IN THE MATTER OF THE ARBITRATION OF:

***Precision Construction, LLC v. City of Hattiesburg, Mississippi***
Circuit Court of Forrest County, Mississippi
Cause No. CI13-0068

## DECISION OF ARBITRATOR

This suit for breach of a construction contract was submitted to binding arbitration by the undersigned. A hearing was held on June 3 and 4, 2014 at which time the parties were afforded the opportunity to present oral and documentary evidence. Thereafter, the parties submitted post-hearing memoranda summarizing their positions. All the evidence and arguments of the parties have been considered in arriving at this decision.

On June 25, 2014, the undersigned arbitrator delivered his decision in person and a transcript of the decision is attached as Exhibit "A" and incorporated verbatim herein.

## AWARD

I, the undersigned arbitrator, having taken the Oath as required by law, do hereby find and AWARD as follows:

(1) The Plaintiff is entitled to recover the sum of $843,929.55 from the Defendant on its claim of breach of contract:

(2) The Plaintiff is entitled to an award of attorney's fees pursuant to Miss. Code Ann. §11-15-119(4). A supplemental award of attorney's fees will be entered following the submissions of the parties.

(3) In the Arbitration Agreement, the parties agreed to equally divided the arbitration costs and each made a deposit of $2,500 toward such costs. All

arbitration fees in excess of the total deposit of $5,000 shall be assessed to the Defendant.

The Articles of Submission in the form of the order of the Circuit Court of Forrest County, Mississippi and the Arbitration Agreement executed by the parties are attached hereto as Exhibits "B" and "C", respectively. The Oath of Arbitrator is attached hereto as Exhibit "D".

Dated at Gulfport, Mississippi this the 2nd day of July, 2014.

DONALD C. DORNAN, JR.
ARBITRATOR

IN THE MATTER OF:

PRECISION CONSTRUCTION, LLC

VERSUS

CITY OF HATTIESBURG, MISSISSIPPI

ARBITRATOR DONALD C. DORNAN, JR., ESQUIRE

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# ARBITRATION DECISION

2:00 p.m. Wednesday, June 25th, 2014

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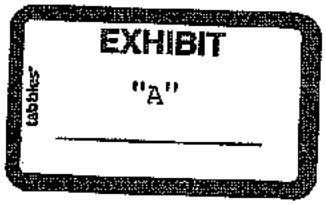




ORIGINAL

The Arbitration Decision dictated on June 25th, 2014, commencing at 2:00 p.m., at the law offices of Jones, Walker, LLP, 25th Avenue, Suite 1125, in the City of Gulfport, County of Harrison, State of Mississippi, before Cay T. Wiser, CCR, Court Reporter and Notary Public within and for the County of Jackson, State of Mississippi.

ARBITRATOR:

DONALD C. DORNAN, JR., ESQUIRE
Dornan Law Office
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APPEARING ON BEHALF OF PRECISION CONSTRUCTION, LLC:

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APPEARING ON BEHALF OF CITY OF HATTIESBURG, MISSISSIPPI:

CHARLES E. LAWRENCE, JR., ESQUIRE
Post Office Box 1624
Hattiesburg, Mississippi 39403

ALSO PRESENT: Mr. Nathan Smutzer

I N D E X

ARBITRATOR'S ORDER

By Mr. Dornan ---------- 4

- - -

E X H I B I T S

Exhibit "A" ---------- 39

- - -

REPORTER'S CERTIFICATE ---------- 40

- - -

MR. DORNAN: This is a binding arbitration that was submitted to me as Arbitrator by the parties in this case pursuant to contractual provisions by which they elected to resolve disputes under the construction contract at issue in this case by binding arbitration.

We had a hearing in this case on June 3rd and 4th of 2014, and at that time both parties were given the opportunity to present evidence supporting their position in the form of live testimony, deposition testimony and documents. And we recessed the hearing; that is, we closed the record at the conclusion of the proceedings on June 4th. At that time, both parties announced that they were satisfied with the hearing in terms of the way it had been handled procedurally.

The parties requested and it was agreed that they would be permitted to submit post-hearing memoranda, which they did. And I appreciate the parties brevity and the clarity of your submissions which has been helpful.

I stated at the time we last met that I saw no reason for there to be a prolonged delay in the decision in this case. I saw no reason

for either side to be burdened by whatever delays busy lawyers find themselves placed in and sometimes arbitration decisions get put on the back burner. I did not want that to happen in this case. And so it was my belief that the simplest way to avoid that, at least for this Arbitrator, was for me to provide you with a decision in verbal form that could be transcribed and attached to a final decision that I will place in writing. And that's what I will do.

So we agreed that we would reconvene here on this date, and I am ready to provide you with my decision.

This is a breach of contract case. This is a construction contract for the installation for underground sewer lines. It's a public contract in that the owner is the City of Hattiesburg, Mississippi. Precision Construction was the successful bidder on this project, which is identified in the documents as the 592 Program Sewer Rehabilitation Project. I will refer to it simply as The Contract or The Project.

