

IN THE SUPREME COURT OF MISSISSIPPI

CASE NUMBER 2009-CA-00053

**HILL BROTHERS CONSTRUCTION
COMPANY, INC.,**

Appellant

vs

**MISSISSIPPI TRANSPORTATION
COMMISSION,**

Appellee

**Appeal from Final Judgment of Hinds County Circuit Court,
First Judicial District (Hon. William F. Coleman, Circuit Judge)
on Appellee's Motion for Complete Summary Judgment**

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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Appellant

vs

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Appellee

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or association of persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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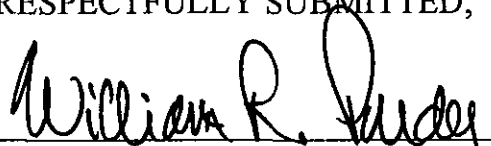
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I. STATEMENT OF ISSUES

The outcome of this case hinges upon the interpretation and effect given the following ending sentence of the standard petroleum price adjustment provision in state highway construction contracts:

After the expiration of contract time, including all authorized extensions, adjustments will be computed using fuel and material prices that are in effect at the expiration of contract time.

(R.E. 11, R. 2191).

A. Did the trial court err in ruling that this sentence was clear and unambiguous and should be interpreted as urged by Appellee, Mississippi Transportation Commission ("Commission")?

B. Did the trial court err in upholding the Commission's interpretation when it is contrary to the plain language and stated principal purpose of the provision which includes the sentence?

C. Is the sentence ambiguous as to which of two price adjustment factors is being changed or replaced "after expiration of contract time", such that the sentence should be construed against the factor advocated by the Commission as drafter of the language and in favor of the factor urged by Appellant Hill Brothers Construction Company, Inc. ("Hill Bros.")?

D. Did the trial court err in upholding the Commission's interpretation of the sentence because it contravenes the authorizing statute and should be struck as being beyond the Commission's power to have promulgated?

II. STATEMENT OF THE CASE

A. Nature of the Case

This case concerns the interpretation and proper application of a standard provision in state highway construction contracts. The provision at issue adjusts contract pay items to account for fluctuating oil prices on a monthly basis during performance of the work. This adjustment provision is authorized by Section 31-7-13(i) of Mississippi Code of 1972, as amended. This statute grants a governing authority like the Commission permission to include in its contracts a price adjustment clause for petroleum products used in the execution of the work, provided that such adjustment is made "with relation to the cost to the contractor" by "adjusting unit prices for the change in the cost of such petroleum products" according to an "industry-wide index established and published monthly by the Mississippi Department of Transportation." (R.E. 12, R. 2571).¹

The parties agree on the interpretation of the Commission's petroleum price adjustment provision in the subject contract prior to expiration of allowable time. The Commission establishes a baseline for petroleum prices in its bid solicitation for each highway project which bidders are instructed to use in calculating their bids. This levels the playing field by removing from the bidding process the risks of unpredictable swings in petroleum prices over the duration of highway projects, which often last two to three years. The adjustment provision also protects the state from having to pay premiums for bids that would otherwise include large contingencies to cover possible increases in oil

¹ Mandatory and Optional Record Excerpts, filed in accordance with M.R.A.P. 30, have been separately paginated in the upper right hand corner as "R.E. ____" to distinguish from other page references. Cited portions to the Record on Appeal are indicated as "R. ____".

prices which may not materialize. The principal purpose of the petroleum price adjustment provision is stated in the provision itself at the outset:

Because of the uncertainty in estimating the costs of petroleum productions that will be required during the life of a contract, adjustment in compensation for certain materials is provided as follows:

(R.E. 9, R. 2189).

After contract award, designated pay items affected by petroleum prices are adjusted each month according to agreed upon formulas by comparing the baseline set at the time of bidding with the actual price of petroleum products, based upon an accepted industry-wide cost index published monthly. The authorizing statute requires that “[t]he price adjustment clause shall be based on the cost of such petroleum products only and shall not include any additional profit or overhead as part of the adjustment.” (R.E. 12, R. 2571). The monthly adjustments, made either up or down according to the industry index, closely correlate to the increased prices a contractor actually pays or the savings realized when prices drop. This means that the adjustment as authorized by statute should be strictly a pass-through mechanism, totally dependent upon variations in cost to contractors of petroleum products and therefore completely neutral as to profit and loss.

As shown, there are two factors for adjustment each month of pay items in state highway construction contracts affected by oil prices:

- Factor 1 is the fixed baseline price set by the Commission at the time of bidding.
- Factor 2 is the fluctuating price of oil according to monthly indices.

This dispute arises because of a change in the adjustment mechanism inserted in the provision by the Commission to take effect upon expiration of the allowable contract time. Specifically at issue is the last sentence of the petroleum price adjustment provision, as follows:

After the expiration of contract time, including all authorized extensions, adjustments will be computed using fuel and material prices that are in effect at the expiration of contract time.

(R.E. 11, R. 2191). This language raises the question of whether “prices in effect at expiration of contract time” becomes the new Factor 1 or a new Factor 2.

Appellant Hill Bros. interpreted this sentence to mean that upon expiration of contract time, the prices then in effect replaced the original baseline (i.e. a new Factor 1) from which future adjustments would be computed according to the fluctuations in the monthly price indices. Appellee Commission interpreted and applied this sentence to retain the original fixed baseline at the time of bidding and to create another fixed level of pricing in effect when contract time expired (i.e. a new Factor 2). The Commission then used this static differential for all periods thereafter and ceased to adjust prices “with relation to the cost to the contractor”, contrary to the statutory authorization. Among other things, the Commission’s interpretation meant that if contract time happened to expire when there was a spike in oil prices, the contractor would be entitled to the same high fixed adjustment, even though petroleum prices thereafter declined and the fixed adjustment produced a windfall above the prices the contractor was actually paying for petroleum products.

Unfortunately for Hill Bros., time happened to expire for the contract at issue at a comparatively low point and thereafter rose significantly. Because the Commission held Hill Bros. to a fixed adjustment at a low level, Hill Bros. was forced to pay hundreds of thousands of dollars out of its own pocket for petroleum products used to complete the subject contract. Clearly, under the Commission's interpretation the adjustments made at expiration of contract time were no longer "with relation to the cost of the contractor" as required by the authorizing statute.

Hill Bros. seeks relief from the considerable losses it experienced because of the Commission's change in adjustment methodology at the expiration of contract time. Hill Bros. respectfully submits that the Commission's revised methodology is contrary to the plain language and principal purpose of the petroleum adjustment provision as set forth in the Commission's contract. Alternatively, Hill Bros. contends that its interpretation of the provision at least is reasonable and, under the doctrine of contra proferentem, the provision must be construed against the Commission as drafter of the language in dispute. Lastly, Hill Bros. asserts that even if the Court finds the last sentence of the provision is unambiguous and agrees with the Commission's interpretation, the sentence contravenes the authorizing statute, exceeds the Commission's power, and should be stricken, allowing petroleum prices to be adjusted in the same manner, both before and after expiration of contract time.

