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

APPEAL FROM THE CIRCUIT COURT OF HANCOCK COUNTY, MISSISSIPPI
CIVIL ACTION NO. 09-0355

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT IS REQUESTED

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ARGUMENT

A. Waveland's award to Reynolds was not in compliance with Mississippi Public Bid Laws.

The City of Waveland ("Waveland") contends that it properly awarded the bid to Reynolds because Reynolds was the "lowest and best bidder." While Reynolds may have been the lowest bidder, it certainly was not the best bidder given the fact that Reynolds' bid ran afoul of Mississippi Public Bid Laws and Waveland's own bid specifications. Waveland asserts that since Reynolds is considered a "resident contractor" under Miss. Code Ann. § 31-3-21(3), it was not required to attach a copy of its resident state's (Indiana's) bid preference statute. Waveland, however, made no factual determinations to this effect before it awarded the bid. There is no question that Reynolds is an Indiana company–the copy of the certificate of responsibility included in the bid cites an Indiana address. (R. 700.) Reynolds was incorporated in Indiana, is domiciled in Indiana, and has its principal place of business in Indiana. (R. 694, 700.) In order to for Reynolds to be treated as a "resident contractor" under the statute, Waveland had to make a finding, **consistent with fact**, that Reynolds, a nonresident contractor, met the requirements of Miss. Code Ann. § 31-3-21(3). *See* MS AG OP., Brannon (December 28, 2009); MS AG Op., Adams (November 17, 2003). Waveland failed to make those requisite factual findings.

Even if Waveland did make the proper requisite findings, the record before Waveland did not support a finding that Reynolds was a "resident contractor" pursuant to Miss. Code Ann. § 31-3-21(3). Specifically, Reynolds did not show that it was nonresident corporation which was qualified to do business in the state **AND** maintained a permanent full-time office in the State of Mississippi for two years prior to January 1, 1986. In its Brief, it appears Waveland points to the Affidavit of Steven Crooke to show that Reynolds is an affiliate of Layne Christensen Company ("Layne Christensen"), that Layne Christensen has been qualified to do business in Mississippi since 1976

and has maintained a permanent full-time office in Mississippi since then. *See* Appellee's Brief, pg. 11, ¶ 2. Crooke's affidavit, however, does not state that Layne Christensen maintained a permanent full-time office in Mississippi two years prior to January 1, 1986. The affidavit only states that, although Layne Christensen qualified to do business in the State of Mississippi in June, 1981, it merely "conducted business" and/or "operated its business" in the State of Mississippi. The conduct or operation of business in the State simply does not equate to a "permanent full time office" as required by statute. Also, there is no mention in Crooke's affidavit that Layne Christensen had *continuously* maintained a full-time office in Mississippi as required by statute.

Waveland awarded the Sewer Project at issue in this appeal to Reynolds despite the fact that Reynolds was in violation of Mississippi Public Bid Laws. Because there was insufficient evidence in the record, and because Waveland failed to make requisite factual findings as to Reynolds and/or Layne Christensen under Miss. Code Ann. § 31-3-21(3), the contract was improperly awarded to Reynolds.

B. Waveland's contention that there must be a finding that the bids were "equal or substantially equal" is wrong.

As an alternative argument, Waveland asserts that the preference statute is inapplicable in this instance because it "only applies when the bids are 'equal or substantially equal.'" *See* Appellee's Brief, pgs. 12-13. Waveland cites to an Attorney General's Opinion issued in 2004, which opined that the preference provisions of the statute are not applicable if the amount of the two bids "are not equal or substantially equal... ." See MS AG Op., Winfield (January 29, 2004). This opinion is clearly wrong given the unequivocal language in Miss. Code Ann. § 31-3-21(3), which contains no such requirement. Miss. Code Ann. § 31-3-21(3), does, however, require that a nonresident contractor attach a copy of its resident state's bid preference statute so that Waveland

could discern whether a Mississippi contractor would be treated the same in Indiana. Reynolds blatantly failed to meet that requirement, and since Waveland did not have a copy of Indiana's preference statute, it could not make that determination.