Precision was the successful bidder on

this project and a contract with a total contract amount of $1,874,847.75 was entered into with the City of Hattiesburg dated January 12, 2012.

The Contract consisted of a three-page formal contract, a set of General Conditions and other specifications that were incorporated into the contract.

The engineering firm of Shows, Dearman & Waits served as the City's engineer for this project and under this contract. The engineer issued a Notice to Proceed for this 350 day project dated February 20, 2012.

The claims in this case are essentially claims for breach of contract. The Plaintiff, Precision Construction, has presented claims for a number of alleged contract violations that it alleges were breaches of the construction contract. Those include delays that the Plaintiff contends caused it to have to remobilize numerous times; the encountering of what the Plaintiff contends were differing site conditions at a location on Timothy Lane in Hattiesburg that resulted in a persistent trench cave-in. The Plaintiff further alleges

that the engineer failed to give direction to the contractor with regard to that trench failure.

The Plaintiff also asserts claims for change orders authorized by the engineer but not processed or paid by the City. In addition, the Plaintiff has included claims for unpaid stored materials, as well as retainage withheld by the City and various claims for lost profits.

So those are the claims that are presented and that we tried in the hearing.

The Defendant's position, the Defendant City, has defended these claims, although it should be noted that the City's representative, the project engineer, Kyle Wallace, acknowledged in his testimony that the Plaintiff did perform the work and is entitled to be compensated for a number of the items that are in dispute in this case.

The City has also raised other defenses, including its claim that the contractor, the Plaintiff, failed to perform an adequate pre-bid inspection of the soil conditions on Timothy Lane as contemplated by Section 4.3 of

the General Conditions. The City also has raised a legal issue that change orders in excess of one percent of the contract price would require formal public body approval under the state public bid laws. And the City also has raised in its post-hearing memorandum the failure of the Plaintiff to mitigate its damages.

At the hearing, the City indicated that it has not declared the contract to be terminated and still desires that the project be completed; but the evidence was that the project has not been completed.

I will discuss the claims one at a time, along with my analysis and conclusions as to those claims. These will include both findings of fact and some conclusions of law as I believe they relate to these claims.

With regard to the Plaintiff's claim for delays, and I use that as an overall catch term, the evidence established that this project was delayed before it even really began and that there were other repeated delays that affected the project in a significant way.

The evidence established that the

contractor intended to begin his work in the area of the Hercules plant in Hattiesburg -- it might be in Petal, I'll stand corrected -- but it turned out that there was an unknown environmental issue regarding a Restricted Use Order that was in effect that prevented the contractor from beginning the work after mobilization at the end of Site 2. Site 2 being a location on one of the exhibits that was used in the hearing. And so this Restricted Use Order prevented access to the Hercules property until it was resolved by the MDEQ under the evidence.

The General Conditions under Section 6.3(a) required the City to make the necessary arrangements for easements, rights-of-way and other such issues before issuing a Notice to Proceed. And I find that the City failed to do so in violation of that section.

The evidence showed and I find that the Plaintiff was required to remobilize and to recommence work at a point between Sites 1 and 2, and that these resulted in additional costs to the Plaintiff.

The evidence showed that on 8th Street,

the Plaintiff encountered an old, abandoned sewer line and a manhole that required additional -- actually four weeks according to the testimony to excavate and remove. There was testimony that creosote was detected at another adjacent street that required remediation and further delays. There was evidence that a mobile home park was located in the path of the plans for installation of the underground sewer lines that required a deviation around the trailer park that caused additional delays. Again, the contract required the Defendant to obtain any necessary easements in advance of the project and in advance of construction. And I find that it failed to do so.

The Plaintiff's claim is that these delays constituted the breach of an implied common law duty not to hinder or delay a contract. And that might be true, but I don't believe I need to necessarily analyze that and I specifically do not reach that. The evidence persuades me that the delays were caused by failures on the part of the Defendant to comply with specific provisions of the contract, and those include

Sections 4.1, 6.38 and 4.4 of the General Conditions. And I'll talk in more detail about 4.4. in a little while. But the evidence was undisputed that these delays caused the Plaintiff to have to demobilize and remobilize five times to meet the changing work conditions, all against a backdrop of a contract where the days were ticking down toward the 350 day limit.

The evidence, actually the evidence was undisputed that the Plaintiff encountered excavation and trench shoring and cave-in problems when it reached Timothy Lane; very early on Timothy Lane one side of the trench began to cave in to the point where the Plaintiff testified, Mr. Smutzer testified, that it became unsafe for his employees and it became a significant problem for the progress of the work.

The evidence presented at the hearing was that the cave-in took place, or at least it got worse at a place, in which an old 8-inch water line was located that had not been shown on the original engineering plans. The evidence indicated that the soil was unstable and that

the 8-inch pipe eventually broke and flooded the excavation, which served to compound the problem, making it even more unstable, so much so that an adjacent building was placed at risk in terms of the cave-in.

