

# MISSISSIPPI PORT AUTHORITY

## BOARD OF COMMISSIONERS

### SPECIAL MEETING

**February 12, 2016**

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Minutes of the Mississippi State Port Authority Board of Commissioners Special Meeting, Friday, February 12, 2016, 2510 14<sup>th</sup> Street, Suite 1450, Gulfport, Mississippi, at which the following Commissioners and staff were present:

**Commissioners:** E.J. Roberts, President  
Robert J. Knesal, Vice-President  
James C. Simpson, Jr., Secretary  
John Rester, Treasurer  
Jack Norris, Commissioner

**Staff:** Jonathan Daniels, Executive Director & C.E.O.  
Matthew Wypyski, Chief Operating Officer  
John Webb, Director of Engineering  
Nick Foto, Program Deputy Director  
Mary Bourdin, Director of Finance  
Kim Purchner, Executive Asst./HRO  
Mel Arsenault, Director of External Affairs

Ben Stone, Balch & Bingham (via telephone)  
David Duhe, Balch & Bingham  
Mark Bond, Balch & Bingham

**Others:** Philip Carter, MDA (via telephone)  
Robert Burns, CH2MHill  
Michael Sheely, CH2MHill  
Taylor McNeil, Brunini Law Firm  
W.C. Fore, W. C. Fore Trucking  
Teresa Elrich, W.C. Fore Trucking  
Todd Bradford, YAJV  
Mark McDaniel, YAJV  
Randall Love, T.L. Wallace  
Derek Bullock, Saunders Construction, LLC  
Richie Ashley, Neel-Schaffer, Inc.

Commissioner Roberts noted the presence of a quorum and called the special meeting to order at approximately 1:30 p.m.

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Commissioner Simpson moved to close the meeting to determine the need for Executive Session. Commissioner Rester seconded and the motion was unanimously approved.

Commissioner Rester moved to enter Executive Session to discuss potential litigation (legal matter). Commissioner Norris seconded and the motion was unanimously approved.

(THE BOARD OF COMMISSIONERS ENTERED INTO EXECUTIVE SESSION AT APPROXIMATELY 1:35 P.M.)

Commissioner Simpson moved to come out of Executive Session. Commissioner Norris seconded and the motion was unanimously approved.

Commissioner Roberts stated that no action took place during Executive Session.

Commissioner Rester moved to amend the agenda to include the approval of Resolution No. 16-01. Commissioner Simpson seconded and the motion was unanimously approved.

Mark Bond, legal counsel for the Mississippi State Port Authority, read aloud Resolution No. 16-01 and offered copies of all exhibits to Resolution No. 16-01 for examination by those in attendance.

Commissioner Simpson moved to approve Resolution No. 16-01 (attached with digital exhibits), awarding the West Pier Construction Phase 2, Project No. 304 to Necaise Brothers Construction Co., Inc. Necaise Brothers Construction was found to be the lowest and best, responsive and responsible bid with an amount of \$44,112,370.24. Commissioner Norris seconded and the motion was approved with the Commission voting as follows:

Commissioner Simpson	Yes
Commissioner Norris	Yes
Commissioner Rester	Yes
Commissioner Knesal	No
Commissioner Roberts	Yes

David Duhe, General Counsel stated that a protest letter was received from W.C. Fore Trucking, Inc. today and this letter was not considered in the Resolution because it was not received in a timely manner.

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*Commissioner Simpson left the meeting.*

OLD BUSINESS:

Commissioner Rester moved to approve Change Order No. 10 with L&A Contracting under Contract No. 013-HUD-018. Change Order No. 10 increases costs by \$225,000 and adds 175 days to the contract. Commissioner Norris seconded and the motion was unanimously approved.

Commissioner Norris moved to approve Amendment No. 3 to Task Order No. 13 with Yates Anderson Joint Venture under Contract No. 010-HUD-006. Amendment No. 3 increases costs by \$506,410.00 with no change in schedule. Commissioner Rester seconded and the motion was unanimously approved.