Furthermore, no Mississippi Court has upheld the analysis set forth in the Attorney General's 2004 Opinion. Waveland cites to *Burnett v. Pontotoc County Board of Supervisors*, 940 So.2d 241, 245-46 (Miss. App. 2006), as authority to show a determination must be made as to whether the bids were "equal or substantially equal" before the preference statute can apply. Yet the Mississippi Court of Appeals made no such holding in *Burnett*. Indeed, the Court stated that the analysis of the preference statute "is a question for another day." *Burnett* at 246. To imply that *Burnett* held otherwise is a gross misrepresentation of the Court of Appeals opinion.

Although the Winfield opinion is wrong, it does go on to say that it "should be explained in the minutes if Tunica determines that bids are or are not equal or substantially equal, then the statutory preference provision in favor of Mississippi bidders apply or do not apply, respectively." Thus, even if the Attorney General's 2004 Opinion was correct (which it clearly is not), in order to take advantage of its implication, Waveland would have had to make findings and explain in its minutes that the bids of Yates and Reynolds were not equal or substantially equal. Waveland failed to make such determination.

C. Waveland's assertion that Miss. Code Ann. § 31-3-21(3) is violative of the Privileges and Immunities Clause holds no merit.

Waveland also asserts in Footnote 2 that if there was no requirement that a determination be made as to whether the bids were "equal or substantially equal" for the preference statute to apply, then the preference statute would be violative of the Privileges and Immunities Clause of the United States Constitution. Such an assertion is misguided at best. There are no reported cases that have

indicated a bid preference statute is unconstitutional. Moreover, the legislative intent for Miss. Code Ann. § 31-3-21(3) was to "level the playing field" between Mississippi contractors and nonresident contractors. Mississippi contractors are to be given preference over nonresident contractors to the same extent that a Mississippi contractor would when bidding against the nonresident contractor in its home state. As the Supreme Court has noted, it was obvious to the Legislature that the best way to determine whether a preference should be given is for the nonresident to attach its home state's bid preference law. *Refrigeration Sales Co., Inc. v. State of Mississippi ex rel. Oren Segrest, Director of Purchasing, et al*, 645 So.2d 1351, 1353 (Miss. 1994). If Waveland truly asserts that Miss. Code Ann. § 31-3-21(3) is unconstitutional, then pursuant to Rule 24 of the Mississippi Rules of Civil Procedure, Waveland should have notified the Attorney General of the State of Mississippi, and allowed him the opportunity to intervene and argue the question of unconstitutionality. *See also*, Miss. Code Ann. § 7-5-1 (1972) (providing that Attorney General "shall intervene and argue the constitutionality of any statute when notified of a challenge thereto.") To the knowledge of Yates, Waveland never notified the Attorney General and, therefore, Waveland waived its assertion.

D. Reynolds' bid irregularity was unwaivable, but if it was waivable, Waveland failed to make that determination.

It is undisputed that Reynolds did not submit its bid on the revised bid forms issued by Waveland with pre-bid Addenda which is in violation of Waveland's mandatory INSTRUCTIONS TO BIDDERS, paragraph 12.4, which **requires** all bidders to "use the latest version of any form so issued for inclusion in his Bidding Documents" and which expressly cautioned Reynolds and all other bidders that noncompliance "**shall be deemed as sufficient cause for rejection of any bid so submitted.**" (R. at 247-48 (emphasis added).) Clearly, pursuant to Waveland's own bidding

instructions, Reynolds' bid contained a non-waivable irregularity, and Waveland's Project Engineer had no authority to correct such a bid.

Waveland, however, contends that Reynolds' bid irregularity was waivable, since it "did not affect the price, quantity, quality or competitiveness of its bid. *See* Appellee's Brief, pg. 16. Even if the failure to use proper bid forms was a waivable irregularity (which it clearly is not), Waveland's Project Engineer did not have the authority to make that decision alone and make after-the-fact corrections to Reynolds' bid. The decision to waive an irregularity in a bid is a decision that can only be made by the municipality (through its governing authority) itself. There is nothing in the evidence before this Court that Waveland's governing authorities were actually advised of the failure to utilize the correct bid form, and, most importantly, that Waveland made the determination that the failure should be waived as a mere irregularity.

