

**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**

BRIEF OF APPELLANT

SUBMITTED BY:

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ORAL ARGUMENT IS REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant, W.G. Yates and Sons Construction Company, Inc., certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or judges of the Mississippi Court of Appeals, may evaluate possible disqualifications or recusal:

1. Appellant, W.G. Yates and Sons Construction Company, Inc., P. O. Box 1354, Biloxi, MS 35933;
2. Todd Bradford, W.G. Yates and Sons Construction Company, Inc., P. O. Box 1354, Biloxi, MS 39533, representative of Appellant;
3. Dodds Dehmer, W.G. Yates and Sons Construction Company, Inc., P. O. Box 1354, Biloxi, MS 39533, representative of Appellant;
4. Chet Nadolski, W.G. Yates and Sons Construction Company, Inc., P. O. Box 1354, Biloxi, MS 39533, representative of Appellant;
5. William Yates, W.G. Yates and Sons Construction Company, Inc., P. O. Box 1354, Biloxi, MS 39533, representative of Appellant;
6. Appellee, the City of Waveland, Mississippi;
7. Ronald G. Peresich, Page, Mannino, Peresich & McDermott, PLLC, P. O. Drawer 289, Biloxi, MS 39533, Attorney for Appellant, W.G. Yates and Sons Construction Company, Inc.;

8. Gina Bardwell Tompkins, Page, Mannino, Peresich & McDermott, PLLC, P. O. Drawer 289, Biloxi, MS 39533, Attorney for Appellant, W.G. Yates and Sons Construction Company, Inc.;
9. Sean J. Tindell, Page, Mannino, Peresich & McDermott, PLLC, P. O. Drawer 289, Biloxi, MS 39533, Attorney for Appellant, W.G. Yates and Sons Construction Company, Inc.;
10. Lauren Reeder McCrory, Page, Mannino, Peresich & McDermott, PLLC, P. O. Drawer 289, Biloxi, MS 39533, Attorney for Appellant, W.G. Yates and Sons Construction Company, Inc.;
11. William R. Purdy, Bradley, Arant, Boult & Cummings, LLP, Suite 400, One Jackson Place, 118 E. Capitol Street, Post Office Box 1789, Jackson, MS 39215, Attorney for Appellant, W.G. Yates and Sons Construction Company, Inc.;
12. Zach Butterworth, Hesse and Butterworth, 841 Highway 90, Post Office Box 3567, Bay St. Louis, MS 39520, Attorney for Appellee, City of Waveland; and
13. Gary Yarborough, Hesse and Butterworth, 841 Highway 90, Post Office Box 3567, Bay St. Louis, MS 39520, Attorney for Appellee, City of Waveland.

THIS, the 3rd day of June, 2011.


GINA BARDWELL TOMPKINS

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STATEMENT OF THE ISSUES

W.G. Yates and Sons Construction Company, Inc., (hereinafter "Yates") presents the following issues in this appeal:

1. Whether the trial court erred in finding Reynolds, Inc. (hereinafter "Reynolds") to be a "resident contractor" consistent with Miss Code Ann. § 31-3-21(3).
2. Whether the trial court erred in finding that the City of Waveland (hereinafter "Waveland") was not required to reject Reynolds' bid when Reynolds failed to include revised bid forms as required by Waveland's bidding instructions.
3. Whether the trial court erred in finding that Waveland's decision to award the Sewer Reconstruction Project North of Railroad Tracks ("Sewer Project") to Reynolds was not arbitrary, capricious, discriminatory, or without substantial evidential basis.

STATEMENT OF THE CASE

Nature and Course of the Proceedings and Disposition in the Court Below

Yates is aggrieved by Waveland's June 2, 2009, action in awarding the Sewer Project to Reynolds. Pursuant to Miss. Code Ann. § 11-51-75, Yates appealed Waveland's decision to the Hancock County Circuit Court on June 11, 2009. A Bill of Exceptions was filed and, after both parties fully briefed the matter and oral arguments were heard, the Circuit Court entered an Order

dismissing the appeal and affirming the action of Waveland. Yates now appeals the lower court's decision to this Court.

Statement of the Facts

Waveland formally advertised for competitive sealed bids pursuant to Miss. Code Ann. § 31-7-13 (Rev. 2008) for the Sewer Project at issue in accordance with published bidding documents and instructions. (R. at 233-646). Waveland's bidding documents for the Sewer Project included Section 00100, INSTRUCTIONS TO BIDDERS which provided, in pertinent part, the following:

12 SUBMISSION OF BIDS

12.1 (Addendum No. 1) . . . Any bids received after the stated time will not be accepted under any circumstances.