Commissioner Rester moved to approve Amendment No. 2 to Task Order No. 14 with Yates Anderson Joint Venture under Contract No. 010-HUD-006. Amendment No. 2 increases costs by \$510,930.00 and adds 95 days to the contract. Commissioner Norris seconded and the motion was unanimously approved.

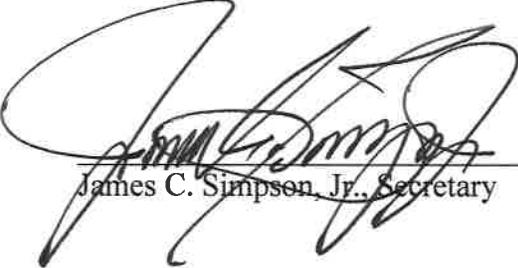
NEW BUSINESS:

Commissioner Knesal moved to approve Task Order No. 19 with Yates Anderson Joint Venture under Contract No. 010-HUD-006. Task Order No. 19 has a not to exceed cost of \$534,965.00 and duration of 198 days. Commissioner Rester seconded and the motion was unanimously approved.

Commissioner Knesal moved to adjourn the meeting. Commissioner Rester seconded and the motion was unanimously approved. The meeting was adjourned at approximately 2:45 p.m.

Approved and Attested

  
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E.J. Roberts, President

  
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James C. Simpson, Jr., Secretary

RESOLUTION NO. 16-01

The Board of Commissioners of the Mississippi State Port Authority at Gulfport (the "Port Authority") took up for consideration the matter of awarding the contract for the West Pier Construction Phase 2, Project No. 304. Thereupon, Commissioner Simpson offered and moved the adoption of the following resolution:

**RESOLUTION OF THE BOARD OF COMMISSIONERS OF THE MISSISSIPPI STATE PORT AUTHORITY AT GULFPORT APPROVING THE AWARD OF THE WEST PIER CONSTRUCTION PHASE 2, PROJECT NO. 304 TO NECAISE BROTHERS CONSTRUCTION CO., INC.**

**WHEREAS**, on or about November 2, 2015, the Port Authority issued an Advertisement for Bids for the West Pier Construction Phase 2, Project No. 304 (the "Project") which, among other things, stated: (i) the Award of Contract criteria for the Project would be expressed in the Instruction to Bidders; and (ii) that the Project was covered by the requirements of Section 3 of the Housing and Urban Development Act of 1968 ("Section 3");

**WHEREAS**, the Instructions to Bidders required that, among other things, the bidder, and its subcontractors, shall be contractors experienced in work of the type and character defined in the Plans and Specifications for the Project and the Port Authority reserved the right to reject any bid if the evidence submitted by the bidder demonstrated that such bidder and its subcontractors were not properly qualified to carry out the obligations of the Contract and to complete the work contemplated therein;

**WHEREAS**, the Instructions to Bidders further required that, among other things, each bidder and its subcontractors submit current State of Mississippi Certificates of Responsibility and the classification of each contractor's and/or subcontractor's kind of work or projects for which the contractor and/or subcontractors are qualified be so stated in the Certificates of Responsibility;

**WHEREAS**, in addition to the aforementioned requirements, each bidder of the Project was to provide the Port Authority with Section 3 requirements as described in the section of the Instructions to Bidders titled "Award of Contract." A copy of the Instruction to Bidders, as amended by Addendum Nos. 1 and 2 is attached as Exhibit "A" and fully incorporated herein;

**WHEREAS**, on or about December 3, 2015, the Port Authority held a pre-bid public meeting to discuss the Project and the requirements for submission of bids, which included a discussion of the type and character of the work required for the Project as well as the Section 3 business concern requirements and the preference given for Section 3 business concern certification;

**WHEREAS**, among the firms in attendance at that pre-bid public meeting were representatives of the following prospective bidders: Necaise Brothers Construction Co., Inc. ("Necaise"); and W.C. Fore Trucking, Inc. ("Fore"). Representatives from the only remaining eventual bidder for the Project, Huey Stockstill, Inc. ("Stockstill"), were not in attendance at the

pre-bid meeting. A copy of the Pre-Bid Meeting Sign-up Sheet is attached as Exhibit “B” and fully incorporated herein;