B. Course of Proceedings and Disposition in the Court Below

Hill Bros. filed a motion for partial summary judgment asserting that the last sentence of the petroleum price adjustment provision in a state highway construction

contract should be interpreted so as to permit after expiration of contract time adjustments “with relation to the cost to the contractor”. Hill Bros.’ motion further contended, in the alternative, that the last sentence of the provision was ambiguous and should be construed against the Commission as drafter. Hill Bros.’ motion finally argued that the Commission’s interpretation of how the provision operated after expiration of contract time could not stand because such interpretation violated the authorizing statute and exceeded the Commission’s power to impose.

The Commission filed a cross-motion for complete summary judgment urging its interpretation of “no more adjustment” after the expiration of contract time. Honorable William F. Coleman, Hinds County Circuit Judge, granted the Commission’s cross-motion. (R.E. 8, R. 2524). Hill Bros. timely appealed. (R. 2528).

C. Statement of Facts

As evidenced by their respective motions for summary judgment, the parties agree that there is no genuine issue of material fact as to the proper interpretation and application of the petroleum price adjustment provision after expiration of contract time. There is no dispute that the petroleum price adjustment provision at issue was included in the underlying state highway construction contract. Likewise, there is no dispute over the content of the adjustment provision nor about how the provision was interpreted by the Commission both before and after expiration of contract time.

While the acknowledged existence and wording of the petroleum price adjustment provision are the only truly material facts necessary for the Court’s decision, Hill Bros. offers the following factual context for the issues before the Court.

On or about October 10, 2000, the Commission awarded Contract No. NH-0056-02(33)PH2/101815 - Oktibbeha County ("Contract") to D. B. Johnson Construction Co., Inc. ("Johnson") for construction of approximately 6.25 miles of Mississippi Highway 25 in Oktibbeha County, Mississippi. See Plaintiff's Itemization of Undisputed Facts. ("Pl. Item.") ¶1 (R.E. 46, R. 143). Travelers Casualty & Surety Company of America ("Travelers") issued to the Commission a performance bond guaranteeing Johnson's performance of the Contract. Id. ¶2 (R.E. 47, R. 144). Johnson's Contract specified an original duration of slightly more than three years, with an original completion date of October 13, 2003. Second Affidavit of John F. Hill, Jr. ("Hill 2d. Aff.") at ¶5 (R.E. 32, R. 2452). However, Johnson defaulted prior to completion, and the Commission called upon Travelers to arrange completion of Johnson's Contract pursuant to Travelers' performance bond. Id.

On September 16, 2003, Travelers and Hill Bros. entered into a Completion Agreement Between Surety and Contracts ("Completion Agreement") by which Hill Bros. agreed to complete the Johnson Contract for Travelers. Id. ¶6 (R.E. 32, R. 2452); Affidavit of James M. Peters, Jr. ("Peters Aff.") ¶3 (R.E. 43, R. 2469). Relevant excerpts of the Completion Agreement itself without voluminous exhibits are reproduced at R.E. 13-22 and in full text at R. 27-40.

At the time of the Completion Agreement, Hill Bros. estimated that the work defaulted upon and left unperformed on the Johnson Contract would take over two years to finish, even though there was less than a month of allowable contract time remaining (i.e. September 16, 2003 - October 13, 2003). Hill 2d Aff. at ¶¶33-34 (R.E. 38-40, R.

2458-2459). Hill Bros. therefore stipulated in its Completion Agreement that Hill Bros. would complete the work remaining in the Johnson Contract in 840 calendar days from the date the Completion Agreement was signed in September 2003. Id. at ¶34 (R.E. 39, R. 2459). This translated into 813 calendar days beyond the original expiration date for the Johnson Contract of October 13, 2003. Id.

The Completion Agreement further provided that Hill Bros. was entitled to the benefit of any time extensions thereafter given for excusable delays in Hill Bros.' performance of the Johnson Contract and to "[a]ny other adjustment factor otherwise provided for in the [Johnson] Contract Documents. Peters Aff. at ¶6 (R.E. 43, R. 2469); First Affidavit of John F. Hill, Jr. ("Hill 1st Aff.") at ¶8 (R.E. 25, R. 96); Completion Agreement at §§4.1 and 5.1 xvi (R.E. 18, R. 32).

The Contract Documents of Johnson's Contract contained Special Provision No. 907-109-01, dated 12/4/97, entitled "Measurement and Payment for Changes in Cost of Construction Materials (Fuels and Asphalt)." Hill 1st Aff. at ¶9 (R.E. 25, R. 96). The referenced Special Provision is set out in full text at R.E. 9-11, R. 2189-2191 and is referred to herein as the "petroleum price adjustment provision". The petroleum price adjustment provision in the Johnson Contract constituted an adjustment factor to which Hill Bros. was entitled to receive the benefit pursuant to Section 5.1 xvi of the Completion Agreement with Travelers. Peters Aff. at ¶¶5-6 (R.E. 43, R. 2469); Hill 2d Aff. ¶¶8-9 (R.E. 33, R. 2453). Expecting the Johnson Contract to take over two years more to complete after expiration of the original Contract time, Hill Bros. counted on the petroleum price adjustment provision, in the words of the provision itself, to protect Hill

Bros. from “the uncertainty in estimating the costs of petroleum products that will be required during the life of a contract.” Hill 2d Aff. ¶¶9, 42, 45 (R.E. 30, 40, 41, R. 2453, 2460, 2461).

The allowable contract time of the Johnson Contract was extended to March 13, 2004 pursuant to time extensions given by the Commission for excusable delays in Hill Bros.’ completion of the Johnson Contract. Id. at ¶35 (R.E. 39, R. 2459). Hill Bros. completed the Johnson Contract exactly two years later in March 2006. Id. at ¶36 (R.E. 39, R. 2459). This meant that Hill Bros. beat its estimate of 840 calendar days stated in its Completion Agreement with Travelers by 83 days. Id. ¶37 (R.E. 39, R. 2459).

Until the expiration of the allowable time, as extended, of the Johnson Contract, the Commission through its subordinate and operating entity, the Mississippi Department of Transportation (“MDOT”), made adjustments monthly to designated pay items affected by oil prices by comparing (a) the baseline price established by MDOT in 2000 for bidding the Contract ultimately awarded to Johnson with (b) the fluctuation in oil prices reflected in the recognized industry-wide index of oil prices maintained and published monthly by MDOT. Hill 1st Aff. ¶¶10, 13-14 (R.E. 25, 26-27, R. 96, 97-98). However, when allowable time of the Johnson Contract expired over three years later on March 13, 2004, MDOT on behalf of the Commission no longer adjusted prices with relation to monthly cost fluctuations but instead imposed a static differential between the original 2000 baseline price established by MDOT and the oil index price in effect at expiration of contract time in March 2004. Id. at ¶18 (R.E. 27, R. 98).

