preference statute cannot be accepted.

Winfield (January 29, 2004; *Billy E. Burnett, Inc.*, 940 So.2d at 245, *citing* MS AG Op., Winfield (January 29, 2004)).

Here, even if Reynolds was a nonresident bidder, its bid was not “equal or substantially equal” with Yates’ bid, and Waveland’s Board did not find Reynolds’ and Yates’ bids to be “equal or substantially equal.” (R.907-915 and R.921-959). To the contrary, Waveland specifically found Reynolds’ bid to be the “lowest and best bid.” (R.907-959, particularly R.954). As such, even if Reynolds was a nonresident bidder, the preference statute is inapplicable; likewise inapplicable is any requirement that Reynolds submit a copy of a preference statute with its bid. ((MS AG Op., Winfield (January 29, 2004; *Billy E. Burnett, Inc.*, 940 So.2d at 245, *citing* MS AG Op., Winfield (January 29, 2004)).

Yates improperly asks the Court to determine that the bids are “equal or substantially equal” and that it should be given preference; Yates’ request improperly attempts to trivialize the City of Waveland’s finding that Reynolds’ bid was the “lowest and best.” Yates’ request runs afoul of the discretion given to municipal boards, improperly requesting that the Court act contrary to the separation of powers between courts and governmental entities. That finding of fact is Waveland’s to make; Waveland determined that Reynolds’ bid was “the lowest,” not “substantially equal” to Yates’ bid. Yates has not and cannot meet its burden of “clearly showing” Waveland’s decision to be “arbitrary and capricious.” *Billy E. Burnett, Inc.*, 940 So.2d at 242.

Waveland's award of the FEMA Sewer North Project to Reynolds, the lowest and best bidder, was proper.

D. Yates' argument that Waveland should have rejected Reynolds' bid because of the forms upon which it was submitted is unfounded.

Yates suggests that Reynolds bid should be rejected because Reynolds did not use one of the bid addenda, but rather used a prior sheet sent by Waveland's engineers. Yates' argument is unfounded.

Though Reynolds did not use an addendum form in submitting its bid, such did not affect the price, quantity, quality or competitiveness of its bid.

Accordingly, Waveland was not required to reject Reynolds bid.

In Hill Brothers Construction & Engineering Co. v. Mississippi

Transportation Commission, the Mississippi Supreme Court discussed the reasons for Mississippi's public bid law. 909 So.2d 58 (Miss. 2005). That Court stated:

[t]he purpose of provisions requiring that contracts with public authorities be let only after competitive bidding [is] to secure economy in the construction of public works and the expenditures of public funds for materials and supplies needed by public bodies; to protect the public from collusive contracts; to prevent favoritism, fraud, extravagance, and improvidence in the procurement of these things for the use of the state and its local self-governing subdivisions; and to promote actual, honest, and effective competition to the end that each proposal or bid received and considered for the construction of a public improvement, the supplying of materials for public use, etc., may be in competition with all other bids upon the same basis, *so that all such public contracts may be secured at the lowest cost to taxpayers.*

Id. at 69 (emphasis included), citing *Landmark Structures, Inc. v. City Council*, 826 So.2d 746, 749 (Miss. 2002) [quoting *Hemphill Construction Co. v. City of Laurel*, 760 So.2d 720, 724 (Miss. 2000)].

In *Hill Brothers*, the Mississippi Supreme Court upheld the Mississippi Transportation Commission's award of the contract to Iafrate, despite Iafrate failing to sign an addendum. *Id.* at 70. The Supreme Court rejected Hill Brothers' arguments that Iafrate's failure to sign the addendum was more than a minor irregularity and that the Mississippi Transportation Commission acted beyond its power. *Id.* at 70-71. The Court noted that the Mississippi Transportation Commission reserved the right to waive bid technicalities. *Id.* at 70-71. The *Hill Brothers* Court also relied upon the fact that the Mississippi Transportation Commission did not know, at the time it made its decision, of any bid irregularities. *Id.* That Court also noted that Iafrate, in its bid, acknowledged receipt of the addendum. The *Hill Brothers* Court held that acknowledgment of the addendum indicated Iafrate's agreement to be bound by that addendum. *Id.* at 67-69.