There was a dispute as to the extent of this, what caused the cave-in and whether it was a differing condition, as contemplated by Section 4.4. of the General Conditions, or whether it was a condition that should have been apparent or at least ascertainable by the Plaintiff prior to its bid.

There was testimony and daily reports from the engineer's inspector, Steve Tingle, that verified the unusual and challenging nature of this problem. He stated either in testimony or through a telephone conversation that he had -- or maybe it was an in-person conversation -- that he'd never seen anything like it before. And I accept that. I think he was under no -- there was no issue at that time, there was no dispute at that time, there was nothing that would have caused him to overstate or not be truthful in terms of that statement according to the evidence I heard. But at that point the

work on Timothy Lane came to a standstill. And that's undisputed in the record.

The Plaintiff testified that Public Works employees from the City and Mr. Wallace came to the site but that they offered no solution. The Plaintiff testified that Mr. Wallace requested that he investigate potential solutions, which he did. Eventually Mr. Wallace wrote a letter on behalf of the City advising the Plaintiff that the design was unchanged and so no change order would be approved.

The Plaintiff has contended that the conditions at Timothy Lane qualify as differing site conditions under the provisions of the General Conditions that address that issue, which is Section 4.4(a), and has taken that position consistently throughout. That provision provides the contractor shall promptly and before such conditions are disturbed notify the owner in writing of (1), subsurface or latent physical conditions at the site differing materially from those indicated in this contract; (2), unknown physical conditions at the site of an unusual nature

differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract.

The Defendant's position seems to be that this was a subsurface condition that was ascertainable by the contractor. And it refers to Section 4.3 entitled "Subsurface Conditions." And that provision does obligate the contractor to act reasonably in advance of bidding to satisfy himself as to the character, quality and quantity of surface and subsurface materials.

The testimony that was presented described dry, unstable soil that became wet and more unstable when the 8-inch water pipe broke. I don't believe that that condition was readily ascertainable or reasonably ascertainable by a reasonable contractor; and I base that conclusion on the fact that the 8-inch water line was not shown on the plans. I find that no reasonable contractor would or should anticipate the presence of an old water line not shown on plans at the depth that the testimony indicated that it was placed. And so

I find that there would not be a reasonable way for a contractor exercising reasonable diligence to become aware of that condition before the project began.

Section 4.4(a) envisions a latent, meaning not readily apparent condition, that differs materially from the conditions indicated in the contract. And I find as a fact that that is what has been established by the evidence in this case.

Roy Moody was offered as an expert by the Plaintiff. He was accepted as an expert. And he testified that the 8-inch pipe was the straw that broke the camel's back. That was his way of stating, as I interpret his testimony, that in the absence of that condition that much of the problem would not have occurred. I find Mr. Moody's opinions to be credible, especially as it relates to this key piece of evidence because I think what separates what happened at Timothy Lane from an ordinary soil condition is the existence of the pipe and that that is the key to the fact that it is not readily ascertainable and it's the key to why the cave-in was so persistent. And I don't believe

a reasonable fact finder could find to the contrary based on the evidence in this case. That pipe belonged to the City, the City at least had constructive knowledge of it and either the City or the City's engineers failed to locate it or show it on the plans.

I stated earlier that the evidence indicated that Kyle Wallace requested that the Plaintiff investigate solutions to this problem, which he did. Exhibit 16 is Mr. Wallace's letter in reply, which takes the position that there had been no change in the design of the project from the time it was bid and therefore no change order would be appropriate even under Section 4.4(a). In my opinion, that position deviated from the contract provisions because the contract provisions discuss and make plain that unknown physical conditions differing materially or subsurface or latent physical conditions differing materially are what would trigger relief under 4.4(a). Mr. Wallace seems to be taking the position in his letter that because the design had not changed, 4.4(a) had no application. And I find that position to be

incorrect. He had requested that the Plaintiff investigate solutions and the additional costs, and so that request was totally inconsistent in the opinion of this Arbitrator, with his later position that there had been no design change. And I find that that was not only contrary to the provisions of the contract, I find it not to be credible. It is also further inconsistent with what the testimony indicated that he verbally told the Plaintiff, which was that the City of Hattiesburg had no more money for this project.

The result was that the engineer failed to give directions to the Plaintiff to deal with the cave-in issue that had arisen at Timothy Lane, that I find was a differing site condition under Section 4.4(a). That section requires the owner to promptly investigate and adjust the contract when there is a differing site condition. And I find that that provision was breached, that requirement was not met and that it was a material breach of the contract on the part of the City. As a result, the project came to a halt on approximately November 7, 2012 and led directly to the

Plaintiff terminating the contract on May 31, 2013.

I will discuss the claim for change orders. There are at least four instances in the evidence that indicated that the Plaintiff had either been requested by the engineer to perform additional work or was given verbal authorization to perform additional work.

Change orders were provided at least twice, once for the work on 8th Street, which I'm going to call Change Order Number 1, and again for the additional work on Timothy Lane, which I'm going to call Change Order Number 2. They were submitted to the engineer but there was no response and it's undisputed that there was no response.

