

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2014-CA-01671

CITY OF HATTIESBURG, MISSISSIPPI

APPELLANT

versus

PRECISION CONSTRUCTION, LLC

APPELLEE

**APPEAL
from Judgment of the
Circuit Court for Forrest County, Mississippi**

BRIEF FOR APPELLANT

[ORAL ARGUMENT REQUESTED]

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THE MISSISSIPPI COURT OF APPEALS

CITY OF HATTIESBURG, MISSISSIPPI	*	APPELLANT
	*	
versus	*	Case No. 2014-CA-01671
	*	
PRECISION CONSTRUCTION, LLC	*	APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed 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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. City of Hattiesburg, Mississippi (“City”), the appellant, has an interest in this matter which relates to the judgment of the Forrest County Circuit Court in confirming the Decision and Supplemental Decision of the Arbitrator in awarding damages against the City with respect to a breach of contract action.

2. Precision Construction, LLC (“Precision”), the appellee, has an interest in this matter which relates to final confirmation of the Decision and Supplemental Decision of the Arbitrator awarding it damages against the City in the breach of contract action.

3. Nathan Smutzer, owner and/or managing member of Precision.

4. Kim Bradley, Deborah Denard Delgado, Carter Carroll, Mary Dryden and Henry Naylor, councilpersons for the City.

5. Charles E. Lawrence, Jr., the former City Attorney and the attorney for the appellant during the arbitration hearing.

6. James W. Gladden, Jr., attorney for the City.

7. Mark D. Herbert, attorney for Precision.
8. Shannon S. McFarland, attorney for Precision.

s/ *James W. Gladden, Jr.*

by _____
JAMES W. GLADDEN, JR., Attorney of
record for the City of Hattiesburg, Appellant

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STATEMENT OF ISSUES

- I. Whether the Arbitrator erred in not allowing the City's motion for reconsideration of his Decision under § 11-15-123, MCA to be heard when it had been filed within 20 days of his Supplemental Decision?
- II. Whether the Arbitrator made material and evident miscalculations in determining the award for claims against the City for Precision's mobilizations without deducting a previous payment to Precision of \$93,000.00 for mobilizations?
- III. Whether the Arbitrator made material and evident miscalculations in determining the award for the "lost profits" claims against the City for unused 30" PVC pipe when the cost for pipe had been previously paid to Precision by the City?
- IV. Whether the Forrest County Circuit Court erred in denying the City's motion to correct material and evident miscalculations in the Arbitrator's decision to award \$93,000.00 in excessive damages to Precision for its mobilizations?

STATEMENT FOR ORAL ARGUMENT

The City of Hattiesburg requests oral argument in this case and will, after the filing of the Appellee's brief, file a request for oral argument pursuant to Rule 34(b) setting forth additional reasons why oral argument should be granted. The undersigned counsel for the City of Hattiesburg believes that this case, because of the issues raised therein, is important enough to justify oral argument.

STATEMENT OF THE CASE

The underlying case was filed in the Circuit Court for Forrest County, Mississippi ("circuit court") to confirm a decision and award and a supplemental decision and supplemental award of the arbitrator on a breach of contract claim by Precision against the City. The original complaint of Precision was filed on January 03, 2012, asserting several claims under a construction contract against the City and seeking binding arbitration of the asserted claims. (R., 8-77). Litigation of the claims asserted by Precision was stayed pending the completion of binding arbitration of the claims asserted by Precision in both its demand for arbitration and its complaint.

The City refused to agree to binding arbitration since it was not mandatory under the construction contract between Precision and the City. The circuit court ordered binding arbitration of the claims in the underlying civil action and stayed litigation pending the arbitration. The City would not agree to the appointment of a specific arbitrator from the list offered by Precision, but the circuit court eventually rendered an agreed order appointing Donald Dornan as arbitrator. (RE. 8) After the parties were given the opportunity to submit pre-hearing position statements and seek discovery, the arbitrator held a hearing over the period June 03-04, 2014.