The impact of this change in methodology was not significantly out of balance with the prices Hill Bros. had to pay for petroleum products until the rapid rise in costs, especially of petroleum prices, following Hurricane Katrina at the end of August 2005. Hill 2d Aff. ¶¶44 (R.E. 40, R. 2460). However, because petroleum prices just happened to be at a comparatively low point at expiration of time for the Johnson Contract in March 2004, Hill Bros. and its subcontractors spent for petroleum products in completing the Johnson Contract by March 2006 nearly a half million dollars more than payments to Hill Bros. made by MDOT pursuant to its static differential interpretation of the petroleum price adjustment provision when allowable contract time expired. *Id.* at ¶¶44-45. (R.E. 40-41, R. 2460-2461).

MDOT rejected protests first made by Travelers on Hill Bros.' behalf and then made directly by Hill Bros. of the unfairness of MDOT's interpretation and application of the petroleum price adjustment provision after expiration of time of the Johnson Contract. Peters Aff. ¶¶7-8 (R.E. 43-44, R. 2469-2470); Hill 1st Aff. ¶¶19-21 (R.E. 28, R. 99); Hill 2d Aff. ¶¶14-18 (R.E. 35-36, R. 2455-2456). Rebuffed by MDOT, Hill Bros. took an assignment of the rights and causes of action Travelers had as take-over surety and successor to Johnson under the Johnson Contract in order for Hill Bros. to seek relief against the Commission for underpayments of the petroleum price adjustments that should have been made pursuant to a correct interpretation and proper application of the provision in accordance with the authorizing statute. Peters Aff. ¶¶9-12 (R.E. 44-45, R. 2470-2471); Hill 2d Aff. ¶¶11-18 (R.E. 34-36, R. 2454-2456). Hill Bros. brought the subject action against the Commission pursuant to Miss. Code Ann. §11-7-3 (1972). The

trial court denied the Commission's challenge to Hill Bros.' standing to bring this action as Travelers' assignee. Findings of Fact, Conclusions of Law and Order ¶8 (R.E. 6, R. 2522). The Commission did not cross-appeal this issue.

Hill Bros. brought the subject action against the Commission on February 15, 2007, within three years of the commencement in March 2004 by MDOT, on behalf of the Commission, of misapplication and underpayments of the petroleum price adjustment provision after the expiration of contract time, as extended, for the Johnson Contract.

D. Statement about Oral Argument

Hill Bros. has requested oral argument. Pursuant to M.R.A.P. 34(b), Hill Bros. states that oral argument will be helpful to the Court primarily to give a better understanding of the factual context in which the Commission's interpretation and application of the petroleum price adjustment provision caused such an undeserved hardship on Hill Bros. Hill Bros. further observes that the importance of this issue transcends the one contract specifically at issue because the petroleum price adjustment provision is a standard Special Provision in all MDOT contracts. Particularly because of the unusual volatility seen recently of oil prices quickly rising from around \$2.00 per gallon to nearly \$4.00 per gallon and then falling back to the \$2.00 range in a space of months, the Commission's cessation of price adjustments after expiration of contract time in times of such volatility could be ruinous to Mississippi companies which perform the state's highway work.

III. JURISDICTION AND STANDARD OF REVIEW

On cross-motions for summary judgment, the trial court granted the Commission's motion for complete summary judgment. (R.E. 8, R. 2524). Hill Bros. timely appealed. (R. 2528). This Court has jurisdiction pursuant to Miss. Code Ann. §9-3-9 (1972) and Rules 3, 4, and 16 of the Mississippi Rules of Appellate Procedure. The Mississippi Supreme "Court conducts a de novo review of summary judgment motions and, therefore, considers facts without any deference to the trial court and applies its own interpretations of the law." Richardson v. Methodist Hospital of Hattiesburg, Inc., 807 So. 2d 1244, 1246 (Miss. 2002) (en banc) *citing* Daniels v. GNB, Inc., 629 So. 2d 595, 599 (Miss. 1993).

IV. SUMMARY OF THE ARGUMENT

Under the objective rule of contract interpretation based upon the "four corners" test of the language actually used, the last sentence of the petroleum price adjustment provision means that the prices in effect at the expiration of contract time became the new fixed baseline from which "adjustments will be computed" based upon fluctuation in actual costs as reflected in monthly indices of petroleum prices published by MDOT.

The Commission interprets the sentence at issue as creating an inflexible price comparison after allowable contract time expires. The Commission's interpretation ceases to allow for further price adjustments and instead imposes a rigid, static, unchanging comparison between (a) the original baseline price established at bidding and (b) the prices in effect at expiration of contract time. As acknowledged by the Commission, its interpretation means that "there is no more adjustment for fuel prices

after that completion date expires. It locks in.” Transcript of Oral Argument (R.E. 58-59, Supplemental Record Volume 1 of 1, pp. 26-27); *see also* Transcript of Oral Argument (R.E. 55-56, R. Vol. 19, pp. 3-4)(“at the end of the contract . . . it’s not adjusted either way.”). Such an interpretation of “no further adjustments” after expiration of contract time is at odds with the language of the sentence at issue which itself states “adjustments will be computed”

Additionally, the Commission’s interpretation conflicts with its own statement of the principal purpose of the petroleum price adjustment provision as a whole. The initial substantive language of the provision explains that price adjustments will be made “[b]ecause of the uncertainty in estimating the costs of petroleum products that will be required during the life of a contract” (R.E. 9, R. 2189). The “life” of a contract does not end at expiration of allowable contract time. Indeed, in this case, it continued on for another two years after the allowable time had expired, because when Johnson defaulted there was two years of work remaining for Hill Bros. to complete. Contrary to this statement of purpose in the provision itself that adjustments will be made for the “life” of the contract, the Commission’s interpretation stops protection from the uncertainty in fluctuating oil prices after the expiration of allowable contract time but before the contract work is actually completed.

Moreover, the Commission’s interpretation is illogical. If petroleum prices happen to be at a high spike at the expiration of contract time - - a fortuity beyond the control or ability to predict of either contracting party - - and prices thereafter decline, then under the Commission’s interpretation, the contractor gets a windfall from a fixed high

differential payment which bears no relationship to the lower costs actually being paid by the contractor for falling petroleum prices. The very uncertainty the provision itself is supposed to prevent is thus reinstated and even accentuated by the Commission's interpretation. The Commission's interpretation leaves to pure chance whether the fixed price differential it advocates when contract time expires will be unduly advantageous or unduly unfavorable to either party. The outcome is determined solely on the totally unpredictable circumstance of what the petroleum price index just happens to be three or four years in the future when allowable contract time expires. In effect, after expiration of contract time, the Commission forces the contracting parties to be unwilling speculators in oil futures.