12.2 If any Addenda are issued concerning changes in the Bidding Documents, the Bidder must use the latest version of any form so issued for inclusion in his Bidding Documents. **Failure to use the correct form shall be deemed as sufficient cause for rejection of any bid so submitted.**

16.1 . . . Bids which are unsigned or are not accompanied by the required Bid Security shall be irrevocably rejected

(R. at 242-51) (emphasis added).

On May 14, 2009, Waveland publicly opened and read aloud sealed bids for the Sewer Project. (R. at 763-65). The lowest two bidders were Reynolds and Yates. (R. at 907-15.) Reynolds' bid states that its state of incorporation is Indiana. (R. at 200.) Reynolds did not, however, attach to its bid a copy of Indiana's current law on that state's treatment of nonresident contractors – as required by Miss. Code Ann. § 31-3-21(3) (Rev. 2008). (R. at 677-761.) Reynolds' bid referenced its own Mississippi State Board of Contractors' license number (08534), and the copy of the certificate of responsibility with the bid notes Reynolds' address as Post Office Box 185; Orleans, Indiana 47452. (R. at 700.) Reynolds' bid further establishes that Reynolds did not become

a subsidiary of Layne Christensen, a Mississippi corporation, until September 28, 2005, when Reynolds was acquired by Layne Christensen. (R. at p. 730.)

Reynolds' bid also did not include the revised bid forms issued by Waveland with pre-bid addenda, which is a violation of the mandatory INSTRUCTIONS TO BIDDERS. These instructions required all bidders to "use the latest version of any form so issued for inclusion in his Bidding Documents" and expressly cautioned all bidders, including Reynolds, that noncompliance would cause "rejection of any bid so submitted." (R. at 248, 677-761). Because Reynolds did not utilize the revised pages from the pre-bid addenda, Waveland's Project Engineer used the figures Reynolds had included on the original bid form pages to calculate the total price for Reynolds. These corrections made by the Project Engineer were contained in the certified bid tabulation given to the City. (R. at 907-15.) Reynolds' corrected total bid price was \$9,356,601.65. *Id.* Yates' corrected total bid price was \$9,471,859.12. *Id.*¹

Waveland published the agenda for its May 20, 2009, meeting. Item 21 on the agenda was a "Motion to approve Yates Construction, as the next lowest and best bidder for the Sewer North Reconstruction Project (FEMA funded), issue notice of award, authorize Mayor to sign construction

¹ An asterisk on the certified bid tabulation identified two line items where the Project Engineer made mathematical corrections to both the Reynolds' bid and the Yates' bid. Yates does not contest these simple mathematical calculations because the errors made by both bidders was evident on the face of the bid and resulted from the failure (in both cases) of the bidders to correctly calculate or multiply the amount of the items with the number of linear feet. Such corrections have been found by this Court and the Attorney General to be waivable. See *W & W Contractors, Inc. v. Tunica Co. Airport Comm'n*, 881 So.2d 358, 362 (Miss. Ct. App. 2004); MS AG Op. Hembree (June 24, 2002); MS AG Op. Delaney (October 6, 2000); MS AG Op. Meek (February 27, 1980). The Project Engineer's certified bid tabulation did **not** indicate, however, that the incorrect bid form had been used by Reynolds and that the Engineer (or the City) had decided to use the bid amount included (on the incorrect bid form - on an incorrectly sized pipe) for the pipe size that was actually to be used for the Project. There is no authority that holds that such a change or amendment is, in fact, waivable.

contract and issue notice to Proceed, pending approval by the City Attorney.” (R. at 767-69.) The agenda was based on the Project Engineer’s recommendation that Waveland reject Reynolds’ bid and award the Sewer Project to Yates as the “lowest and best bidder.” (R. at 771-815.) Before the May 20, 2009 meeting, representatives of Reynolds were allowed to voice objection to Waveland’s proposed award to Yates, and the matter was not ultimately not heard by the Board on May 20, 2009. (R. at 223.)

By letter dated May 26, 2009, Dodds M. Dehmer, Vice-President and General Counsel for Yates, provided information to Zach Butterworth, the attorney for Waveland, regarding Reynolds’ bid. (R. at 1007-08.) Among other things, Yates noted that Reynolds was a nonresident contractor based in Indiana. *Id.* Yates objected to the award of the contract to Reynolds on the basis that Reynolds’ bid was materially non-responsive because it failed to attach to its bid a copy of Indiana’s current law on the treatment of nonresident contractors. As such, Yates advised Waveland that Reynolds’ bid could not be considered as the lowest and best bid under the Mississippi Public Bid Laws. *Id.* Dehmer’s letter also noted that Yates understood that Reynolds had failed to use the correct Bid Form and, if so, Reynolds’ bid should have been rejected as the Bid Form was considered a Bidding Document, and that Section 12.4 of the Instructions to Bidders stated that “Failure to use the correct form **shall** be deemed as sufficient cause for the rejection of any bid so submitted.” *Id.*