The result of the arbitration hearing was the Decision of Arbitrator (“decision”) rendered July 02, 2014, and the arbitrator’s Supplemental Decision and Award of Attorney’s Fees (“supplemental decision”) rendered on July 24, 2014. (RE. 4 and 5) Certain issues with these two decisions are in dispute by the City. The City believes that the arbitrator made egregious material and evident miscalculations in the his decisions. Secondly, the City asserts that the proper time for it to move the arbitrator for reconsideration of its decisions was twenty days after July 24, 2014 and not twenty days after July 02, 2014.

The City accepts the arbitrator’s determination that the City breached its construction contract with Precision, but several substantial miscalculations of the claims of Precision against the City are evident miscalculations by the arbitrator. The first is in respect to mobilizations of equipment from one locale to another during the time the contract was in force. The City asserts that the arbitrator materially miscalculated these damages by not allowing for a discount to the City for its prior payment of \$93,000.00 for mobilizations. The second area of concern is the burdensome and egregious miscalculations by the arbitrator in calculating “lost profits” by Precision. The City asserts that the arbitrator made material and evident miscalculations in his computation of the “lost profits” award by not deducting the cost of the materials already paid to Precision by the City and by not calculating “lost net profits.”.

On August 12, 2014, the City filed a motion with the arbitrator to reconsider his award and supplemental award. (R., 157-171) After Precision filed it response in opposition to the City’s motion and after the City filed its rebuttal, the arbitrator rendered his order denying the City’s motion. (RE. 6). On September 16, 2014, the City filed a Motion to Stay Hearing on and Defer Disposition of Motion and a Motion, with Authorities, to Amend, Modify and/or Correct Arbitrator’s

Decision and Supplemental Decision. Precision filed its opposition to both motions. (R., 191-217A).

After a hearing on the City's motions, the circuit court rendered an order granting, in part, and denying, in part, the City's motion to correct the arbitrator's decision and supplemental decision. (RE. 2). Further, the circuit court granted Precision's motion to confirm the arbitration award. In its Judgment *Nunc Pro Tunc*, the circuit court granted an \$856,666.46 judgment for Precision, ordered the City to pay the balance of unpaid arbitrator's fees and ordered that the judgment shall bear and interest at 8.0% per annum from September 26, 2104 until paid. (RE. 3). The City filed its Notice of Appeal of the circuit court's judgment on November 19, 2014. (R., 327-328).

STATEMENT OF FACTS

On January 03, 2012, Precision entered into a construction contract with the City for the purposes of making repairs to certain sewer lines within the City limits, a project described as 592 Program Sewer Rehabilitation, Contract No. 2 ("contract"). (R., 28). The value of this contract was \$1,874,847.75. (R., 31). From the start of the contract until the demand on March 06, 2013 by Precision on the City to arbitrate pending disputes, the project was beset with a number of problems, both anticipated and unanticipated. In its March 06, 2103 demand for arbitration, Precision sought the following relief:

- a. "[T]he City accept and acknowledge a differing site condition pursuant to Section 4.4 of the Contract," payment of all costs related to any response by the City and the contract be extended a reasonable period to allow Precision to perform the work;
- b. "[T]he City pay at least the sum of \$8,450.00 for repair on the waterline on Timothy Lane and an extension of . . . time" to allow Precision to perform the work;
- c. "[T]he City . . . compensate Precision, at its cost, for approximately 1,050 linear feet of PVC pipe ordered at the direction of the City . . . ;"

- d. “[T]he city engineer act on Precision Construction’s request for change order for additional work incurred on 8th Street, . . .;”
- e. Precision “be reimbursed for all costs for removal of muck from manholes and pipe after the collapse of waterline on project, . . .;” and
- f. Precision be awarded “a time extension to the contract and appropriate damages for delays caused by . . . engineers [in relocating] from one portion of the project to the other. . . .” (R., 9-10).

As part of its arbitration demand, Precision also sought (1) an injunction against the City prohibiting it from “taking any action against it in retribution for filing the demand for arbitration” and (2) “it be awarded all of its reasonable attorney’s fees and costs in pursuing arbitration and that the City . . . be assessed with all costs of the arbitrator.” (R., 10).