I talked a minute ago about the excavation and repair of the old broken sewer line and manhole on 8th Street. A change order in the amount of $55,775.42 was presented but Mr. Wallace never responded. It was undisputed that the work had been done. It's undisputed that the Plaintiff is entitled to compensation for that. Mr. Wallace disputed the amount of the change order.

Change Order Number 2 was for repair of the water line on Timothy Lane requested by City Public Works personnel and by Steve Tingle, $8,450. And within the category of change orders I also include, even though these were not submitted as written change orders, the Plaintiff was requested to remove the mud from manholes. I believe that was on Timothy Lane, $2,295, and remove the dirt, haul dirt off that was contaminated with creosote that I talked about earlier, $1,228.70.

Mr. Wallace acknowledged that the work was done on each of those, that it was necessary, that it was performed by the Plaintiff. He acknowledged that the Plaintiff was entitled to be compensated. His explanation was that he intended to hold the change orders and process those at the end of the project. I find that position to be questionable for at least two reasons, maybe more than two, but at least two. First of all, there's no provision in the contract that authorizes the owner to hold change orders until the end of the project. I reread the contract from cover to cover and found no authorization. I think he admitted in

his testimony that he had no specific contractual authorization for that. It was just more convenient.

My reading of the contract is that it requires an equitable adjustment for authorized additional work. And that did not take place in this case. And Mr. Wallace, according to the Plaintiff, never told him that he was holding the change orders. He just didn't respond. And I don't recall Mr. Wallace having any explanation for why he didn't respond. But the result was that the Plaintiff did work for the City authorized by the engineer but received no response to his requests for payment. And I find that that was a breach of the contract.

The City has taken the position, and I want to address this quickly, I think it's important to address it, the City has taken the position that public bid laws of Mississippi, and the Defendant has cited Section 31-7-13 of the Mississippi Code, which is part of the State public bids statutes, for the argument and the position that that provision prohibits payment of change orders exceeding one percent

of the contract amount. So the City has argued that the first change order, Number 1, which is over $55,000, is in violation of that statute in the absence of any official action by the City of Hattiesburg.

Section 31-7-13(g) does indeed limit non-written authorizations for additional work under public contracts to one percent of the contract price. However, my review of the applicable case law leads me to conclude that there are exceptions to this requirement, particularly where the owner's representative has requested, ordered, directed and/or authorized the extra work. The Supreme Court of Mississippi in Tupelo Redevelopment Agency v. Gray Corp, 972 So.2nd 495 (Miss 2007), held that a public entity waived the contract provision requiring written change orders where the owner's representative made repeated oral requests that the contractor proceed with the additional work and the contractor did so. The same analysis is found in Eastline Corp v. Marion Apartments, 524 So.2d. 582, (Miss 1988). And so the legal principle that I believe applies here is that where change orders are

repeatedly promised, authorized and the work done, the owner waives the right to rely on those contractual or statutory provisions. And that's what I so find in this case.

My conclusion, and I believe it's a mixed conclusion of law and fact on the waiver, is supported by the acknowledgment by Mr. Wallace that the work was done at the request of the City, was authorized verbally by the engineer, was necessary to the project and for the most part he acknowledged that the Plaintiff is entitled to be compensated.

And I cited the Gray case a minute ago, the Tupelo Redevelopment v. Gray Corporation case. In that case, the Supreme Court held that a promise of a final change order was adequate evidence of waiver. Now, we don't have in this case the promise of a final change order. We have the opposite in this case. We have the engineer holding change orders with his admitted intent to process them as a final change order or series of final change orders. So we don't have exactly what happened in Gray. But I do find that Mr. Wallace's intention to address the change

orders at the end of the project is clear evidence of the City's intention to pay the Plaintiff for the extra work. And I find as a fact that the Plaintiff performed the additional work in direct response to the City's request and the City's promise to timely process the change orders. Under the contract, change orders are required to be timely processed and paid. So I find that under the evidence presented in this case the City waived any right to argue that change orders should have been in writing or that there's a statutory prohibition due to the amount.

Just as an aside, the policy of holding change orders for convenience, I find that to be questionable on any project, let alone a public project. I don't think that's compatible with the way the contract is written in this case. And so I think parties who are engaged in public contracting would be well advised to consider either revising their contract form or amending that policy for future reference.

The remaining claims by the Plaintiff basically are that certain stored materials

were brought to the job site. Actually, the evidence was that it was paid as part of a pay request, then backcharged later and deducted. Mr. Smutzer testified that the additional materials were in fact on-site apparently having been miscounted by the inspector. I accept that testimony. The Defendant offered no real evidence or testimony on that issue, nor did it make any effort to contest that claim. So I find that the Plaintiff has proven this claim and should recover.

With regard to retainage, the evidence indicated that the City retained the sum of $32,228.32 as retainage. The contract does provide for retainage. Retainage accrued over a number of pay requests, summing to this figure at the end -- or at the time of termination, at the time of the last pay request. My review of the evidence did not provide me with an explanation as to why the Defendant continued to retain possession of the retained funds in view of the fact that it has not made any claim to those funds. That amount of money represents funds that were withheld from payments for work already performed and

approved and accepted by the City. And so, I guess, stated another way, I find that the retained funds rightfully belong to the Plaintiff and he's entitled to recover those as part of the judgment in this case or part of the award, I will say.