If Hill Bros.' interpretation of the last sentence of the Commission's petroleum price adjustment provision is not accepted by the Court as the only correct interpretation, then Hill Bros. submits that at least its interpretation is a reasonable one. Even if the Commission's interpretation is also judged to be reasonable, the existence of two reasonable interpretations establishes that the petroleum price adjustment provision is ambiguous and should be construed against the Commission as drafted. The ambiguity arises because until allowable contract time expires, there are two factors for petroleum product price adjustments: Factor 1 is the baseline price established by the Commission at time of bidding; and Factor 2 is the fluctuating monthly price index of actual prices. The last sentence replaces one of these factors with the prices in effect at expiration of contract time, but the sentence does not say which. Hill Bros. believes it is more logical that prices in effect at expiration of contract time replace the baseline prices, thereby

substituting one fixed factor with another, so as to continue adjusting prices “with relation to the cost to the contractor” for the entire “life” of the contract as required by the authorizing statute. The Commission insists that the prices in effect at contract time became a second fixed factor, thereafter eliminating entirely adjustments “with relation to the cost to the contractor”. This ambiguity should be interpreted against the Commission as drafter. This is especially true considering the language appears in a standard petroleum price adjustment provision in state highway contracts put out for competitive bid without any opportunity for negotiation.

Even more importantly, the Commission’s interpretation is contrary to and not permitted by the authorizing statute, Miss. Code Ann. §31-7-13(i) (R.E. 12, R. 2571). This statute is the legal authority for Mississippi governing entities, like the Commission, to include in their road construction contracts “a price adjustment clause” like the one before the Court. However, the statute requires such a provision to adjust contract prices” with relation to the cost to the contractor, including taxes, based upon an industry-wide cost index, of petroleum products including asphalt used in the performance or execution of the contract” While the Commission may elect not to insert such an adjustment provision in one of its contracts, when, as here, the choice is made to include a petroleum price adjustment provision, such provision must adhere to the requirements of the statutory authorization.

The Commission’s interpretation of the provision *prior* to expiration of contract time does comply with the requirements of Miss. Code Ann. §31-7-13(i) because the statute states that the price adjustment clause “shall be” based on the cost of such

petroleum products and that adjustments are to be made “with relation to the cost to the contractor.” However, the Commission’s interpretation of the last sentence of its provision to cease further price adjustment *after* expiration of contract time is contrary to the enabling statute. In the first place, the statute does not authorize different methods of adjustment distinguished between before and after expiration of contract time. Instead, it requires price adjustment “with relation to the cost to the contractor . . . of petroleum products . . . used in the execution or performance of the contract.” The Commission’s interpretation of the last sentence of its adjustment provision as creates at expiration of contract time a static price differential with no relation to the cost of the contractor and irrespective of the actual cost thereafter of petroleum products. Hill Bros. was in fact deprived of a price adjustment “with relation to the cost of the contractor” for petroleum products “used in the performance of the contract” for the two year period after expiration of time of the Johnson Contract in March 2004 until Hill Bros. completed Johnson’s defaulted work in March 2006. This result - - caused by the application of the last sentence of the petroleum price adjustment provision as interpreted by the Commission - - directly conflicts with the statutory mandate and constitutes a restriction on price adjustments that exceeds the Commission’s power. Worse, the Commission perverts the ameliorative purposes of the authorizing statute through imposing an interpretation that, by pure chance, can exact a harsh penalty, as happened to Hill Bros., if oil prices happen to skyrocket after expiration of contract time.

V. ARGUMENT

A. **Objective Reading of Four Corners of Petroleum Price Adjustment Provision Validates Hill Bros.’ Interpretation**

1. **Standards for Contract Interpretation**

Mississippi adheres to the objective rule of contract interpretation, which is measured by the actual language used in the contract. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095, 1105 (¶27) (Miss. 2004). It matters not what the parties may have meant or intended. Landry v. Moody Grisham Agency, Inc., 254 Miss. 363, 181 So. 2d 134, 139 (Miss. 1965). Courts instead are “concerned with what the contracting parties have said to each other [in the language of their contract], not some secret thought of one [that was] not communicated to the other.” Mississippi State Highway Commission v. Patterson Enterprises, Ltd., 627 So. 2d 261, 263 (Miss. 1993) (bracketed clarification added). Consequently, “[c]ourts must ascertain the meaning of the language actually used, not ‘some possible but unexpressed intent of the parties.’” IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 104 (¶33)(Miss. 1998) *quoting* Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 418 (Miss. 1987). These principles apply to the Commission’s contracts and to the notices, specifications, and provisions contained therein. *See* Mississippi Transportation Commission v. Ronald Adams Contractors, Inc., 753 So. 2d 1077, 1084 (¶20) (Miss. 2000); Lehman Roberts Company v. State Highway Commission of Mississippi, 673 So. 2d 742, 743-44 (Miss. 1996).

However, this Court need not construe the petroleum price adjustment in isolation. “When construing a contract, [courts] read the contract as a whole, so as to give effect to all of its clauses.” Brown v. Hartford Ins. Co., 606 So. 2d 122, 126 (Miss. 1992). In so

doing, a court should endeavor, insofar as is feasible, to reconcile and harmonize all provisions. *See Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352-53, *reh. den.* (Miss. 1990); *City of Grenada v. Whitten Aviation, Inc.*, 755 So. 2d 1208, 1215 (¶18), *reh. den.* (Miss. App. 1999) *quoting* *Benefit Trust Life Ins. Co. v. Lee*, 248 Miss. 715, 160 So. 2d 909, 915 (Miss. 1964). Courts should also seek “the meaning most coherent in principle with the best justification which may be found in that language” of the clause at issue. *Lehman-Roberts Company v. State Highway Commission of Mississippi*, 673 So. 2d 742, 744 (Miss. 1996). Additionally, “words of a contract should be given a reasonable construction, where that is possible, rather than an unreasonable one; and the court should likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other.” *Rubel v. Rubel*, 221 Miss. 848, 75 So. 2d 59, 65 (Miss. 1954) *accord*, *Goldberg v. Lowe*, 509 F. Supp. 412, 423 (N.D. Miss. 1981). This means that contracts should be construed to avoid absurd, harsh, unfair, unreasonable, or commercially impractical results. *Frazier v. Northeast Shopping Center, Inc.*, 458 So. 2d 1051, 1054 (Miss. 1984), *Glantz Contracting Co. v. General Electric Co.*, 379 So. 2d 912 (Miss. 1980). To the contrary, “[i]t is the duty of courts to give to a contract that construction or interpretation, if possible, which will square its terms with fairness and reasonableness, each party to the other” *Citizens’ Bank v. Frazier*, 157 Miss. 298, 127 So. 716, 717 (Miss. 1930)(Griffith, J.).