On March 29, 2013, Precision filed its Complaint against the City in the Circuit Court of Forrest County, Mississippi (“circuit court”). Precision sought damages against the City for breach of contract, including all nine items in its demand letter of March 06, 2013, referenced above. (R., 10-10A). Further, Precision requested the circuit court for an order staying the litigation and compelling arbitration. (R., 10A)

After the parties could not agree on arbitration, Precision filed, on May 03, 2013, its Notice of Hearing to compel arbitration under its complaint filed in the circuit court. (R., 78). The City filed its Answer to the Precision’s Complaint on May 08, 2013, in part acknowledging Precision’s demand to compel arbitration, but denying the necessity of such arbitration. (R., 79-82). On June 06, 2013, the circuit court ordered that the proceedings in the lower court should be stayed pending “binding arbitration pursuant to section 11-15-101.” (sic) (RE. 7; R., 83-84).

On June 10, 2013, Precision filed its Motion for Appointment of Arbitrators. This motion acknowledged that the City did not agree to the appointment of an arbitrator, and, further, asked the circuit court to appoint any of three arbitrators referenced in a May 20, 2013 letter to the City. (R., 85-92). On July 10, 2013, the circuit court entered an Agreed Order on Appointment of Arbitrators, naming “the Honorable Donald Dornan of Gulfport, Mississippi as arbitrator.” (RE. 8; R., 93-94). The parties entered into an Arbitration Agreement on August 05, 2013, identifying, in part, (1) that the issues before the arbitrator are those submitted in “the case of *Precision Construction, LLC v. City of Hattiesburg, Mississippi*,” and (2) the arbitration would be governed by the rules of the Mississippi Construction Arbitration Act. (R., 151).

An arbitration hearing was held on June 03-04, 2014, during which oral and documentary evidence was submitted by both parties. After the hearing, the parties were allowed to submit “post-hearing memoranda summarizing their positions.” (R., 105). The decision was rendered on July 02, 2014, wherein the arbitrator awarded Precision “the sum of \$843,929.53 from the [City] for its claim of breach of contract”; assessed all arbitration fees in excess of \$5,000.00 to the City; and determined that Precision is entitled to attorney’s fees and costs as against the City which would be determined in a “supplemental award” from the arbitrator. (R. 105-106).

The decision, dated June 25, 2014 contains the determinations of the arbitrator and the rationale for his decision. (R. 107-151). The City acknowledges that the decision of the arbitrator with respect to the determination that the City had breached its contract with Precision is not readily challengeable. However, the arbitrator’s breakdown of his award as shown in Exhibit A, attached to his decision, is contested by the City because it is replete with egregious errors and evident miscalculations. These errors will be discussed fully in the argument of the issues herein, but, in summary form, the arbitrator awarded the following:

- (1) “Lost Profit on 30" Pipe” for “3,654 x \$126.38 per foot” in the sum of \$461,792.52;
- (2) “Lost Profit on Select Fill” for “6,919 x \$10 per yard” in the sum \$69,190.00;
- (3) “Lost Profit on Asphalt” for both base course and surface course in the sum \$23,045.83;
- (4) “Extra Work” in the amount of \$81,317.23;
- (5) “Extra Mobilization/Site Moves” for “5 @ \$31,000 each” in the sum of \$155,000.00;
- (6) “Claim for Stored Material” in the sum of \$18,164.93; and
- (7) “Retainage” in the sum of \$35,419.64. (R., 147-148).

The arbitrator rendered his supplemental decision and award of attorneys’ fees on July 24, 2014, wherein he awarded to Precision the sum of \$76,257.65 in “attorney’s fees and expenses” and assessed the sum \$7,032.74 against the City for remaining unpaid arbitration fees. (RE. 5, 293-300). The magnitude of the attorney’s fees and expenses was a substantial portion of the overall, cumulative award to Precision.