By letter dated May 28, 2009, Waveland received certain information from Tom Vaughn, an attorney for Reynolds, regarding Reynolds’ bid. Included with the letter is a Certificate of Fact by the Secretary of State of Indiana outlining the merger between Layne Merger Sub 2, Inc (Layne Christensen); the Articles of Merger between Layne and Reynolds, a Form 10K for the fiscal year ending 2006 outlining the acquisition of Reynolds by Layne; and the Affidavit of Steven F. Crooke dated May 29, 2009, indicating that Layne Christensen or its predecessor had conducted business

in Jackson, Mississippi, since 1976. (R. at 817-904.) These documents indicate that Reynolds has a separate legal existence, although it is a wholly owned subsidiary of Layne Christensen. *Id.* They also indicate that Reynolds is an Indiana domestic corporation, and that Reynolds was acquired in a merger transaction effective September 28, 2005. *Id.*

After improperly correcting Reynolds' bid, the Project Engineer then recommended to Waveland, in a letter dated June 1, 2009, that the Sewer Project be awarded to Reynolds. (R. at 727.) This recommendation was contrary to his earlier recommendation, although the revised letter from the Project Engineer contained no facts or other information supportive of his changed recommendation. There is also no finding or determination by the Waveland Board that it actually considered the reasons for this change in the Project Engineer's recommendation. *Id.* Waveland's published agenda for its June 2, 2009, meeting included a "Motion to approve Reynolds's (*sic*) Construction as the lowest and best bidder for the Sewer System Reconstruction North of Railroad project, as well as approving the contracts, pending the approval of City Attorney and Notice to Proceed." (R. at 917-19.) Yates' representatives attended the June 2, 2009 meeting of the Mayor and Board of Alderman. (R. at 928.) When the agenda item was called for discussion, and after the motion had been made and seconded, William R. Purdy, one of Yates' attorneys, rose and requested the opportunity to be heard before a vote was taken on the motion. *Id.* Waveland's Mayor summarily rejected Yates' request to be heard on the matter. *Id.* Without any discussion, the Mayor and Board of Alderman voted to award the Sewer Project to Reynolds at Reynolds' improperly corrected bid price. *Id.* Yates' attorney, Purdy, was subsequently permitted to speak to the Mayor and Board of Alderman but only off the record and during the public comments portion at the end of the agenda. Purdy's comments were taken after Waveland had concluded its official public business, including the vote to award the Sewer Project to Reynolds at its corrected bid price, and

were not considered by Waveland. (R. at 226-27.) Purdy made four (4) basic points to the Mayor and Board of Alderman: (1) Reynolds did not attach a copy of Reynolds' resident state's current bid preference law to its bid as required by statute; (2) Reynolds did not use the correct bid forms as revised by Waveland's pre-bid Addendum, in direct violation of Waveland's INSTRUCTIONS TO BIDDERS; (3) Reynolds' bid was corrected by the Project Engineer after the fact to conform to the revised bid sheets, which was a violation of Mississippi law; and (4) Waveland's award to Reynolds exceeded Waveland's powers and was illegal. *Id.* Finally, before filing its notice of appeal to the Hancock County Circuit Court, Yates, through its counsel, filed a formal bid protest with Waveland which outlined the errors Waveland made in its award of the Sewer Project to Reynolds. (R. at 975-90.)

SUMMARY OF THE ARGUMENT

Waveland awarded the Sewer Project to Reynolds despite the fact that Reynolds' bid was in direct violation of Mississippi Public Bid Laws and its own bid specifications. There was insufficient evidence in the record before Waveland, and Waveland clearly did not make the requisite factual findings as to Reynolds and/or Layne Christensen under Miss. Code Ann. § 31-3-21(3.) There was also insufficient evidence in the record and Waveland clearly did not make the requisite factual findings as to Reynolds' failure to comply with Waveland's own bid specifications. Thus, Waveland improperly awarded the contract to Reynolds when the record shows that Yates was the lowest and most responsive bidder.