I want to spend a minute to talk about the defenses. I think I've touched on the 4.3 inspection issue raised by the Defendant. There was some questioning about whether soil borings should have been taken. The Plaintiff admitted that no soil samples were taken. Mr. Moody testified that soil borings or soil samples would not have disclosed the subsoil conditions on Timothy Lane, and I find that to be credible. And more importantly, I find that those type of borings or samples would not have disclosed the 8-inch water pipe which I find to be the culprit for the problems at Timothy Lane. And I agree with Mr. Moody that it was the straw that broke the camel's back. And, again, so I find that a reasonable inspection would not have disclosed that information, that fact.

I've already given my findings with regard

to the differing site condition issue. The Defendant really didn't offer any real evidence to challenge that position. I think what was there was a differing latent condition and I have spoken to that. And, again, I find Mr. Wallace's position stated in Exhibit 16 to be contrary to the plain and unambiguous provisions of the contract. And so on that issue, I find that -- I find that the Timothy Lane differing soil conditions alone justified -- and the Defendant's failure to act on those conditions -- justified the Plaintiff in terminating the contract.

Mr. Wallace, the project engineer and the City's representative, was called in this case as an adverse witness. His testimony in my view provided little, if any, support for the City's position. Among other things, he testified that no exploratory work was done before the bid package was sent out. He stated that he was unaware of the MDEQ order at the Hercules facility. He admitted that he never responded to the change order requests from the Plaintiff. He took the position that it was more convenient to hold the change orders until

the end of the project, although he acknowledged that there was no -- he had no contractual basis to take that position. As stated, he acknowledged that the Plaintiff is entitled to compensation for additional work admittedly performed.

He disagreed with the amount of Change Order Number 1 but offered no basis for it, nor presented any amount that he believed was more appropriate. He was unaware of the 8-inch water line on Timothy Lane. He admitted that it should have been shown on the plans; then later he stated that it couldn't have been shown on the plans, a deviation in his position that I found not to be credible. He admitted that the Plaintiff is entitled to be compensated for the extra mobilizations. He admitted that the Plaintiff would be entitled to additional contract time. He admitted that the change orders would not circumvent the public bid law, and he stated that he would not have done that.

I find Mr. Wallace's actions on this project to be questionable. I find some of his testimony to lack credibility. If so many of

the claims of the Plaintiff are valid, as he acknowledged, I see no valid reason why those items have not been paid.

My conclusion is that the City and Mr. Wallace have engaged in what I'm going to call a rope-a-dope approach to this case, to this contract, to this litigation without any real effort to present meaningful factual or legal defenses.

So to summarize my findings on the issues we've talked about so far, I find that the Defendant breached the contract in at least these respects: Failure to timely process and pay authorized change orders; failure to obtain necessary right-of-ways and easements, as well as environmental clearances, causing or being responsible for unnecessary delays requiring multiple remobilizations by the Plaintiff; failing to recognize and acknowledge the unforeseeable differing site conditions at Timothy Lane caused by the 8-inch water line; and then failure to direct the contract's efforts to remedy the problems at Timothy Lane. Further, the Defendant withheld retainage rightfully belonging to the Plaintiff and

failed to pay for stored material after backcharging the Plaintiff on a pay request.

As to damages, the Plaintiff has asserted claims for several categories of damages. In addition to the retainage, the change orders and the stored materials, the Plaintiff has made claims for lost profits and for the cost of extra mobilizations, as well as idle equipment. So I want to talk about those briefly.

The Plaintiff has made a claim for lost profit on 30 inch-pipe remaining to be laid. And the testimony was that on a cost-per-day, profit-per-day and a profit-per-foot basis, there were approximately 3,654 feet of 30-inch pipe remaining to be laid which would have resulted in an estimated profit of $461,792.52. That evidence was largely unopposed, and I find as a fact that those losses are reasonable and that they were caused by the breaches of the contract by the Defendant that I have outlined earlier.

The Plaintiff has asserted a claim for lost profit on fill materials that had not been installed. Again, on an estimated 6,919

remaining yards of fill at $18 a yard and an $8 per yard profit, the sum of $69,190 was claimed by the Plaintiff, not significantly disputed by the Defendant, and I find to be recoverable as being caused by the breaches.

Likewise, the Plaintiff asserts a third claim for lost profit, this time on asphalt. And this has to do with the remaining tons of asphalt that were not laid but would have been laid but for the breach of the contract and its termination of 814.97 tons at $14 a ton which I find to be recoverable. We have asphalt base course and we have surface course that were testified to. I have corrected a mathematical error of addition in the Plaintiff's claim, and I award or I will award for asphalt, base course, lost profit, the sum of $11,636.25; for lost profits on the surface course, $11,409.58; for a total lost profit on asphalt of $23,045.83.