Like Iafrate in the *Hill Brothers* case, Reynolds acknowledged receipt of all addenda and submitted a 5% bid bond with their bid. Thus, they agreed to be bound by those addenda and to the price they submitted. Further, Waveland specifically reserved its rights to reject minor irregularities in the bid. As shown in the instructions to bidders, those instructions merely state that failure to use the bid

form “shall be deemed as sufficient cause” for disqualification of the bid; such does not require disqualification of the bid. Accordingly, as per the teachings of *Hill Brothers*, Reynolds accepted responsibility for and agreed to be bound by the terms of the addendum.

Further, the Supreme Court case of *Landmark Structures v. the City of Meridian and Caldwell Tanks* refutes Yates’ argument that Waveland was required to reject Reynolds’ bid. Here, the only difference of which Yates complains concerning Reynolds’ bid is the addendum’s reference to 16 inch, versus 15 inch pipe. (See R.680 [Item No.’s 61-66] versus R.651). That change was simply an immaterial typographical error in the bid, and did not require rejection of Reynolds’ bid. The teachings of *Landmark Structures* bear out these points.

In *Landmark Structures*, the bid specifications stated that “concrete and formwork requirements...shall be strictly enforced to ensure concrete of the highest practicable structural and architectural standards.” *Landmark Structures*, 826 So.2d 746, 747 (Miss. 2002). Despite the request for bids stating that “concrete pour height shall be a minimum of 6ft. and a maximum of 12 ft.,” Caldwell (the lowest bidder)’s bid called for concrete pour heights of four feet. *Id.* at 748-49. Meridian awarded Caldwell the bid despite this nonconformity. *Id.* *Landmark Structures*, the third lowest bidder, sued. *Id.*

The *Landmark Structures* Court upheld Meridian's decision, holding that there was "no evidence in the record to support Landmark's contention...that Caldwell was at an unfair economic advantage." *Id.* at 750.

Likewise, Yates has made no showing of an unfair economic advantage here. Yates has that burden. Even if one assumes (*arguendo*) that Yates' bid on the line item it questions (the 16 inch pipe) would have been \$0.00, such only reduces Yates' bid by \$8,925.00 (Line items 61-66 at \$1,487.50 per line). (R.651 and R.911, at Yates' bid tabulation). Reynolds submitted a bid bond agreeing to be bound by their price. Thus, making these assumptions, Reynolds' bid would still have been \$106,332.47 less than Yates' bid. (Yates' bid minus \$8,925.00, minus Reynolds' bid). Yates was not at an economic disadvantage and it has failed to meet its burden of showing such a disadvantage.

J.H. Parker Construction Co., Inc. v. the City of Natchez further demonstrates that Waveland acted within its rights by accepting Reynolds as the lowest and best bidder. 721 So.2d 671 (Miss. App. 1998). The call for bids in that case required bidders to submit a "Prequalification of Bidders" statement, and the bid documents stated that "an award would not be made to any bidder submitting a proposal involving omissions or irregularities..." *Id.* at 672-73. The lowest bidder, who was awarded the project, failed to submit the required statement. *Id.* at 672. The fourth lowest bidder sued. *Id.*

The Court of Appeals in *J.H. Parker* held that the lowest bidder (who was awarded the project) did not “alter or destroy the competitive bidding process,” or “receive an advantage or benefit over the other bidders” by failing to submit the required statement. *Id.* at 677. The Court stated that the failure did not “affect the price, quality, or quantity of the bid.” *Id.* The Court held that the City of Natchez’ decision was not outside its discretion and it upheld the city’s decision. *Id.*

Reynolds submitted a sealed bid, thus giving no opportunity for collusion or fraud. Reynolds bid was the lowest bid actually submitted. (R.763-64; R.907-915). Reynolds also, in its bid, acknowledged receipt of the addenda and submitted a 5% bid bond that bound it to the price it submitted. (R.686-90). Those facts make it clear that Reynolds knew what items on which it was bidding, and Reynolds submitted a bid for all the line items. (R.677-686). As is evident from the bid documents, the only difference between the form Reynolds submitted and the addenda (which Reynolds acknowledged) are the line items for 15 inch versus 16 inch gravity sewer lines. (R.680; R.255-56, at line items 61-66). As demonstrated above, Yates would have saved at most \$8,925.00 by that line item difference, which was not sufficient to affect the competitiveness of the bids.