ARGUMENT

A. Standard of Review

"The scope of review is limited when examining the actions of a municipal board." *Nelson v. City of Horn Lake ex. rel. Bd. of Aldermen*, 968 So.2d 938, 942 (Miss. 2007). "For questions of law, a municipal board's decision is reviewed de novo." *Id.* Furthermore, we apply a de novo standard of review to issues of statutory interpretation. *Id.* Otherwise, we "will not set aside the action of the governing body of a municipality unless such action is clearly shown to be arbitrary, capricious, or discriminatory or is illegal or without substantial evidentiary basis." *Id.* at (§11) (quotations omitted). "An act is arbitrary and capricious when it is done at pleasure, without reasoned judgment or with disregard for the surrounding facts and circumstances." *Id.* "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion or more than a 'mere scintilla' of evidence." *Id.*

Precision Communications, Inc., v. Hinds County, Mississippi, 2009-CC-01720-COA (Miss. Ct. App. 2011).

B. The trial court erred in finding Reynolds to be a "resident contractor" pursuant to Miss Code Ann. § 31-3-21(3).

The trial court erred in finding Reynolds to be a "resident contractor" pursuant to Miss. Code Ann. § 31-3-21(3). When the bids for the Sewer Project were open and read, it was abundantly clear that Reynolds had failed to attach to its bid a copy of Indiana's current law pertaining to that state's treatment of nonresident contractors as required by Miss. Code Ann. § 31-3-21(3) (Rev. 2008). Reynolds is a non-resident contractor as defined in Miss. Code Ann. § 31-3-21(3). Miss. Code Ann. § 31-3-21(3) provides in pertinent part:

In the letting of public contracts preference shall be given to resident contractors, and a nonresident bidder domiciled in a state having laws granting preference to local contractors shall be awarded Mississippi public contracts only on the same basis as the nonresident bidder's state awards contracts to Mississippi contractors bidding under similar circumstances; and resident contractors actually domiciled in Mississippi, be they corporate, individuals, or partnerships, are to be granted preference over nonresidents in awarding of contracts in the same manner and to the same extent as provided by the laws of the state of domicile of the nonresident. 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 . . .

(Rev. 2008) (emphasis added).

Miss. Code. Ann. § 31-3-21(3) **requires** that a nonresident bidder attach a copy of his resident state's current law pertaining to treatment of nonresident contractors when submitting a bid for a public project. MS AG Op., Adams (November 17, 2003). "The inclusion of the law of a foreign state is a statutory requirement which **cannot be waived**, and the failure to include that law would prevent the award of that bid to that bidder." *Id.* (emphasis added.) *See also*, MS AG Op., Brown (August 17, 2001). "This statutory requirement is **mandatory** and a copy of the non-resident bidder's state law must be attached to his bid prior to the award of the contract." MS AG Op., Walls (April 25, 1989) (emphasis added). "If the non-resident bidder fails to provide the attachment prior to the time of the award, then his bid must be rejected." *Id.* *See also*, MS AG Op., Zebert (April 4, 1989). "[W]e have consistently opined that the failure of a non-resident bidder to submit a copy of his applicable bid preference law prior to the time of the award should result in the rejection of his bid." MS AG Op., Brannon (August 21, 2009) (citing MS AG Op., Dulaney (June 26, 2009); MS AG Op., Jones (September 4, 2007)).

The intent of the Legislature in its adoption of Section 31-3-21(3) is clear. Mississippi contractors are to be given preference over non-resident contractors bidding against them to the same extent that a Mississippi contractor would when bidding against the non-resident contractor in the non-resident's home state. As such, the statutory intent is to level the playing field. 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 non-resident to attach to its bid a copy of its home

State's 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).

The Mississippi Supreme Court has stated:

Legislative intent is to aid to statutory construction, often elusive to the perception of unaided vision, remains nevertheless the pole star of guidance. Appellee invokes as an elemental formula acceptable to lay and legal usage that what the legislature said is clear and unambiguous and what is meant to be found simply by what is said. This formula should not be discredited. It is only by words that statutory intent is to be disclosed

Id. (citing *Anderson v. Lambert*, 494 So.2d 370, 373-374 (Miss. 1986) (citing *Quitman County v. Turner*, 196 Miss. 747, 18 So.2d 122 (1944)). Also, it has been said that the Court's primary objective is to employ the interpretation that best suits the Legislature's true intent or meaning. *Anderson v. Lambert*, 494 So.2d 370, 372 (Miss. 1986).