Furthermore, “law in force at the time a contract is made forms a part of it and is written into the contract as much as if expressly incorporated therein.” *Ivison v. Ivison*, 762 So. 2d 329, 336 (¶19) (Miss. 2000). This point is significant because the “legal

purpose” should first be sought in the objective reading of the contract language at issue. See In re Estate of Harris, 840 So. 2d 742, 745 (¶15) (Miss. App. 2003); City of Grenada v. Whitten Aviation, Inc., 755 So. 2d 1208, 1214 (¶16) (Miss. App. 1999); Cooper v. Crabb, 587 So. 2d 236, 241 (Miss. 1991). Moreover, no interpretation should be given which contravenes public policy or to which no man in his right mind would have agreed to. See Goldberg v. Lowe, 509 F. Supp. 412, 421 (N.D. Miss. 1981) *quoting* 17 Am. Jur. 2d §245 (not violate public policy); Tupelo Redevelopment Authority v. Abernethy, 913 So. 2d 278, 284 (¶14) (Miss. 2005) (no man in right mind would accept).

In applying the foregoing standards, Mississippi courts undertake a three-tiered approach. First, the court examines the language within the “four corners” of the document. Second, if the “four corners” examination does not permit the court to determine objectively the parties’ intent as expressed by the language used in the contract, the court should then apply discretionary “canons” of construction. Third, if the contract continues to evade clarity, only then it is necessary for a court to resort to consideration of extrinsic or parol evidence. See Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 352-353, *reh. den.* (Miss. 1990) (seminal case for “three tiered approach” to contract interpretation); *accord*, Facilities, Inc. v. Rogers-Usry Chevrolet, Inc., 908 So. 2d 107, 111 (¶7) (Miss. 2005); West v. West, 891 So. 2d 203, 210-211 (¶¶14, 15) (Miss. 2004).

2. Application of Standards of Contract Interpretation

For reasons hereafter stated, Hill Bros. submits that its construction of the petroleum price adjustment provision at issue best satisfies the foregoing standards of contract interpretation under the “four corners” tier of objective analysis of the language actually used.

a. Plain Meaning

Both the Commission and Hill Bros. agree on the interpretation and application of the petroleum price adjustment provision *before* expiration of contract time. There are two price adjustment factors, spelled out in the petroleum price adjustment provision, as follows:

The established base prices for bituminous products and fuels will be included in the contract documents under a Notice to Bidders entitled “Petroleum Products Base Prices For Contracts Let In (Month and Year).” **[Factor 1]**.

Each month thereafter the Engineer will be furnished with the current monthly prices. Adjustments for change in cost will be determined from the difference in the contract base prices and the prices for the period that the work is performed and for the quantities completed provided the price change in a product is more than five percent. Adjustments may increase or decrease compensation depending on the difference between the base prices and prices for the estimate period. **[Factor 2]**.

(R.E. 9, R. 2189)(embolded bracketed material added).

As shown, the two factors for adjusting petroleum prices are separated into one which is fixed and another which is flexible. Factor 1 is the fixed baseline of prices in effect at the time of bidding as specified in MDOT’s Notice to Bidders. Factor 2 is the flexible fluctuation in prices set forth in MDOT’s monthly indices of petroleum prices.

Each month adjustments are computed by comparing the cost to the contractor as approximated by MDOT's monthly price indices (Factor 2) with fuel and material prices in effect at the time of bidding (Factor 1).

The Commission and Hill Bros. differ on what happens after expiration of contract time, in accordance with the last sentence of the petroleum price adjustment provision:

After the expiration of contract time, including all authorized extensions, *adjustments will be computed* using fuel and material prices that are in effect at the expiration of contract time.

(R.E. 11, R. 2191)(emphasis added). Hill Bros. contends the above quoted criterion becomes the new fixed Factor 1. The Commission contends it replaces the flexible Factor 2 of fluctuation monthly prices with another fixed factor.

Both parties agree that, after expiration of contract time, there is a new fixed adjustment factor in the form of prices in effect at the expiration of contract time. Hill Bros. understandably construed this new fixed factor as taking the place of the initial fixed Factor 1 to become the revised baseline upon which "adjustments will be computed". Additionally, under Hill Bros.' interpretation, prices continue to be adjusted, as before, with relation to the cost of the contractor, which are reflected by MDOT's monthly indices of petroleum prices. Hill Bros.' interpretation therefore preserves the basic concepts of a fixed Factor 1 as compared to a flexible Factor 2 used to calculate an "adjustment" in fluctuating petroleum prices using MDOT's monthly price indices.

In contrast, under the Commission's interpretation, after expiration of contract time, MDOT's monthly price indices are cast aside entirely. In the Commission's view, Factor 1 remains the same but now Factor 2 also becomes fixed, creating a static

difference between the prices established at the time of bidding and the prices established at the expiration of contract time. Prices no longer adjust. Instead, the Commission argues, “there is no more adjustment for fuel prices after [the contract] completion date expires.” (R.E. 58-59, Suppl. R. Vol. 1 of 1, pp. 26-27). According to the Commission, prices are locked in. *Id.* There is no further adjustment, either up or down, regardless of how much actual prices for petroleum products fluctuate. (R.E. 55-56, R. Vol. 19, pp. 3-4). This runs counter to the language of the provision sentence itself which expressly states “adjustments will be computed” based upon prices in effect at the expiration of contract time.

b. Legal Purpose and Harmonizing Language

As noted, the introduction to the petroleum price adjustment provisions states:

Because of the uncertainty in estimating costs of petroleum products that will be required during the life of a contract, adjustment in compensation for certain materials is provided as follows

(R.E. 9, R. 2189).

Hill Bros.’ interpretation is consistent with the legal aim and principal purpose of the petroleum price adjustment provision stated above. Hill Bros. retains the original Factor 2 to provide for adjustments resulting from uncertain fluctuation in petroleum prices as reflected in MDOT’s monthly price indices both before and after expiration of contract time. Just the opposite is the effect of the Commission’s interpretation of the last sentence of the provision which does away entirely with protecting the parties from price fluctuations after contract time expires.

In fact, the Commission's interpretation puts both the Contractor and MDOT at financial peril of great swings in oil prices, which no one can predict. If allowable contract time fortuitously ends when there is a high spike in petroleum prices, under the Commission's interpretation, MDOT would be stuck with paying the contractor an unusually large price differential when prices thereafter decline. Transcript of Oral Argument (R.E. 55-56; R. Vol. 19 at 3-4). The contractor would actually be receiving a windfall in the form of payments much higher than his actual cost. Conversely, under the Commission's interpretation, if contract time just happens to expire at a low spike in petroleum prices, the payment will be artificially low and a contractor could be ruined by rapid increases in petroleum prices caused by market conditions over which the contractor has absolutely no control but for which no adjustment would be allowed under the Commission's interpretation.