Reynolds submitted a sealed bid, which was the lowest and best bid, as evident from its bid and the recommendation from Waveland’s engineer and attorney. Reynolds’ use of the original bid form did not affect the price, quality or quantity of its bid, and it did not give any opportunity for fraud or collusion; those

are the things against which the public bid law is in place to guard. On the other hand, Waveland's award of the FEMA Sewer North Project to Reynolds upholds the reason for that public bid law, giving the project to the lowest bidder, Reynolds, so that the bid process "*secured the lowest cost to taxpayers.*" See *Hill Brothers*, 909 So.2d 58 (Miss. 2005).

Also, like the Mississippi Transportation Commission in *Hill Brothers*, Waveland's Board had no knowledge that Reynolds did not use the bid addendum at the time Waveland's Board awarded the subject project to Reynolds. To the contrary, the record evidence showed that Reynolds submitted all required bid documents and was the lowest and best bid. (R.907-15; R.763-64). Waveland relied on this, and the recommendations of its engineer and attorney. (R.954). Waveland's Board's decision was not arbitrary or capricious.

Entirely lost in Yates' reasoning and argument is that Mississippi law expressly favors the grant of public contracts to the "lowest actual bidder," which Reynolds is. That public policy is found in decisions such as *Hill Brothers* and in the decision method for determining the "lowest and best bid" outlined in Miss. Code § 31-7-13 (d)(i); See also *Parker Brothers v. Crawford*, 68 So.2d 281, 285 (Miss. 1953). That statute states that, should any governing authority accept a bid other than the "lowest bid actually submitted, [the authority] 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 § 31-7-13 (d)(i).

The City of Waveland reasonably, honestly, and in good faith awarded the FEMA Sewer North Project to the lowest actual bidder, Reynolds. Waveland’s Board made that decision based on the evidence before it and the recommendations of its engineer and attorney. Yates failed to and cannot meet its burden of showing by substantial evidence that Waveland’s Board’s award of the subject project to Reynolds was arbitrary or capricious, or outside of Waveland’s powers. Yates also cannot meet its burden of demonstrating that it was placed at an economic disadvantage. Waveland’s Board’s decision saved the taxpayers \$115,257.47.

E. Yates’ petition for monetary damages fails as speculative and because there is no record evidence to support it.

Even if Yates could meet its burden of showing by substantial evidence that Waveland acted arbitrary and capriciously, there is no evidence in the record to support Yates’ claim for monetary damages, and no evidence to support that any action by Waveland damaged Yates. Accordingly, Yates’ claim for damages must be denied.

It is well-settled law in Mississippi that concerning a bill of exceptions, the bill of exceptions constitutes the record for review, and the circuit court, sitting as the appellate court, can only consider the case made by the bill of exceptions.

Stewart v. Pascagoula, 206 So.2d 325, 328 (Miss. 1968); *See also Cox v. Board of*

Supervisors of Madison County, 290 So.2d 629, 630 (Miss. 1974) and *Pruitt v. the Zoning Board of the City of Laurel*, 5 So.3d 464, 469 (Miss.Ct.App. 2008).

Yates requests that it be awarded damages in the form of lost profits. This claim cannot stand because there is no evidence in the record to support those damages, and the record is the only thing on which this appellate court can act. *Stewart*, 206 So.2d at 328. Yates has no contract with Waveland and no contract right to the FEMA Sewer North Project. Accordingly, it has not been deprived of any right or property by Waveland's award of the project to Reynolds and has not been damaged. There is also no proof of lost profits.