In an appeal from the decision of a municipal authority, Miss. Code Ann. § 11-51-75 (1972) states that the person aggrieved may "embody the facts, judgment, and decision in a bill of exceptions." Miss. Code Ann. § 11-51-75 (1972). The bill of exceptions serves as the record on appeal, and the Mississippi Supreme Court has held that "[t]he circuit court can only consider the case as made by the bill of exceptions. This is the **only record** before the circuit court, as an appellate court." *Van Meter v. Greenwood*, 724 So.2d 925, 928 (Miss. 1998) (citing *Stewart v. City of Pascagoula*, 206 So.2d 325, 328 (Miss. 1968)) (emphasis added). It is uncontradicted that Reynolds failed to attach a copy of its home state's preference law. Therefore, Waveland never had an opportunity to determine whether or not a Mississippi contractor bidding in Indiana would be subject to an adverse preference when bidding against an Indiana contractor. Clearly, it was impossible for Waveland to have made a factual determination on this issue in the absence of the Indiana state statute. Despite the fact that Mississippi's statute provides that a non-resident

contractor” **shall** attach thereto a copy of his state’s current law pertaining to such state’s treatment of non-resident contractors,” Waveland nevertheless awarded the bid to a non-resident. Such an award completely ignored the mandatory language of Miss. Code Ann. § 31-3-21(3) and was, therefore, not supported by substantial evidence, was arbitrary and capricious, was beyond Waveland’s authority under state law, and violated Yates’ right to be awarded this contract.

Waveland’s position is that Reynolds should be considered a “resident contractor” because of its relationship to Layne Christensen. This assertion is clearly unsupported by the evidence **contained in the appellate record** and, therefore, the evidence necessary to support such a finding was **not** before Waveland when the decision was made to award the Sewer Project to Reynolds. Waveland is required, as suggested by opinions from the Mississippi Attorney General, to find, determine and/or adjudicate that the non-resident contractor meets the requirements of Miss. Code Ann. § 31-3-21(3) **and those findings must be consistent with fact**. *See* MS AG Op., Brannon (December 28, 2009) (“If the Gulfport City Council makes the determination, **consistent with fact**, that the nonresident contractor meets these requirements, then the nonresident contractor must be treated as a resident contractor for purposes of Section 31-3-21”) (emphasis added); MS AG Op., Adams (November 17, 2003) (“Whether or not a certain corporate contractor meets this definition is a factual determination for the Tunica County School district to make subject to court review”) (citing MS AG Op., Henley (July 31, 1991)).

What the appellate record does show is:

- Reynolds’ bid lists its Mississippi State Board of Contractors’ license number, 08534, and the copy of the certificate of responsibility included in the bid notes

Reynolds' address as Post Office Box 185; Orleans, Indiana 47452. (R. at 677-761, specifically at 700).²

- Reynolds is an Indiana corporation domiciled in Indiana with a principal office of 4250 North State Road, Orleans, Indiana. (R. at 700.)
- Reynolds' state of incorporation is Indiana. (R. at 694.)
- Reynolds was not acquired by Layne Christensen until a merger transaction effective on September 28, 2005. (R. at 730.)
- Reynolds' acquisition did not occur until nearly twenty (20) years after January 1, 1984 – the relevant date contained in Miss. Code Ann. § 31-3-21(3).
- After the bids were opened by Waveland, but before the contract was awarded, Reynolds submitted certain information to Waveland on May 28, 2009. (R. at 817-904.)

Included in the information received from Reynolds was an affidavit of Steven F. Crooke.

(R. at 819.) Crooke's affidavit states:

1. I currently serve as Senior Vice President–General Counsel and Secretary of Layne Christensen Company and Vice President for Reynolds, Inc., a wholly owned subsidiary of Layne Christensen Company. I also serve as General Counsel for Reynolds, Inc.
2. Reynolds, Inc. was acquired in a merger transaction effective September 28, 2006. Please see attached Certificate of Merger filed with the Delaware Secretary of State evidencing the acquisition of Reynolds, Inc., attached hereto as Exhibit 1.
3. Layne Christensen Company has conducted business in the State of Mississippi since 1976 when it acquired certain assets and facilities located in Jackson, Mississippi and Cleveland, Mississippi from The Singer Company. At the time of such acquisition from The Singer Company, Layne Christensen Company

² Layne Christensen has its own certificate of responsibility number issued by the State of Mississippi Board of Contractors.

conducted business as "Layne-Western Company, Inc." In May 1981, "Layne-Western Company, Inc." was reorganized and re-incorporated in the State of Delaware. The newly organized "Layne-Western Company, Inc." then qualified to conduct business in the State of Mississippi in June 1981. On June 5, 1992, "Layne-Western Company, Inc." changed its name to "Layne, Inc." and then in March 1996, "Layne, Inc." changed its corporate name to "Layne Christensen Company."

4. As of the date hereof, Layne Christensen Company continues to operate its business in Jackson, Mississippi and has done so continuously since 1976.

(R. at 819.)