Instead of removing uncertainty with regard to petroleum prices, the Commission's interpretation actually induces it. One party will "win" and the other party will "lose" based on circumstances completely beyond their control: namely, what the level of oil prices just happens to be when allowable contract time expires years after the job is bid. The Commission's interpretation subverts the purpose of the petroleum price adjustment provision to neutralize the effect of petroleum price fluctuation and, at the expiration of contract time, actually converts the petroleum price adjustment provision into an involuntary gamble of whether petroleum prices will thereafter rise or fall. Isn't this an absurd result, which must be avoided?

In summary, the principal purpose and essential features of the petroleum price adjustment provision are:

1. removal of uncertainty and risk of fluctuations in oil prices by
2. adjusting contract prices monthly over the life of the contract, using
3. a single fixed price for comparison with
4. varying prices under Factor 2 in relation to the cost of the contractor as reflected in MDOT's price indices.

Hill Bros.' interpretation preserves every one of these features. On the other hand, the Commission's interpretation violates all of them. The Commission's interpretation is therefore contrary to the principal purpose and plain meaning of the petroleum price adjustment provision.

c. Laws and Public Policy

As noted, "law in force at a time a contract is made forms a part of it and is written into the contract as much as if expressly incorporated therein." Iverson v. Iverson, *supra*, 762 So. 2d at 336 (¶19). In this instance, the "law in force" is Miss. Code Ann. §31-7-13(i). (R.E. 12, R. 2571). This is the legal authority for the petroleum price adjustment provision in the first place.

The statute authorizes the Commission to "include in its bid proposal and contract documents a price adjustment clause with relation to the cost to the contractor, including taxes, based upon an industry-wide cost index, of petroleum products including asphalt used in the performance or execution of the contract" Id. The statute further confirms that the industry-wide cost index "shall be established and published monthly by the Mississippi Department of Transportation" Id. There is nothing in the statute

that permits a price adjustment provision that employs some adjustment mechanism other than “with relation to the cost to the contractor” based upon the industry-wide index established and published monthly by MDOT. Id.

As shown, the Commission’s authority to include a petroleum price adjustment provision is conditioned by the Legislature upon adjustments which are made “with relation to the cost to the contractor”. By statute, the “cost to the contractor” is specifically defined as MDOT’s monthly price indices of oil products. Yet, this is precisely the feature which the Commission proposes to eliminate in its interpretation of the last sentence of the provision; whereas, Hill Bros.’ interpretation preserves the statutorily mandated requirement and continued use of MDOT’s indices.

d. Fairness and Reasonableness

The Commission’s interpretation leaves to pure chance whether the fixed price differential in effect when contract time expires will be unduly advantageous to one party and unduly unfavorable to the other party, solely because of the unpredictable circumstance of what the petroleum price index just happens to be at the expiration of contract time. This is the very risk the petroleum price adjustment provision is intended to prevent. In this instance, Hill Bros. was penalized by the Commission’s interpretation in receiving nearly a half million dollars less in petroleum price adjustments than Hill Bros. should have received if the petroleum price adjustment provision had been properly applied. As a result, Hill Bros. had to go into its own pocket to pay the price increase of petroleum products used to complete the Johnson Contract when these increases should have been covered by the adjustment provision.

As observed, the unfairness of the Commission's interpretation could just as easily have worked against the Commission based on the utter fortuity of whether petroleum prices were at a high point or comparatively low point when contract time happens to expire. This is hardly in keeping with a construction of the language which is "most equitable to the parties" or "coherent with the best justification". See Rubel v. Rubel, *supra*; Lehman-Roberts Company v. State Highway Comm'n, *supra*.

3. Commission's Interpretation Is Contrary to Purpose Stated in Provision Itself

One need not resort to statutory construction to divine the purpose of the petroleum price adjustment provision at issue in this case. The Commission itself stated the principal purpose of the petroleum price adjustment provision in introductory language chosen by the Commission, as follows:

Because of the uncertainty in estimating the costs of petroleum products that will be required during the life of the contract, adjustment in compensation for certain materials is provided . . .

(R.E. 9, R. 2189). As shown below, there are three basic concepts forming the principal purpose of the petroleum price adjustment provision, *each* of which is preserved by Hill Bros.' interpretation of the last sentence and *none* of which is implemented by the Commission's interpretation.

(a) “uncertainty in estimating the costs of petroleum products”

Hill Bros.’ interpretation maintains the protection to contractors against the uncertainty of petroleum price fluctuation by making adjustments both before and after expiration of contract time in relation to the actual cost paid by contractors for qualifying products. In contrast, the Commission’s interpretation intentionally subverts the ameliorative purpose of the clause in order to impose upon the contractor, after expiration of allowable contract time, the very risk of fluctuating petroleum pricing that the petroleum price adjustment provision was designed to prevent.

(b) “during the life of the contract”

The contract does not end when the allotted duration for completion has run; instead the contract “lives on” until the work has been completed and finally accepted. Hill Bros.’ interpretation preserves the intended protection of the petroleum price adjustment provision for “the life of the contract”; whereas, the Commission terminates all adjustments “with relation to the cost to the contractor” after expiration of allowable contract time despite the continuation of work thereafter.

(c) “adjustment in compensation will be provided.”

Hill Bros.’ interpretation sustains price adjustments for the life of the contract; the Commission’s interpretation requires that adjustments cease at the expiration of allowable contract time even though work remains.

Clearly, only Hill Bros.’ interpretation is consistent with the stated purpose of the petroleum price adjustment provision as worded by the Commission itself.

B. Hill Bros.' Interpretation Is at Least Reasonable and Therefore Prevails Under Doctrine of *Contra Proferentum*

1. Doctrine of *Contra Proferentum*

Hill Bros. respectfully submits that its interpretation of the petroleum price adjustment provision is the only logical construction consistent with the standards of contract interpretation applied to the four corners of the language actually used. However, it is unnecessary that Hill Bros. prevail on this ground. If the Court remains unsatisfied that the only correct interpretation is that offered by Hill Bros., pursuant to the three-tiered approach, the Court moves to the second tier.

This entails discretionary implementation of applicable 'canons' of contract construction. For example, one rule espoused by this Court suggests that uncertainties should be resolved against the party who prepared the instrument.

Pursue Energy Corporation v. Perkins, 558 So. 2d 349, 352-53, *reh. den.* (Miss. 1990).

Actually, the rule cited is more than a mere suggestion. The Mississippi Supreme Court said in Stamper v. Gilbert, 332 So. 2d 61, 63 (Miss. 1976):

There is also the universal rule of construction that when the terms of a contract are vague and ambiguous, they are always construed more strongly against the party preparing it. [Citations omitted].