**WHEREAS**, as directed in the Instructions to Bidders, if any prospective bidder had questions concerning interpretation of the Bidding Documents, such prospective bidder was directed to contact the Port Authority by e-mail and the deadline for the submission of questions was ten (10) calendar days before December 22, 2015. The Instructions to Bidders directed that any interpretation of the Contract Documents would be made only by a written Addendum duly issued, and the Port Authority was not be responsible for any other explanation or interpretation of the Contract Documents not otherwise in the form of a duly issued written Addendum;

**WHEREAS**, on December 22, 2015 at 10:00 a.m., the Port Authority opened the sealed bids submitted by the following three (3) bidders and the total bid amount submitted by each respective bidder was as follows:

Bidder Name	Total Bid Amount
Fore	\$43,985,610.71 <sup>1</sup>
Necaise	\$44,112,376.28 <sup>2</sup>
Stockstill	\$47,507,754.00

**WHEREAS**, upon opening the sealed bids and reading aloud the total bid amounts submitted by each bidder, the Port Authority notified those in attendance at the bid opening that it was taking the three (3) bids under advisement and reviewing the total bid amounts as well as other criteria contained in the bid packages of each respective bidder. This internal review was conduct by the Port Authority, together with its construction consultants Yates Anderson Joint Venture (“YAJV”), TL Wallace Construction, Inc. (“TL Wallace”), and CH2M Hill, Inc. (“CH2M”), and with respect to Section 3 compliance, the Mississippi Development Authority (“MDA”);

**WHEREAS**, following the opening of the bids, but prior to award, on January 27, 2016, the Port Authority received a bid protest from Necaise which protested that: (1) “during the bids for Phase 1, [Necaise believed] Fore could not meet the Section 3 requirements using only employees from Fore. If this [were] repeated for Phase 2, [Fore’s] bid must be disqualified”; and (2) “[Fore’s] sub-contractor plan submitted with his bid. [Necaise was] concerned whether there were any sub-contractors listed, but if any were listed they do not meet the requirements set forth in the bid documents furnished by MSPA and MDA along with the provisions outlined in the MS

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<sup>1</sup> Fore incorrectly calculated bid line items and reflected a total price in the amount of \$43,941,235.87, which was read aloud at the bid opening.

<sup>2</sup> Necaise incorrectly calculated bid line items and reflected a total price in the amount of \$44,112,354.87, which was read aloud at the bid opening.

State Board of Contractors licensing requirements.” A copy of the January 27, 2016, Necaise bid protest is attached as Exhibit “C” and fully incorporated herein;

**WHEREAS**, on February 1, 2016, the Port Authority received a bid protest from Fore which asserted that “Fore submitted the lowest and best bid for the Project and as a result is entitled to contract award.” A copy of the February 1, 2016, Fore bid protest is attached as Exhibit “D” and fully incorporated herein;

**WHEREAS**, by letter dated February 2, 2016, Fore responded that the Necaise protest was without merit. A copy of the foregoing letter is attached as Exhibit “E” and fully incorporated herein;

**WHEREAS**, on February 3, 2016, in conducting its due diligence in its evaluation of the foregoing bid protest from Necaise, the Port Authority requested that Fore (1) provide documentation which stated that the Section 3 residents identified in Fore’s bid package were employees of Fore, and (2) confirm that it would not subcontract any work under the Project in an amount in excess of ten percent (10%). A copy of the foregoing request is attached as Exhibit “F” and fully incorporated herein;

**WHEREAS**, Fore complied with the Port Authority’s request and provided information that demonstrated that the employees identified in Fore’s bid package are employees of Fore and, further, that Fore did not have any subcontractors whose work will exceed an amount in excess of ten percent (10%) of the total bid. A copy of the foregoing response is attached as Exhibit “G” and fully incorporated herein;