Further, it is speculative to assume that Yates would have received the bid had Reynolds' bid been rejected. The teachings of the Mississippi Supreme Court in *Hemphill Construction Company, Inc. v. the City of Laurel* demonstrate this point. 760 So.2d 720 (Miss. 2000).

Here, had Waveland not awarded the bid to Reynolds, they would not have awarded the bid to Yates. (Yates R.E. 3, at pp. 38-39). Waveland reserved the right to reject all bids. (R.248-49). Accordingly, Yates' assertion that they would have been awarded the project had Reynolds' bid been rejected is speculative and ignores Waveland's right to reject all bids. The teachings of *Hemphill* demonstrate this point of law; that case was decided in 2000, two (2) years after the *Durant* case upon which Yates incorrectly relies for its damage claim.

In *Hemphill*, the Supreme Court reversed the Court of Appeals' decision and rendered a verdict for the appealing contractor against the City of Laurel. 760 So.2d at 725. Despite finding that Laurel's decision was contrary to law, the Supreme Court did not award Hemphill the damages it sought. Such was because Laurel's bid documents reserved the right to reject all bids, rendering damages speculative. (*Id.* at 724). Specifically, the *Hemphill* Court stated:

[T]he City argues that Hemphill lacks standing to pursue this matter because the decisions of the Circuit Court and Court of Appeals allowed work to continue under the City's decision. The construction has been completed during litigation. Further, any damages sought by Hemphill would be speculative, because the City reserved the right in its bid notice to reject all bids.

(*Id.* at 724). Having spelled out those details of the project having been completed and Laurel having reserved its rights, the Supreme Court deemed the matter "academic" insofar as Hemphill and Laurel were concerned, because any damages would be speculative since Laurel could have rejected all bids. (*Id.*). Accordingly, though the Supreme Court "reversed" the Court of Appeals decision that overturned Laurel's decision, it "rendered" a verdict and did not send the matter to the trial court for a damage hearing. (*Id.* at 725).

The *Hemphill* decision is the last word from the Supreme Court concerning damage claims stemming from a governmental entity's decision awarding bids. *Hemphill* distinguished *City of Durant*, upon which Yates relies. Such is because, though the City of Durant also "reserved the right to reject all bids," Durant

confessed that the city would have awarded the contract to the appealing contractor had Durant not considered the lowest bidder. *City of Durant v. Laws Construction Co., Inc.*, 721 So.2d 598, 601 (Miss. 1998). Those facts kept the damages in that matter from being speculative. Those facts are not present in the *Hemphill* case or in this matter.

As per the teachings of *Hemphill*, Yates' damage claim must fail because it is contingent on speculation. A plaintiff must prove damages by a preponderance of the evidence and with reasonable certainty. *Amiker v. Brakefield*, 473 So.2d 939, 939 (Miss. 1985). Yates cannot meet that proof here.

F. Yates is judicially estopped from seeking monetary damages.

Yates is judicially estopped from seeking to recover monetary damages from Waveland because Yates sought and obtained a protective order from having to produce damage and lost profit information in this litigation.

The Mississippi Supreme Court has outlined the well-settled requirements for judicial estoppel. Judicial estoppel will apply if: 1) the party's position is clearly inconsistent with the previous one; 2) the court accepted the party's previous position; and 3) the non-disclosure of information was not inadvertent. *Kirk v. Pope*, 973 So.2d 981, 991 (Miss. 2007).

Before the Parties agreed upon the bill of exceptions (the record) in this matter, Waveland submitted discovery requests to Yates. Rather than answer that

discovery, which, in part, sought information that would have included information of any profit Yates projected to make, Yates sought a protective order from having to answer that discovery. (R.115G-115L). The Circuit Court granted that protective order. (R.1082-84). Accordingly, Waveland was denied the opportunity to obtain information from Yates of its supposed lost profits.