This "canon" of contract construction is so universally accepted that it is also referred to as the "doctrine" of *contra proferentem*. See, e.g., Kirschenheuter v. Board of Trustees of GSA-ILA Pension Plan and Trust, 341 F. Supp. 624, 631 (S.D. Miss. 2004). It is even embodied in Restatement (Second) of Contracts §206 (1981). This doctrine has been specifically applied to contractual provisions promulgated by the Mississippi Transportation Commission. See Mississippi Transportation Commission v. Ronald

Adams Contractor, Inc., 753 So. 2d 1077, 1084 (¶20) (Miss. 2000).

The test is not whether the non-drafter's interpretation is best or should be preferred. Instead, the non-drafter's interpretation need only be reasonable. Thus, one finds the doctrine of *contra proferentem* stated as follows: "Where the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party." Facilities, Inc. v. Rogers-Usry Chevrolet, Inc., 908 So. 2d 107, 111 (¶11) (Miss. 2005); McLeod v. Allstate Insurance Company, 789 So. 2d 806, 810 (¶16) (Miss. 2001). Here, Hill Bros. is the non-drafter and, if the Court finds ambiguity, the petroleum price adjustment provision must be construed most strongly against the Commission.

2. Application of Doctrine

It has been previously explained how the Commission's petroleum price adjustment provision, before expiration of contract time, employs two adjustment factors: Factor 1 being baseline pricing established in the bid notice and resulting contract, and Factor 2 MDOT's being monthly price indices. When the allowable contract time runs out, the last sentence of the petroleum price adjustment provision replaces one of these factors with the prices in effect at the expiration of contract time. However, the petroleum price adjustment provision does not specify whether this new criterion replaces the original Factor 1 or Factor 2. The Commission argues for Factor 2 but, for reasons previously given, Factor 1 is more logical. If arguments can be made for either Factor, then the provision must be regarded as ambiguous.

The most compelling evidence of ambiguity is the confusion within MDOT itself as to how the petroleum price adjustment provision should be interpreted and applied. MDOT is the agency subordinate to the Commission. The Commission has authority over the state's highways which is implemented under MDOT's "control and supervision". Miss. Code Ann. §65-1-47 (Rev. 2005). The Commission appoints MDOT's Executive Director who directs MDOT's activities subject to Commission approval. Miss. Code Ann. §§65-1-9, 65-1-10 (Rev. 2005). Pursuant to Miss. Code Ann. §65-1-5 (Rev. 2005), the Commission is the entity to be sued, but MDOT is the operational arm of the Commission which actually administers state highway construction projects, including payments made pursuant to them.

MDOT therefore actually applies the petroleum price adjustment provision in making monthly adjustments to contracts as called for by the provision. However, MDOT's own interpretations of the petroleum price adjustment provision have varied and adjustments made have been inconsistent from one MDOT District to another, within the same MDOT District at different times, and even with regard to the same highway construction contract being administered by MDOT. Hill 1st Aff. ¶25 (R.E. 29, R. 100). If the agency charged with administering the provision is inconsistent in its interpretations, then the provision cannot be considered anything but unclear and ambiguous.

As shown *supra*, Hill Bros.' interpretation of the provision is the most logical, consistent with the language and principal purpose of the petroleum price adjustment provision and of the statute enabling the Commission to include such a provision in its

contracts. Without question, it must be said that Hill Bros.’ interpretation at the very least is not unreasonable. Accordingly, under the doctrine of *contra proferentem*, Hill Bros.’ interpretation prevails over the interpretation of the Commission, which drafted the petroleum price adjustment provision.

When the Court is able to make a determination under the first tier of “four corners” analysis or is able to apply a canon of construction, specifically including the doctrine of *contra proferentem*, there is no need for the Court to resort to extrinsic evidence, and the Court may and should rule on contract interpretation as a matter of law. *See, e.g., Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So. 2d 107, 116 (¶25) (Miss. 2005) (if contract is unambiguous, consideration of extrinsic or parol evidence outside “four corners” is not justified); Mississippi Transportation Commission v. Ronald Adams Contractor, Inc., 753 So. 2d 1077, 1085 (¶23) (Miss. 2000) (ambiguity of provision in MDOT contract construed most strongly against Commission as drafter); *see also Globe Music Corporation v. Johnson*, 226 Miss. 329, 84 So. 2d 509, 511 (Miss. 1956) (decree affirmed not on factual findings but on doctrine of *contra proferentem* whereby “any ambiguity in the contract must be resolved in favor of the “non-drafter”). Moreover, MDOT contracts, like the one at issue, are published to bidders on a take-it-or-leave-it basis. There is no negotiation. Consequently, there is no extrinsic evidence to be considered outside the language of the contract and the authorizing statute.

C. The Commission's Interpretation Violates the Authorizing Statute Such that the Limitation on Adjustments in the Last Sentence Should Be Stricken

For reasons stated, Hill Bros. contends that its interpretation should prevail either in accordance with applicable standards of contract interpretation or as being at least a reasonable interpretation of an ambiguous provision drafted by the Commission. However, if the Court should find that the last sentence of the petroleum price adjustment provision is clear and unambiguous and should be interpreted as contended by the Commission, then Hill Bros. submits such an interpretation cannot stand because it contravenes the authorizing statute. Accordingly, the last sentence should be stricken from the provision and adjustments in petroleum prices should be made "with relation to the cost to the contractor" for the "life of the contract" without regard to expiration of contract time.

1. Authorizing Statute

Section 31-7-13(i) of Mississippi Code of 1972 was enacted by the Mississippi Legislature in 1975 in its current form. (R.E. 90, R. 2189). The full text of this statute is hereafter set forth with emphasis of language later discussed.

(i) Road construction petroleum products price adjustment clause authorization. – Any agency or governing authority authorized to enter into contracts for the construction, maintenance, surfacing or repair of highways, roads or streets, may include in its bid proposal and contract documents a price adjustment clause *with relation to the cost to the contractor*, including taxes, based upon an industry-wide cost index, of petroleum products including asphalt *used in the performance or execution of the contract* or in the production or manufacture of materials for use in such performance. Such industry-wide index shall be established and published monthly by the Mississippi Department of

Transportation with a copy thereof to be mailed, upon request, to the clerks of the governing authority of each municipality and the clerks of each board of supervisors throughout the state. The price adjustment clause shall be based on the cost of such petroleum products only and shall not include any additional profit or overhead as part of the adjustment. The bid proposals or document contract shall contain the basis and methods of *adjusting unit prices for the change in the cost of such petroleum products*.