The Plaintiff also asserts a claim for idle equipment. And by "idle equipment" the Plaintiff testified that his machinery was basically on call for this job or remobilization for this job and therefore was

unavailable to be either rented by him or used for profit by him on other job opportunities. The Plaintiff seeks damages for the loss of use, I will use that term, for idle equipment for his two excavators, a loader, a dozer and two hydraulic pumps. And the amount of his claim is $298,086.69.

The Plaintiff could not identify a specific contract or a specific customer that he would have been able to rent any of this equipment to during the relevant time frame. He could not identify a specific contract that was missed out on. I don't find fault with the estimates of the per day rental because I think that came from a reliable source but I find that this claim is speculative. And I also find that for me to make an award on this aspect of the claim would result in a degree of duplication. And by that I mean as follows: If you look at the lost profits claims, I reached the conclusion, I believe it was discussed, that the equipment that was being used to lay the pipe, dig the trenches, do the excavation, install the pipe and to some extent lay the asphalt were these same pieces of

equipment, the excavators, the loader, the dozer. And so those pieces of equipment would have been used to realize the profits in the three profit categories, and so I find that to award lost rentals for idle equipment as to them would result in a duplication to which the Plaintiff would not be entitled. So I find that claim not to be recoverable. I find that it has not been sufficiently established based on the evidence presented.

The Plaintiff has made a claim for prompt pay penalties, which I will briefly discuss. Section 31-5-25 provides for prompt pay penalties on amounts that are past due on public contracts. My reading of the statute and the case law indicates that the purpose of the statute is to encourage public owners to make timely payments and not penalize parties contracting with public entities when they do. Although I find that one percent a month is a modest penalty for late payment, it does not appear punitive to me, it's more like a late charge on a credit card as I see it. But the Plaintiff is entitled to recover prompt payment penalties under the statute. It applies to

some but not all of the Plaintiff's claims. So I find that the claims for extra work under the change orders, the claim for the stored materials and the retainage would be subject to the prompt pay penalties.

As fact finder I have attempted to make some type of reasoned determination of when the prompt payment percentages would begin to accrue on these claims. As I read the statute, they begin 45 days after the amount is due. And so I have attempted to do that. As to the claims for the extra work and the stored materials, I've used 45 days after the invoice date. As to the retainage part of the last pay request, because it was part of a pay request, pay requests are payable within 20 days and then 45 days is my interpretation of the contract in the statute as to the retainage.

And so for the extra work for the Change Order Number 1, the amount owed plus prompt payment, the amount of $67,309.47 will be awarded. On Change Order Number 2, the amount plus prompt payment in the amount of $9,905.71 will be awarded. For the vacuuming of the mud, the amount plus prompt payment as I've

calculated it, in the amount of $2,690.36, will be awarded. And then for the dirt hauling with the creosote contamination including the prompt payment penalty, the sum of $1,411.69 will be awarded. My total of those four categories that will be awarded is $81,317.23.

Moving to the claim for mobilization, extra mobilization. It was undisputed that the Plaintiff remobilized five times. He estimated that that cost him approximately $31,000 each time. It was pretty much undisputed that he was entitled to be compensated for that. I have no indication in my notes of any challenge to that amount or that the Plaintiff was entitled to it. So that's a claim of $155,000 for mobilizations that will be awarded.

On the claim for stored materials, I'm going to try to break these down into categories, just like the Plaintiff's claim did. I'm using that method simply for clarity and simplicity. So on the 30-inch pipe, the amount owed plus prompt payment is going to be $8,028.71. For the 96-inch manhole riser, the amount plus prompt payment penalty would be $2,258.36. On the 20-inch steel casing, the

amount due plus prompt payment penalty would be $1,247.43. On the 15-inch sewer pipe, the amount owed plus the penalty would be $6,630.43. The total claim for stored material that will be awarded, including prompt payment penalties, will be $18,164.93.

On the retainage, the amount retained, I've already stated that it's $32,228.32. Applying the prompt payment penalty in the fashion that I stated a moment ago brings the total with prompt payment penalties to $35,419.04.

When parties come to arbitration, they make a decision to forego some procedural rights that they are willing to exchange for an Arbitrator's final binding decision, especially where we have parties that are sophisticated and represented by counsel. And so some of the rights that the parties have foregone that might be available in court or with a trial may or may not be available in arbitration because the rules of evidence are relaxed, although I believe in this case that my conclusions and my findings are based on the great weight of the evidence in this case.

An Arbitrator, like a juror, is entitled to weigh the evidence and determine the credibility of the witnesses. And where necessary, I have done that in this case. I have certainly weighed the evidence and where I thought necessary and appropriate, I have indicated that I have weighed the credibility or determined the credibility of witnesses or testimony.