Waveland cites three cases in support of its contention that Reynolds' failure to use proper bid forms was a waivable irregularity. Yet in all three cases, either the Mississippi Supreme Court or the Mississippi Court of Appeals states that the authority to waive the irregularity lies with the governing body, and in each case the governing body took the appropriate steps to *determine* that the irregularity was waivable. In *Hill Bros. Constr. & Eng'g Co., Inc. v. Miss. Transp. Comm'n*, 909 So.2d 58, 68 (Miss. 2005), the Mississippi Supreme Court provided that "the minutes of the MTC constitute relevant and substantial evidence that the MTC considered this matter seriously, made the appropriate findings on record, and acted within its discretion in awarding the project to Iafrate [the bidder]." In *Landmark Structures, Inc. v. City of Meridian*, 826 So.2d 746 (Miss. 2002), the Supreme Court noted the City of Meridian properly determined the irregularity was waivable after the matter was placed on the city council's agenda, and the aggrieved bidder was allowed to voice his concerns on the record before the contract was awarded. Likewise, in *J.H. Parker Construction,*

Co., Inc. v. City of Natchez, 721 So.2d 671, 677 (Miss. App. 1998), the Mississippi Court of Appeals held that "the City had the discretion to determine whether Lampkin's proposal sufficiently complied with the bid invitation," and that the City "waived the technical defect in Lampkin's bid." In the instant case, there is **no** substantial evidence that Waveland even **considered** the matter, much less made the appropriate findings as to this irregularity. (R. at 954.) As such, Waveland has acted arbitrarily and capriciously, without substantial evidence and exceeded the scope of its powers in its award to Reynolds. Its decision to award the Sewer Project to Reynolds should be overturned.

E. Yates has a valid claim for monetary damages.

Waveland asserts that Yates cannot support a damages claim because there is no proof in the record to support damages since Yates had no contract with Waveland. *See* Appellee's Brief, pgs. 22-23. The Mississippi Supreme Court, however, has expressly held in *Durant v. Laws Construction Co., Inc.*, 721 So.2d 598 (Miss. 1998), that an aggrieved bidder who has brought an appeal pursuant to Miss. Code Ann. § 11-51-75 (1972), can recover compensatory damages and attorneys' fees. The Court provides

> Laws [aggrieved bidder] brought this action solely under § 11-51-75. The Circuit Court found that the contract was illegally granted to King and this Court is in agreement with this interpretation. Even under the plain language of the statute, it seems that the circuit court had the authority to 'render such judgments that the board or municipal authorities ought to have rendered' by awarding the contract to Laws. **By doing so the Laws has a contract claim for breach and contract damages since the City allowed another company to provide the same services that Laws had the legal right to perform**. Compensatory damages under the law of contracts are the proper measure of damages for an aggrieved bidder which was entitled to the award of the contract. Therefore this Court holds that Laws [the contractor] is entitled to damages measured by the law of contracts where a complete and adequate remedy is available, the enforcement of the statutory bid laws are upheld and legislative attempt to make sure that public contracts are awarded on a competitive basis and not for any other purpose is enforced.

Id at 606 (emphasis added). Obviously, Yates is entitled to compensatory damages and attorneys fees under the Mississippi law should this Court overturn the circuit court's decision.

Waveland further contends that Yates is not entitled to damages because damages would be speculative in light of the fact that Waveland had reserved the right to reject all bids. *See* Appellee's Brief, pg. 23. Waveland claims that it would not have awarded the contract to Yates, had it not awarded the contract to Reynolds. *Id.* This claim is unsupported by the record. Yates cites to mere lawyer's speculation in the transcript, not evidence in the record that shows the contract would not have been awarded to Yates. (*See* R.E. 3, pgs. 38-39). The record does show, however, that Yates was originally recommended by the Project Engineer for the award of the contract as the "lowest and best bidder." (R. at 771-815.) The record also shows that it was on Waveland's agenda to approve Yates as the next lowest and best bidder for the Sewer Project. (R. at 767-769.) As such, it is reasonable to conclude that Yates would have been awarded the contract had Reynolds' bid been rejected.