Neither the affidavit nor the other information submitted by Reynolds to Waveland actually contains what is required by Miss. Code Ann. § 31-3-21(3): that Reynolds or Layne Christensen has (1) been qualified to do business in this State **and** (2) has maintained a **permanent full-time office**³ in the State of Mississippi for two (2) 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 does not equate to a "permanent full time office" as required by the statute. The Mississippi State Tax Commission's Income Tax Regulation (Reg. 806) Multistate Taxation (January 14, 1988) defines "doing business" as:

the operation of any enterprise or activity in Mississippi for financial profit or economic gain. . . Doing Business includes, but is not limited to, the following: The regular maintenance of an office or other place of business in Mississippi, [. . .] The owning, renting, or operating of business or income-producing property, real or personal, in Mississippi.

³ According to Black's Law Dictionary, "permanent" means "continuing or enduring in the same state, status, place, or the like, without fundamental or marked change, not subject to fluctuation, or alteration, fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient."

As such, it is clear that an entity or business can “conduct,” “operate” or “do business” in Mississippi, but not have a personal full time office in the State. In fact, there are a number of entities that conduct or operate a business within the State, but which do not maintain a permanent full time office. The Legislature clearly intended that **both** provisions of Miss. Code Ann. § 31-3-21(3) be satisfied in order to qualify as a resident contractor. A non-resident contractor must **both** have been qualified to do business in the State **and** have maintained a permanent full time office in the State for two (2) years prior to January 1, 1986. The only evidence in the record before Waveland and the lower court was the affidavit of Steven F. Crooke in which he simply states that Layne Christensen (and not Reynolds), had, since 1976, operated its business in Jackson, Mississippi. The fact that Layne Christensen may have continued to “operate its business” does not meet the statutory requirement that it had “maintained a permanent full time office in the State. . . .” This is a clear statutory requirement, and a non-resident who wishes to be considered as a resident for bidding purposes must meet both tests. As a result, Layne Christensen was statutorily required to have in place a “full time” office on a permanent basis from January 1, 1984 to May, 2009.

Nowhere in Crooke’s affidavit and, more importantly, nowhere in the record before Waveland and the lower court is there evidence that Layne Christensen had continuously maintained a full time office, as opposed to an office which conducts some, but not all, of its business on a full time basis in the State. There is no showing from Crooke’s affidavit of what kind of business was conducted year to year in its Jackson operation, whether it was a one or two-person office; or if the office was simply equipped to answer the phone and forward business opportunities to the out-of-state corporate address; or if it was an office that was maintained for the limited purpose of being able to say that it was simply “doing business” in Mississippi.

Operations of that type would clearly not qualify under the non-resident contractor statute. There is also no showing in Crooke's affidavit, or anywhere else in the record before Waveland or the lower court, showing that Layne Christensen operated a full time office for some period of time, whether or not a full time operation, **continuously**, as the statute requires, since January 1, 1984. Crooke's affidavit falls far short of the statutory requirement that could enable Layne Christensen and/or Reynolds, to be considered as a resident contractor.⁴

In addition, the status of Layne Christensen, as opposed to Reynolds, is not before this Court. The preference statute clearly refers to the non-resident contractor (Reynolds) which submits the bid. It is Reynolds whose bid was submitted to Waveland along with its Board of Contractors' License Number and its Certificate of Responsibility. Nothing was submitted by Layne Christensen because it was not the entity bidding on the project.

The statute clearly provides that "the term 'resident contractors' includes a non-resident that has qualified to do business in the State and has maintained a permanent full time office," and can only refer to the non-resident contractor actually submitting the bid. There is no evidence in the record that Reynolds could meet the statutory requirement, and Waveland has not argued that point to date. Instead, Waveland's argument is that even though the statute speaks of the non-resident contractor which submits the bid, and the bid was submitted only by Reynolds, nevertheless Reynolds is entitled to "piggyback" upon another non-resident contractor (Layne Christensen). Had Reynolds, the contractor who submitted the bid, been able to meet the

⁴ It is clearly required, as with affidavits used for summary judgment purposes, that this affidavit must contain sufficient factual specificity in order to be given the requisite authority. *See, Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) ("conclusory allegations unsupported by **concrete and particular facts** will not prevent an award of summary judgment") (emphasis added); *Richardson v. Oldham*, 12 F.3d 1373, 1378-79 (5th Cir. 1994) (affidavits in opposition to summary judgment that contain conclusions or conjecture not based on personal knowledge and **insufficient factual specificity** are not competent summary judgment evidence) (emphasis added).

qualifications of a “resident contractor,” then its subsidiaries and affiliates could also have been considered “resident contractors.”

Regardless of whether or not the term “non-resident contractor” is construed to apply to Reynolds, or to Layne Christensen, the fact is that the Bill of Exceptions (which was all that was considered by Waveland and reviewed by the appellate court) does not contain evidence showing that either entity had maintained a permanent full time office in Mississippi for two years prior to January 1, 1986. More clearly stated, there was no evidence **in the record** before Waveland and before the lower court to indicate that either Reynolds or Layne Christensen presented enough information for Waveland to have made a determination, consistent with fact, that either entity could be considered a “resident contractor” under the applicable statute.