The Plaintiff has included a claim for attorneys' fees and costs in this case. I have looked in the contract and I do not find that the contract includes any provision for the recovery of attorneys' fees by a prevailing party. I'm not surprised by that being a public construction contract. So the basis of Plaintiff's request for fees is under the Construction Arbitration Statute, which is set forth in Section 11-15-19, I believe, of the Mississippi Code. That provision -- 11-15-119. That provision allows in Subsection 4 for an Arbitrator to award attorneys' fees and costs to a prevailing party. The case law makes it discretionary with the Arbitrator.

I have elected to exercise that discretion

in this case and I will award attorneys' fees to the Plaintiff. I don't believe I am required to give a basis for the exercise of that discretion, but I find that the actions of the Defendant throughout this project, based on the evidence, convinces me that an award of attorneys' fees is appropriate and necessary to make the Plaintiff whole.

And so the Plaintiff will have seven business days from today to present a fully supported fee petition on that issue. And I think what that does is take us to next Friday, which is the 4th of July, so you will have till Monday after the 4th of July, it will be July 7th. And then the Defendant, you may have seven days after receipt of that to respond if you so desire. I will then make a decision and enter a supplemental award of attorneys' fees.

The Plaintiff also makes a claim for costs, although I'm not sure what costs the Plaintiff is seeking. So I went back to the statute in 11-15-119, (4), and it says an Arbitrator may award attorneys' fees and costs but it doesn't tell me what costs consist of or define costs. So for now, I define costs as

the arbitration fees. And I will make some award of arbitration fees in my written award that I will enter when the transcript is complete in this case. I have not determined how I will apportion or if I'll apportion the arbitration fees in this case, but I will make a supplemental award regarding attorneys' fees after the completion of the schedule that I just gave you.

Before that date I will give you a formal award with the articles of submission, which is the term of art that the statute refers to, which I interpret to be the order requiring this case to go to arbitration and the parties' arbitration agreement signed by the parties and their lawyers. I consider those to be the articles of submission, along with my oath which I will provide because those are the things you need for whatever you need to do with my award after it's entered. After it's entered, my role comes to a conclusion.

So I want to thank y'all, all the lawyers, all the counsel, all the parties, for your professionalism, for your civility, for being clear and cogent with your briefing on this

case.

And that concludes my decision. The total award will be $843,929.55. And I will either attach to the transcript or I will attach to my written award the summary sheet that I have created for myself but I will make it available to you so you will be able to understand what I said in case you didn't get it. Hopefully it will all be in the record.

If there are any questions, let me know; if not, we will close the record on this case. Questions?

MR. HEBERT: No questions.

MR. LAWRENCE: I do not have any.

MR. DORNAN: Thank you. Let's let the record stand closed.

(Said Record was closed at 2:55 p.m.)

- - -

(Exhibit "A" - Summary Sheet was marked.)

- - -

C E R T I F I C A T E

STATE OF MISSISSIPPI

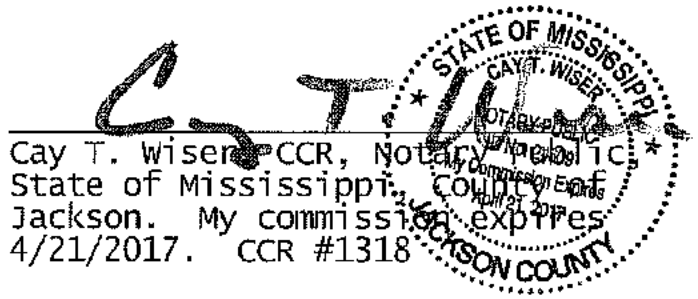
COUNTY OF JACKSON

I, Cay T. Wiser, CCR, Freelance Court Reporter and Notary Public, duly commissioned for the County of Jackson, State of Mississippi, do hereby certify;

That on the 25th of June, 2014, there appeared before me the aforementioned Arbitrator and Counsel of Record, and that the preceding thirty-nine (39) typewritten pages contain a full, true and correct copy of my stenotype notes and/or electronic tape recording of the Arbitrator's Decision;

That I am not related to or in anywise associated with any of the parties to this cause of action, or their counsel, and that I am not financially interested in the same;

IN WITNESS WHEREOF, I have hereunto set my hand, this the 30th day of June, 2014.




Cay T. Wiser, CCR, Notary Public, State of Mississippi, County of Jackson. My commission expires 4/21/2017. CCR #1318

Claim # 1 – Lost Profit on 30" Pipe:

3,654 x $126.38 per foot **$461,792.52**

Claim # 2 - Lost Profit on Select Fill :

6,919 x $10 per yard **$69,190.00**

Claim # 3 – Lost Profit on Asphalt: (Plaintiff's calculations had addition error)

| | | |
|---|---|---|
| Asphalt Base Course $775.75 x $15.00 | $11,636.25 | |
| Surface Course 814.97 x $14.00 | $11,409.58 | |
| TOTAL: | | **$23,045.83** |

Claim # 4 – Idle Equipment

**$0**

Claim # 5 – Extra Work:

Change Order 1 - Amount & Prompt Payment Penalty - $67,309.47
Change Order 2 – Amount & Prompt Payment Penalty - $9,905.71
Vacuum Mud – Amount & Prompt Payment Penalty - $2,690.36
Dirt Hauling – Amount & Prompt Payment Penalty - $1,411.69
TOTAL: **$81,317.23**