**WHEREAS**, on February 3, 2016, in conducting its due diligence in its evaluation of the foregoing bid protest from Fore, the Port Authority requested that Necaise provide any specific information or documentation in support of its January 27, 2016, bid protest. A copy of the foregoing request is attached as Exhibit “H” and fully incorporated herein;

**WHEREAS**, Necaise provided to the Port Authority additional information which Necaise asserted supported the claims made in its bid protest. A copy of the foregoing response is attached as Exhibit “I” and fully incorporated herein;

**WHEREAS**, on February 5, 2016, the Port Authority received an additional bid protest from Fore which asserted that Necaise failed to comply with Section 3 and, thus, Necaise is an unqualified bidder. A copy of Fore’s second bid protest dated February 5, 2016, is attached as Exhibit “J” and fully incorporated herein;

**WHEREAS**, the Executive Director of the Port Authority has carefully considered the surrounding facts and circumstances and has carefully evaluated the information received and, based upon such, has determined that all bid protests pertaining to this Project should be rejected;

**WHEREAS**, the Port Authority finds, after having consulted with the Executive Director, that the contract for the Project should be awarded without delay because it is necessary to protect the substantial interests of the Port Authority;

**WHEREAS**, the Award of Contract section of the Instructions to Bidders stated that the Project would be awarded to the lowest responsive, responsible bidder, subject to a preference for a Section 3 Business Concern of 1.5 percent of the bid amount for the purpose of determining the lowest bid;

**WHEREAS**, the Port Authority has reviewed and evaluated the bids for the purposes of determining the lowest responsive, responsible bidder and has adopted the narrative summary attached hereto and fully incorporated herein as Exhibit "K";

**WHEREAS**, based upon the Port Authority's review of the bids, the bid submitted by Fore reflects electrical work in the amount of \$13,098,297.70, approximately 29.78% of Fore's total bid amount. However, Fore, from reviewing the submitted Certificate of Responsibility, does not have a license to perform commercial (or any other) electrical work. Although the Port Authority is aware that a certain portion of the electrical work can be performed without a license, Fore does not possess the necessary qualifications to self-perform any part of the electrical work for which a license is required (which establishes grounds for rejection of the bid). The Port Authority must infer that Fore intends to subcontract the electrical work to multiple subcontractors in order to remain at or under the 10% threshold. However, Fore did not identify or provide Certificates of Responsibility of any subcontractors anticipated to perform the electrical work required for the Project;

**WHEREAS**, in addition to the foregoing, the bid submitted by Fore reflects FAA hot mix asphalt work<sup>3</sup> in the amount of \$11,285,532.00, approximately 25.66% of the total bid. Based upon review of the bid submitted by Fore, Fore does not possess the necessary certifications, facilities, asphalt mix plant, and equipment to create the specified asphalt mixture (which necessitates rejection of the bid). The Port Authority must infer that Fore intends to subcontract the performance of the asphalt mixture work to multiple subcontractors in order to remain at or under the 10% threshold. However, Fore did not identify any subcontractors to perform such work required for the Project;

**WHEREAS**, from consulting with its experts, the Port Authority is advised that there are limited paving contractors within a reasonable delivery distance to the Port of Gulfport in Gulfport, Mississippi to provide the mix design meeting the temperature requirements of the Project;

**WHEREAS**, based upon the inadequacies of Fore's bid with respect to the electrical work and the hot mix asphalt work, approximately 55.44% of Fore's total bid amount is unable to be properly evaluated by the Port Authority or performed by Fore. As such, Fore is a non-responsible bidder and its bid should be rejected or alternatively, deemed not the "best" bid;

**WHEREAS**, based upon the foregoing, the Port Authority finds that Necaise is the lowest and best, responsive and responsible bidder for the Project;

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<sup>3</sup> The referenced "hot mix asphalt" is identified on the Bid Form as line items: 32 12 16.01 Hot Mix Asphalt, FAA P401, 9.5mm; 32 12 16.02 Hot Mix Asphalt, FAA P401, 12.5mm; and 32 12 16.03 Hot Mix Asphalt, FAA P403, 19mm.