Waveland cites *Hemphill Const. Co. v. City of Laurel*, 760 So.2d 720 (Miss. 2000) as authority for its contention that because it retained the right to reject all bids, Yates' damages claim would be speculative. Waveland's application of *Hemphill* is overreaching at best. In *Hemphill,* the Mississippi Supreme Court does **not** make an express holding that damages would be speculative because the City reserved the right to reject all bids. Rather, the Court mentions in dicta that the issue **may** be "academic" in nature since the circuit court and Court of Appeals allowed the work to continue under the City's decision. *Hemphill* at 724. The *Durant* case, on the other hand, is directly on point. In *Durant*, the City, rather than wait for a decision of the appeal, proceeded with the illegal award of the contract. At the time of the initial hearing the project was substantially completed. Since the project was precluded from being awarded to the aggrieved bidder due to its

substantial completion, the circuit court determined that the aggrieved bidder was entitled to recover damages. The City appealed, and the Mississippi Supreme Court, in affirming the award of damages, provided: **"[i]f there is no remedy, justice certainly will not prevail and the City will be given a means to directly violate the statutory law and suffer no consequences... ."** *City of Durant v. Laws Construction Co.*, 721 So. 2d 598, 605-606 (Miss. 1998). The Court went on to provide: **"If meaningful damages are not allowed then the legislative intent of the statutory bidding laws that public contracts are to be awarded on a purely competitive basis cannot be carried out."** *Id.* at 606.

F. Waveland's judicial estoppel argument fails because discovery is not allowed on appeal.

Waveland next argues that Yates is judicially estopped from seeking monetary damages because Yates sought and obtained a protective order from having to produce information on damages in this litigation. *See* Appellee's Brief, p. 25. Waveland contends that documents and answers that would have been produced by Yates in response to discovery by Waveland would have formed part of the record in this cause. *Id* at 26. However, it is clear Yates will be entitled to damages as an aggrieved bidder under the law of contracts pursuant to *Durant v. Laws Construction Co., Inc.*, 721 So.2d 598 (Miss. 1998).

Waveland forgets that the underlying action before this Court is an appeal. The bill of exceptions is the record on appeal and is made up of those actions which occurred before the governing authority. *See Van Meter v. Greenwood*, 724 So.2d 925 (Miss. 1998). Discovery requests were not appropriate in this instance because this Court is not allowed to consider any information outside the bill of exceptions. The bill of exceptions is not made up of things that the parties think the Court should know, but only those which reflects what the municipal body did. In

fact, in *Falco Lime Inc. v. Mayor and Aldermen of Vicksburg*, 836 So.2d 711 (Miss. 2002), the Mississippi Supreme Court held that the circuit court erred in conducting a trial de novo because the appellant was required to proceed under Miss. Code Ann. § 11-51-75. The circuit court was required to function in its appellate role, and thus, **no discovery or testimony outside the bill of exceptions should have been allowed** on the Board of Alderman's decision in that instance. *Id* at 717. Accordingly, Waveland's judicial estoppel argument fails.

G. Waveland's assertion that FEMA and MEMA are indispensable and necessary parties to this matter is misplaced.

Waveland next argues that the Federal Emergency Management Agency (FEMA) and the Mississippi Emergency Management Agency (MEMA) should have been joined under Rule 19 of the Mississippi Rules of Civil Procedure, and thus Yates' bill of exceptions and requested relief should be dismissed. Again, the underlying action is an appeal to this Court. It is not a new cause of action. Therefore, even if Yates did choose to join FEMA and MEMA, it could not do so. Furthermore, it is difficult to see how FEMA and MEMA's interest in the matter would "as a practical matter impair or impede his ability to protect that interest or leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." *See* M.R.C.P. 19(a). FEMA and MEMA are simply funding some or all of the costs of the Sewer Project. The source of funding has no bearing on Waveland's compliance with the necessary bidding laws. In fact, because the Sewer Project is or may be funded by FEMA/MEMA, it is likely more important for Waveland to comply with state laws on bidding procedures, as a government agency would necessarily require compliance with state laws. Further, if the Court reverses the circuit court's ruling, as Yates contends that is should--that

Waveland should not have awarded the contract to Reynolds--then it is Waveland's responsibility to compensate Yates for its damages and attorney's fees--not FEMA or MEMA.

CONCLUSION

Waveland has utterly failed rebut Yates' showing that it acted beyond the scope of its authority, violated the statutory rights of Yates, acted arbitrarily and capriciously, and acted without substantial evidence. As such, the ruling should be reversed, and this matter should be remanded to the trial court for a hearing to determine Yates' damages pursuant to *City of Durant v. Laws Construction Co.*, 721 So.2d 598 (Miss. 1998).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GINA BARDWELL TOMPKINS, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing **W.G. Yates and Sons Construction Company, Inc.'s Reply Brief of Appellant** to:

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This the 24th day of October, 2011.

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