Claim # 6 – Extra Mobilization/Site Moves

5 @ $31,000 each **$155,000.00**

Claim # 7 – Claim for Stored Material

30" Pipe - Amount & Prompt Payment - $8,028.71
96' Manhole Riser – Amount + Prompt Payment - $2,258.36
20' Steel Casing – Amount + Prompt Payment - $1,247.43
15" Sewer Pipe – Amount + Prompt Payment - $6,630.43
TOTAL: **$18,164.93**

**EXHIBIT "A'**

Claim # 8 – Retainage :

Plaintiff requested a prompt payment penalty for 12.4 months where 9.9 months is more accurate.

Invoice Date – 5/31/2013 - due in 20 days and Prompt Payment applies after 45 days.
Past Due on 65th day – 08/04/2013. From 08/04/2013 to 06/01/14 is about 9.9 months. Under prompt payment statute, owner must pay 1% penalty per month

Amount - $32,228.32
Prompt Payment Penalty: $322.28 (1%) x 9.9 months = $3,190.72

TOTAL: **$35,419.04**

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TOTAL DAMAGES **$843,929.55**

**IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI**

PRECISION CONSTRUCTION, LLC — PLAINTIFF

V. — CIVIL ACTION NO. CI13-0068

CITY OF HATTIESBURG, MISSISSIPPI — DEFENDANT

FILED
JUL 10 2013
FORREST COUNTY CIRCUIT CLERK

**AGREED ORDER ON APPOINTMENT OF ARBITRATORS**

By motion dated June 10, 2013, Plaintiff herein applied to this Court pursuant to §11-15-109 for the appointment of an arbitrator for this proceeding.

Since the date of the filing of this motion, the Court has been advised that the parties have reached an agreement on the appointment of the Honorable Donald Dornan of Gulfport, Mississippi as arbitrator.

WHEREFORE PREMISES CONSIDERED, pending disclosure of any conflicts, the Honorable Donald Dornan of Gulfport, Mississippi is hereby appointed arbitrator in this matter.

SO ORDERED, this the 10th day of July, 2013.

Honorable Robert B. Helfrich

AGREED TO AND APPROVED:

Precision Construction, LLC

By: _____
Mark D. Herbert
Its Attorney

City of Hattiesburg, Mississippi

By: _____
Charles E. Lawrence, Jr.
Its Attorney

EXHIBIT
"B"

{JX062260.1}

Prepared by:

Mark D. Herbert (MSB No. 2370)
M. Jason Clayton (MSB No. 101933)
JONES WALKER LLP
190 E. Capitol Street, Ste. 800 (39201)
Post Office Box 427
Jackson, MS 39205-0427
Telephone: (601) 949-4900
Facsimile: (601) 949-4804

## ARBITRATION AGREEMENT

The parties identified below hereby submit the case of ***Precision Construction, LLC v. City of Hattiesburg, Mississippi*** to binding arbitration before Donald C. Dornan, Jr. who shall act as arbitrator. The parties understand and agree that the arbitrator's decision is final and binding on the parties to this proceeding.

A prehearing deposit of $2,500.00 per party is required and will be credited to the arbitrator=s final statement of fees.

Fees for arbitration services will be charged at the rate of $275.00 per hour plus an administrative fee of $300.00. There will be an additional $50.00 administrative fee for each party over two. The parties agree to apportion the fees as follows:

**Divided equally between the parties**

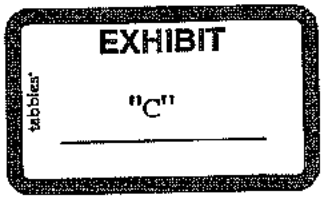
The arbitrator may assess the arbitration fees as part of any award.

The parties agree that the arbitration will be governed by rules set forth in the Mississippi Construction Arbitration Act.

This Agreement entered into on this the 5th day of August, 2013.

Charles E. Lawrence, Jr.
Attorney for City of Hattiesburg
1105 Edwards St.
Hattiesburg, MS 39401-5512

Mark D. Herbert
Attorney for Precision Construction
Post Office Box 427
Jackson, MS 39205-0427



STATE OF MISSISSIPPI

COUNTY OF HARRISON

## OATH OF ARBITRATOR

I, Donald C. Dornan, Jr., having been selected to serve as arbitrator in the case of ***Precision Construction, LLC v. City of Hattiesburg, Mississippi*** do solemnly swear that I will faithfully and impartially hear and determine the matter submitted to me in this case according to the evidence and the manifest justice and equity thereof; that I will exercise fair and impartial judgment, without favor or affection; and that I am not affiliated with nor related to any of the parties to this case. So help me God.

This the 3rd day of June, 2014.

DONALD C. DORNAN, JR.

SWORN TO AND SUBSCRIBED before me this the 3rd day of June, 2014.

NOTARY PUBLIC

My Commission Expires:

July 16 2015

EXHIBIT "D"