**WHEREAS**, the Instructions to Bidders requires the lowest responsive and responsible bidder to comply with certain Section 3 requirements identified therein;

**WHEREAS**, MDA is ultimately responsible for analyzing and making determinations regarding bidders' compliance with such Section 3 requirements;

**WHEREAS**, by e-mail dated December 29, 2015, the Port Authority requested that MDA review the Section 3 submissions provided by Fore, Necaïse, and Stockstill;

**WHEREAS**, by e-mail dated January 4, 2016, MDA identified minor informalities in the form of clerical errors and questions in the Section 3 submissions of Fore and Necaïse, but advised the Port Authority that no such minor informality constituted a disqualifying error with respect to the Project's Section 3 requirements. A copy of the foregoing e-mail correspondence is attached hereto and fully incorporated herein as Exhibit "L";

**WHEREAS**, based upon the foregoing analysis by MDA, the Port Authority finds that any informalities in the Section 3 submissions of both Fore and Necaïse are minor and are hereby waived and do not prevent the Port Authority from issuing an award of the contract for the Project;

**WHEREAS**, Mississippi Code Annotated § 31-7-13(d)(i) governs the bidding process for awarding public contracts and states, in pertinent part, "[p]urchases may be made from the lowest and best bidder [and] [i]f any governing authority accepts a bid other than the lowest bid actually submitted, it 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";

**WHEREAS**, the Port Authority finds that the total bid amount submitted by Necaïse in the amount of \$44,112,376.28 is \$126,765.57, or 0.288 percent, higher than the \$43,985,610.71 total bid amount submitted by Fore;

**WHEREAS**, the Port Authority has determined that the 0.288 percentage variance constitutes substantially equal bids because the price difference represents a *de minimus* amount in relation to the total cost of the Project and, notwithstanding, the bids of both Fore and Necaïse are substantially lower than the Port Authority's engineering estimate of \$45,548,482.55;

**WHEREAS**, after having carefully considered all the evidence and important aspects of the Project, including, among other things, the necessity of completing the Project in timely and efficient manner, the capabilities of both Fore and Necaïse from reviewing the respective bid packages, and the expertise and reasoned judgment of the Port Authority staff and consultants, together with the Port Authority's familiarity with the Port of Gulfport Restoration Program, the Port Authority finds that Necaïse is the lowest and best, responsive and responsible bidder for the Project;

**WHEREAS**, the Port Authority's determination to award the Project to Necaïse, the lowest and best bidder, was carefully made with regard to the surrounding facts and circumstances, supported by substantial evidence, well-documented, and serves the best interest of the State of Mississippi; and

WHEREAS, the Port Authority now desires to authorize and approve the award of the contract for the West Pier Construction Phase 2, Project No. 304 to Necaise Brothers Construction Co., Inc.

**NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE MISSISSIPPI STATE PORT AUTHORITY AT GULFPORT, AS FOLLOWS:**

In accordance with the findings of the Board of Commissioners as set forth in the Recitals above and Mississippi law, the Port Authority hereby authorizes and approves the awarding of the contract for the West Pier Construction Phase 2, Project No. 304 to Necaise Brothers Construction Co., Inc. because it is the lowest and best, responsive and responsible bid.

Commissioner Norris seconded the motion to adopt the foregoing Resolution, and the vote thereupon was as follows:

	<u>Voted:</u>
Commissioner Knesal:	<u>No</u>
Commissioner Norris:	<u>Yes</u>
Commissioner Rester:	<u>Yes</u>
Commissioner Roberts:	<u>Yes</u>
Commissioner Simpson:	<u>Yes</u>

The motion having received the foregoing vote of the Board of Commissioners, the President declared the motion carried and the Resolution adopted, on this the 12<sup>th</sup> day of February, 2016.

This Resolution, along with any exhibits thereto, shall be incorporated into and considered as part of the minutes for the Board of Commissioners' meeting in which it is adopted.

  
E.J. ROBERTS, PRESIDENT