It is also important to note that the Mississippi Legislature enacted and the Governor signed into law an amendment to Miss. Code Ann. § 31-3-21(3) which became effective July 1, 2010. This amendment requires that “[w]hen 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 non-resident contractors.” The amendment to the statute now clarifies the mandatory requirement of the preference statute and now unequivocally states:

Any bid submitted by a nonresident contractor which does not include the nonresident contractor’s current state law shall be rejected and not considered for award.

Miss. Code Ann. § 31-3-21(3) (Rev. 2010). The amended statute does not create new law, but reinforces the language in the previous law which requires that the non-resident contractor **shall** attach to his bid a copy of his state’s preference law.

Waveland awarded the Sewer Project at issue in this appeal to Reynolds even though Reynolds was in direct violation of Mississippi Public Bid Laws. Because there was insufficient

evidence in the record and Waveland clearly did not make the requisite factual findings as to Reynolds and/or Layne Christensen under Miss. Code Ann. § 31-3-21(3), Waveland improperly awarded the contract to Reynolds. The trial court erred in deeming Reynolds a “resident contractor.”

C. The trial court erred in finding that Waveland was not required to reject Reynolds’ bid when Reynolds did not include revised bid forms as required by Waveland’s bidding instructions.

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).) Because it failed to use the proper bid forms, Reynolds, submitted its bid with an incorrect size pipe. Waveland’s Project Engineer, with no evidentiary support that Reynolds made a pricing mistake, ultimately used the figures from Reynolds in the original bid form pages to calculate the total bid price for Reynolds. In other words, he transferred the pricing as actually submitted by Reynolds to the revised bid forms. (R. at 677-81.) No other contractor bid on the wrong size pipe. No other bid was corrected in such a manner. Thus, Reynolds’ bid was improperly corrected, was never submitted by Reynolds, was never signed by Reynolds, was not sealed, was not accompanied by bid security applicable to the amount of the corrected price and, being corrected after the fact, was not in existence as of the deadline for the submission of bids. 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.

In *Hemphill Const. Co. v. City of Laurel*, 760 So.2d 720 (Miss. 2000), the City of Laurel allowed the lowest-bidding contractor to amend its bid price to correct an error after the bids were opened, and then subsequently awarded that contractor the contract. The Mississippi Supreme Court reversed the Court of Appeals' ruling, and held that the City of Laurel acted beyond its authority or powers. "Municipalities have only such powers as are expressly granted or necessarily implied by statutes." *Id* at 723. "The public bid laws do not expressly provide for the action taken by the City in this case, and the question becomes whether such action is necessarily implied." *Id*. "It is true that this Court has recognized that governing authorities have a measure of discretion in awarding public contracts. The discretion exists, however, only where it is supported by statute." *Id*.

The controlling statute for governing authorities to contract for public construction is Miss. Code Ann. § 31-7-13 which provides that purchases "may be made from the lowest and best bidder after advertising for competitive sealed bids. . . ." *Id* at 722. The Mississippi Supreme Court went on to provide:

[t]he law requires 'competitive sealed bids.' **The purpose of the law is to protect the public by promoting competition so as to prevent fraud, favoritism and the like.** These premises negate any inference that a bid can be amended after opening to substantially increase the bid price...[t]herefore, the City acted beyond its powers in awarding the contract...under the amended bid price.

Id at 724 (emphasis added). As outlined in *Hemphill*, Mississippi public bid laws do not allow for after-the-fact corrections of sealed bids. Waveland was not authorized to allow such amendments to Reynolds' bid by its Project Engineer, and as such, was not permitted by law to award the Sewer Project to Reynolds. Waveland should have rejected Reynolds' bid on its face for failure to comply with its own bid specifications.

Even if 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. His decision to waive an irregularity in a bid is a decision that can only be made by the municipality 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.

It is well settled under Mississippi laws that a municipality can act only through its minutes. *See Rawls Springs Utility Dist. v. Novak*, 765 So.2d 1288, 1291 (Miss. 2000); *Nichols v. Patterson*, 678 So.2d 673, 676-77 (Miss. 1996). "A county or municipality can act only through its minutes, and those official actions must be evidenced by its minutes." *Smith v. Board of Sup'rs of Tallahatchie County*, 124 Miss. 36, 86 So. 707, 709 (1920). This Court has also ruled that a board's "minutes are the exclusive evidence of what the board did, and that parol evidence is not admissible to show what actions the board took." *Myers v. Blair*, 611 So.2d 969, 972 (Miss. 1992) (quoting *Noxubee County v. Long*, 141 Miss. 72, 106 So. 83, 86 (1925)). Simply put, even if using the wrong bid forms and bidding on the wrong size pipe was a waivable irregularity in Reynolds' bid, Waveland never made a finding **on its minutes** that the irregularity was waivable. Waveland simply awarded the Sewer Project to Reynolds without making any finding whatsoever that Reynolds' bid contained a waivable irregularity. (R. at 954.) As a result, Waveland's actions were arbitrary and capricious in this instance.