(R.E. 90, R. 2189)(emphases added).

a. “may include”

Hill Bros. recognizes that pursuant to the statute, the Commission had the discretion whether to include a petroleum price adjustment provision in the Johnson Contract or in any other or all highway construction contracts. However, once the Commission exercised its discretion to include such a provision in the Johnson Contract, the Commission had no discretion to deviate from statutory requirements for such a provision.

b. “with relation to the cost to the contractor”

As stated, under the Commission’s interpretation of the last sentence of the petroleum price adjustment provision, at the expiration of contract time, contract prices no longer adjusted “with relation to the cost to the contractor”. Instead, under the Commission’s interpretation, after expiration of contract time, the differential became fixed and no longer tracked the monthly price indices. Under the Commission’s interpretation, payments to the contractor are locked-in at expiration of contract time and payments are made *irrespective* of the cost to the contractor.

c. “used in the performance”

The statute requires that the fluctuating price adjustment be made based upon an industry-wide cost index for petroleum products “used in the performance or execution of the contract” In this case, Hill Bros. and its subcontractors used petroleum products for two years after expiration of contract time in March 2004 until completion in March 2006 of work for the Johnson Contract for which price adjustment was not provided “with relation to the cost of the contractor” as ordered by the authorizing statute.

d. “adjusting unit prices for the change in the cost of such petroleum products.”

At expiration of the contract time, the Commission stopped adjusting unit prices for the change in the cost of such petroleum products. There is no authority given in the statute for differentiating between before the expiration of contract time and after. Certainly, there is no authority to cease adjusting unit costs “for the change in the cost of such petroleum products” which is synonymous with and reinforces the concept of price adjustments “with relation to the cost to the contractor”. Yet, the Commission violated this requirement twice stated in the authorizing statute by creating an artificial static adjustment at expiration of contract time instead of a price adjustment “with relation to the cost to the Contractor” by “adjusting unit prices for the change in the cost of such petroleum products.”

2. Deviation from Statutory Authority Beyond Commission's Power

The Commission's authority to include a petroleum price adjustment provision in state highway construction contracts, including the Johnson Contract, comes from Miss. Code Ann. §31-7-13(i). "It is a fundamental rule that administrative agencies may exercise only those powers that are granted by statute." Wright v. White, 693 So. 2d 898, 901 (Miss. 1997). The Commission was therefore without authority to promulgate a provision which conflicts with or is contrary to the provisions of any statute, particularly the very statute on which the Commission's authority is based. See Mississippi Public Service Commission v. Mississippi Power & Light Company, 593 So. 2d 997, 1000 (Miss. 1991), *citing* 73 C.J.S. Public Administrative Law and Procedure §89 at 584, 585, 588 (1983). "In exercising the check or review principle to restrain the agency from using unauthorized power, this Court has repeatedly stated that powers legislatively granted to and exercised by an administrative agency are limited to and must not exceed the authority prescribed by the legislative enactment." *Id.* at 1000, *citing* State ex rel. Pittman v. Mississippi Public Service Commission, 520 So. 2d 1355 (Miss. 1987); Reserve Life Insurance Co. v. Coke, 254 Miss. 936, 183 So. 2d 490 (1966); United Gas Pipeline Co. v. Mississippi Public Service Commission, 241 Miss. 762, 133 So. 2d 521 (Miss. 1961).

The authorizing statute permits only one type of price adjustment: it must be "with relation to the cost to the contractor" by "adjusting unit prices for the change in the cost of such petroleum prices." There is no differentiation in the statute based upon expiration of contract time. To the contrary, the statutory adjustment scheme applies to all

“petroleum products including asphalt used in the performance or execution of the contract.” The interpretation given by the Commission to the last sentence of the petroleum price adjustment provision contravenes these statutory requirements. Even worse, the Commission’s unauthorized change in the adjustment mechanism at the expiration of contract time destroyed the beneficial effects of the statute intended by the Legislature and penalized Hill Bros. by nearly a half million dollars. This is a perversion of the statute beyond the Commission’s power.

As a result, the Court should strike the last sentence of the petroleum price adjustment provision, since it is the only portion of the provision which is contrary to the authorizing statute. Under Mississippi case law, “if a court strikes a portion of an agreement as being void, the remainder of the contract is binding.” Russell v. Performance Toyota, Inc., 826 So. 2d 719, 725 (¶25) (Miss. 2002) citing authorities; *see also* Miss. Code Ann. §75-2-302(i)(1972).

If the last sentence of the petroleum price adjustment provision is struck, then there would be no difference in price adjustment based upon expiration of contract time. This would allow all adjustments for the “life” of the contract to be made “with relation to the cost to the contractor” for all petroleum products “used in the performance” by “adjusting unit prices for the change in the cost of such petroleum products” as contemplated by the statute. Such uniform adjustments would satisfy statutory intent as well as the principal purpose of the petroleum price adjustment provision as stated in the Commission’s own introductory language. This result would therefore harmonize the language within the petroleum price adjustment provision and comply with statutory authorization.

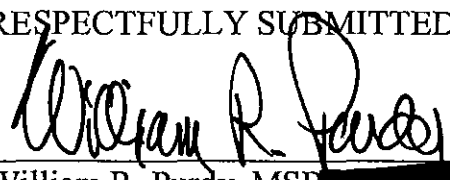
VI. CONCLUSION

For reasons given, Appellant Hill Brothers Construction Co., Inc. respectfully requests a ruling by this Honorable Court, as a matter of law, either (a) that the interpretation given by Hill Bros. to the petroleum price adjustment provision prevails over the interpretation given by Appellee Mississippi Transportation Commission or (b) that the last sentence of the petroleum price adjustment provision should be struck as having been improperly promulgated in excess of the Commission's power. Hill Bros. requests the Court to reverse the trial court's summary judgment in favor of the Commission, to render judgment as a matter of law in favor of Hill Bros. as to the Commission's liability for proper adjustments in applicable unit prices after expiration of contract time according to the monthly indices published by MDOT, and to remand to the Hinds County Circuit Court only the issue of the amount due Hill Bros. consistent with the Court's ruling on liability.

This the 11th day of August, 2009.

RESPECTFULLY SUBMITTED,

By:


William R. Purdy, MSB # [REDACTED]
Attorney of Record for Appellant, Hill
Brothers Construction Company, Inc.

OF COUNSEL:

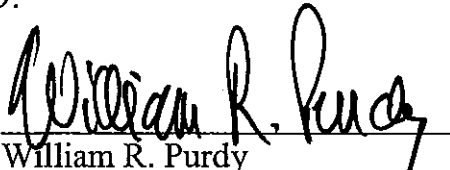
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CERTIFICATE OF SERVICE

I, William R. Purdy, hereby certify that I have this date mailed by first, class United States mail, postage pre-paid, a true and correct copy of the foregoing Brief of Appellant, Hill Brothers Construction Co., Inc. to:

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This the 11th day of August, 2009.

A handwritten signature in black ink, appearing to read "William R. Purdy", is written over a horizontal line.

William R. Purdy
Attorney of Record for Appellant,
Hill Brothers Construction Company, Inc.