

# Mississippi Supreme Court upholds rules allowing bid changes after opening

- By TED CARTER Mississippi Business Journal

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The Port of Gulfport is shown in this aerial view.

- Courtesy



Brant Pettis

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A recent victory at the state Supreme Court for the Mississippi State Ports Authority wrapped up the last of a string of litigation related to the \$570 million restoration of the Port of Gulfport after Katrina.

The court's early June ruling closed a bid dispute between the Ports Authority and Eutaw Construction Co. In a failed claim for \$3 million, Eutaw challenged the correctness of allowing winning bidder Fore Trucking to increase the amount of riprap and other materials as specified in a bid-specification change order.

The materials change for elevating the port's 84-acre West Pier by 14 feet came after the bid opening. The initial bid specs required 2,200 square yards of riprap and 2,500 square yards of aggregate base course, a type of crushed limestone. An amendment to the bid shortly before the opening increased riprap to 4,400 square yards and aggregate base course to 5,000 square yards.

Fore Trucking kept its bid price at \$19.9 million and insisted its price took into account the added materials but failed to amend the materials amount in a bid response, said Brant Pettis, a Gulfport-based Balch & Bingham lawyer who represented the Ports Authority. “The port’s perspective and position are that the bidder” intended to offer the \$19.9 million all along, he said.

The court agreed: “We conclude that the intended correct bid was evident.”

Pettis, in an interview, said the Mississippi Supreme Court’s ruling gives state agencies needed clarity on rules governing bid openings and awards. With the ruling, the court vindicated a claim that state administrative rules allow a state agency to accept a bid change after bid opening but before the bid award.

In this instance, the Ports Authority allowed Fore to increase materials to the specified amount with no increase in its bid amount.

“The real significance of this is for public procurement in Mississippi,” Pettis said. “Before this opinion, Mississippi courts have not had occasion to apply the Mississippi Procurement Manual to a state agency.”

Eutaw, which submitted a bid of \$22.9 million, won early in the dispute, convincing Circuit Court Judge Winston L. Kidd the Ports Authority should have tossed out Fore Trucking’s bid.

The trial court served as an appeals court in the case, a typical practice for appeals from an admirative agency, Pettis said.

Kidd held that Mississippi law does not allow a bidder to alter its bid after opening. He relied on a 2000 state Supreme Court ruling in a bid lawsuit against the City of Laurel from Hempstead Construction. Hempstead prevailed in a challenge to a city bid award to a bidder allowed to substantially increase the bid amount after the bid opening.

“This court reversed that decision and held that ‘the relevant public bid law does not allow a governing authority to accept a bid price increase after the sealed bids are opened,’” the high court judges said in the ports ruling.

Calling Kidd’s ports ruling “misguided,” the judges said Kidd’s reliance on the Hempstead ruling failed to make a key distinction: The 2000 case allowed a bid price increase after a bid opening while the Ports Authority case allowed a change that left the bid price intact.

Fore’s corrections, which lowered the cost to taxpayers of what was already the lowest bid, is not what Hempstead is meant to protect against, the Supreme Court said.

Pettis called the overlooked materials quantity a “minor error” that does not run the risk of prejudicing the other bidders.

That is not to say flexibility on bid procedures won’t lead to difficulties, the Balch & Bingham attorney said. “If there is an effort to game the system, I don’t think that is something the court would allow.”

What the Supreme Court is willing to allow, Pettis said, is an acknowledgment “we don’t live in a perfect world and there needs to be some grace in this,” provided it is exercised objectively.

The reversal of Kidd’s appellate ruling closed years of litigation over contracts and other issues stemming from the rebuild of the port destroyed by Katrina in August 2005. A key ruling came in 2010 with U.S. District Judge James Robertson’s finding that the state could divert the \$570 million cost of the restoration from a \$5 billion federal funds allocated for victims of the hurricane.

Plaintiffs that included the Mississippi State Conference NAACP and the Gulf Coast Fair Housing Center lacked standing to sue, Robertson ruled.

For port-rebuilding contractor W.C. “Cotton” Fore, the June Supreme court ruling showed the Ports Authority “was just following the law” when it upheld Fore Trucking’s bid. “We didn’t see where Eutaw had a leg to stand on,” said Fore, company president, in an interview, adding “there is no hanky panky going on at the Port of Gulfport.”