Waveland has cited *Hill Bros. Constr. & Eng'g Co., Inc. v. Miss. Transp. Comm'n*, 909 So.2d 58 (Miss. 2005) in support of this as a waivable irregularity. However, this Court clearly held that the authority to waive the irregularity lay with the Mississippi Transportation

Commission and noted 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 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.

D. The trial court erred in finding that Waveland’s decision to award the Sewer Project to Reynolds was not arbitrary, capricious, discriminatory, or without substantial evidential basis.

Waveland awarded the Sewer Project to Reynolds with its knowledge that Reynolds was not in compliance with Mississippi Public Bid Laws. On May 26, 2009, Dodds Dehmer, Vice-President and General Counsel for Yates, wrote the attorney for the City of Waveland informing him that Reynolds had failed to attach a copy of Indiana’s current bid preference statute, that Reynolds was not in compliance with Waveland’s bid specifications, and that Yates should be determined the lowest responsive bidder. At the June 2, 2009 Waveland meeting, when the motion to award the Sewer Project to Reynolds was called for discussion, one of Yates’ attorneys, William Purdy, rose and requested the opportunity to be heard before a vote was taken on the Motion. The Mayor rejected Yates’ request to be heard, and without any discussion whatsoever, the Mayor and Board of Aldermen voted to award the Sewer Project to Reynolds. The record contains no findings and/or factual determinations by the Board on Reynolds’ failure to attach a copy of Indiana’s current law on its treatment of nonresident contractors, and no findings and/or factual determinations with regard to Reynolds’ failure to comply with Waveland’s bid specifications. (R. at 954.) An act by

a governing authority is both arbitrary and capricious when it is done without reason or judgment, and it disregards the surrounding facts and settled controlling principles. *Dept. of Health v. S.W. Miss. Med. Center*, 580 So.2d 1238, 1240 (Miss. 1991). Clearly, Waveland disregarded the “surrounding facts” and “controlling principles” when it awarded Reynolds the Sewer Project, especially when it had no sufficient evidence before it and made no factual determination on the relevant issues. The City was well aware that the Reynolds bid was not in compliance with Mississippi Public Bid Laws, and not in compliance with its own bid specifications, as is evidenced by the May 26, 2009, letter from Dehmer. Furthermore, the fact that Waveland summarily rejected Yates’ request to be heard before taking the vote on the matter without any discussion at the June 2, 2009, Mayor and Board of Alderman meeting indicates that its decision to award the Sewer Project to Yates was arbitrary and capricious. Because Waveland acted arbitrarily and capriciously, and because Waveland’s decision was not supported by substantial evidence, Waveland’s decision to award the Sewer Project should be overturned by this Court.

CONCLUSION

Waveland awarded the Sewer Project to Reynolds even though Reynolds’ bid was in direct violation of Mississippi Public Bid Laws and of its own bid specifications. There was insufficient evidence in the record before the City and the appellate court, and Waveland clearly did not make the requisite factual findings or determination as to Reynolds and/or Layne Christensen’s non-resident contractor status under Miss. Code Ann. § 31-3-21(3). There was insufficient evidence in the record and Waveland clearly did not make the requisite factual findings as to Reynolds’ failure to comply with its own bid specifications.

Similarly, the trial court erred in deeming Reynolds a “resident contractor” was a waivable irregularity and finding that Waveland was not required to reject Reynolds’ bid when Reynolds did

not include revised bid forms as required by the bidding instructions. The trial court further erred in finding that Waveland's decision to award the Sewer Project to Reynolds was not arbitrary, capricious, discriminatory, or without substantial evidential basis. Waveland improperly awarded the contract to Reynolds when the record shows that Yates was the lowest and most responsive bidder. 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,

**W. G. YATES & SONS CONSTRUCTION
COMPANY, INC.**

**BY: PAGE, MANNINO, PERESICH &
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BY: 

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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**

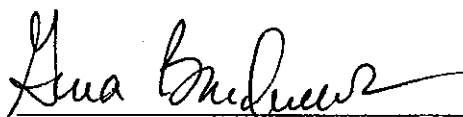
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This the 3rd day of June, 2011.



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