Now, after seeking and obtaining that protective order, Yates requests that it be awarded monetary damages. Yates is judicially estopped from recovering such damages. Waveland has a right to defend itself against a claim for damages, and Yates sought protection from having to produce supposed lost profit information to Waveland. Yates' failure to produce that information was clearly not inadvertent, and the Court ruled in favor of Yates' position. The failure of Yates to produce that evidence unconstitutionally restricts Waveland's rights to defend itself against a lost profit claim.

Yates' request for damages is contrary to its prior refusal to produce alleged lost profit information. Thus, Yates is judicially estopped from seeking or obtaining that relief, as per the teachings of *Kirk*. 973 So.2d at 991. An award of monetary damages to Yates, under these facts, would violate Waveland's due process rights to obtain knowledge about, and hear and rebut evidence of damages alleged by a party. See *Wisdom v. Stegall*, 70 So.2d 43 (1954), *Allstate Ins. Co. v. Fioravanti*, 451 Pa. 108 (1973), and *In re Amalgamated Food Handlers, Local 653-A*, 70 N.W.2d 267 (1955).

G. FEMA and MEMA are necessary and indispensable parties to this matter.

The Federal Emergency Management Agency (“FEMA”) is paying for the work under the subject sewer project through the Mississippi Emergency Management Agency (“MEMA”). Accordingly, FEMA and MEMA are necessary and indispensable parties to this action. Yates’ *Bill of Exception* and petition for relief must be denied.

M.R.C.P. 19 (a) provides that a person subject to the jurisdiction of the Court “shall be joined as a party in the action if:

- i. In his absence complete relief cannot be accorded among those already parties, or
- ii. He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.”

Miss. Rule Civ. Proc. 19 (a).

FEMA and MEMA clearly have an interest and right to be heard on Yates’ bill of exceptions. First, Yates seeks to be awarded the project at a price that would

cost FEMA/MEMA \$115,257.47 more to complete the work. As such, overturning Waveland's Board's decision would deprive FEMA and/or MEMA of property rights and money without due process. This cannot be the result.

Yates' bill of exceptions and requested relief therein must be dismissed for failure to notice and add indispensable parties.

V. CONCLUSION

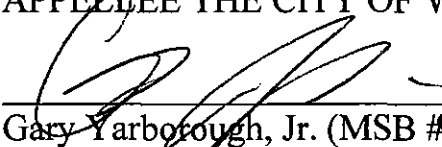
Waveland's Board of Mayor and Aldermen properly awarded the subject bid to Reynolds. Yates has not met its burden of showing by substantial evidence that Waveland's actions were arbitrary and capricious. Reynolds was not required to submit any preference statute with its bid because Reynolds is a "resident contractor." Reynolds' bid also complied with the bid requirements in all material ways. The form of Reynolds' submission did not affect the competitiveness of the bidding process.

Waveland's Board acted on the evidence before it, and its engineer's recommendation that Reynolds was the lowest and best bidder. The evidence in this record supports that recommendation. Yates' claims are unfounded and should be dismissed, with judgment and an award of costs and attorneys' fees given to Waveland, in an amount to be determined by the Court at a hearing for those elements of damage.

RESPECTFULLY SUBMITTED on this the 6th day of September, 2011.

APPELLEE THE CITY OF WAVELAND

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CERTIFICATE OF SERVICE

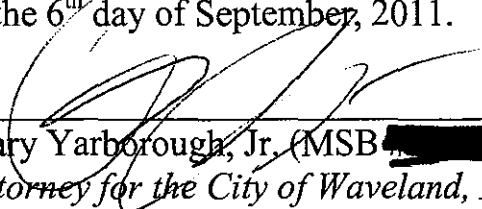
The undersigned counsel does hereby certify that he has this day served a true and correct copy of the above and foregoing upon all counsel of record via U.S. Mail, postage prepaid:

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The Honorable Lawrence Bourgeois, Jr.
Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

The undersigned has also this day deposited for mailing to the Supreme Court Clerk by U.S. Mail, postage prepaid, an original and three (3) copies of this brief for filing, as well as an electronic PDF copy for filing.

SO CERTIFIED ON THIS the 6th day of September, 2011.



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