On August 12, 2014, the City filed its Motion for Reconsideration of Arbitrator’s Decision and Supplemental Decision with the arbitrator under § 11-15-123, MCA setting out those grounds under § 11-15-135, MCA for which the arbitrator could modify, correct or affirm the award. (R., 157-171). [**NOTE:** Exhibit D of the motion is missing from the record, but is shown as Exhibit F (R., 190).]. On August 19, 2014, Precision filed its response to the City’s motion, and, subsequently, the City filed its rebuttal to Precision’s opposition on August 27, 2014 (R., 180-190). On August 29, 2014, the arbitrator peremptorily denied the City’s motion for reconsideration of the decision because it was not filed within twenty days of receipt of the award, and then denied the City’s challenge to the supplemental decision. (RE. 6). The City contends that the decision of the arbitrator was not final until he rendered his supplemental decision for attorney’s fees and expenses because they were a claim sought by Precision in its demand for arbitration and in its complaint. It

is noteworthy that counsel for Precision did not perceive there to be a bifurcation of the rule under § 11-15-123, MCA with respect to when decision was final. Precision did not object to the filing of the City's motion as being outside the 20-day requirement of § 11-15-123, MCA.

On September 16, 2014, the City filed with circuit court its Motion to Say Hearing on and Defer Disposition of Motion (R., 191-192) and its Motion, with Authorities, to Amend, Modify and/or Correct Arbitrator's Decision and Supplemental Decision (R., 193-220). Precision filed its responses to both motions on September 26, 2014 (R., 221-319). A hearing was held before the circuit court on these motions, and on October 22, 2014, the circuit court rendered an Order Granting in Part and Denying in Part the City of Hattiesburg's Motion . . . to Amend, Modify and/or Correct Arbitrator's Decision and Supplemental Decision and Granting Precision Construction's Motion for Confirmation of Arbitration Award. (R., 320-322). The circuit court issued its Judgment *Nunc Pro Tunc* on October 22, 2014 (R., 323). This appeal was filed on November 19, 2014. (R., 327-328).

SUMMARY OF THE ARGUMENT

The circuit court ordered an arbitration in this civil action, and then confirmed a modified award and supplemental award rendered by the arbitrator. The City contends that errors related to three aspects of the case on appeal. First, after the award and supplemental award were rendered by the arbitrator, the City filed with the arbitrator a motion for reconsideration of both awards under § 11-15-123, MCA within the 20-day period after receipt of the supplemental award from the arbitrator. The arbitrator erred in denying that part of the City's motion relating to his original decision and award because the motion was not filed within twenty days of the date of the receipt of the award. Such a decision does not reflect judicial economy nor the fact that reconsideration of an action should only be taken after all claims sought by the plaintiff are decided.

Secondly, the City contends that the arbitrator made material and evident miscalculations in his decision and supplemental decision, resulting in an egregious and inequitable award of damages against the City. The miscalculations were so obvious that counsel for Precision agreed that the arbitrator awarded certain damages based on incorrect information, given by Precision in an earlier request for damages. There are, at least, two other areas of evident miscalculations by the arbitrator which need to be corrected or amended, namely, (1) the award for mobilizations of equipment used during the work on the project by Precision and (2) the award for "lost profits" was calculated as a form of lost revenue which is not the same as "lost profits" and, certainly, not the "lost net profits" that are permitted in breach of contract disputes in the State of Mississippi.

Finally, the City of Hattiesburg contends that the circuit erred in not amending or correcting the arbitrator's award and decision with respect to mobilizations of used during work on the project by Precision. The basis for this contention is the decision of the arbitrator and the evidence

presented to him by Precision during the hearing make it clear that the arbitrator failed to give the City a credit of \$93,000.00 for money already paid to Precision for mobilization of equipment.

ARGUMENTS

I. Whether the Arbitrator erred in not allowing the City's motion for reconsideration of his Decision under § 11-15-123, MCA to be heard when it had been filed within 20 days of his Supplemental Decision?

The court-appointed arbitrator held an arbitration hearing from June 03-04, 2014 on the breach of contract issues raised by Precision in its demand for arbitration and the complaint which it filed in the circuit court. (RE. 4, 110). The arbitrator rendered his decision on July 02, 2014, wherein he awarded cumulative damages against the City in the amount of \$843,929.55, assessed the excess unpaid arbitrator's fees against the City, and stated that Precision was entitled to attorney's fees as it had claimed and that a "supplemental award of attorney's fees will be entered following the submissions of the parties." (RE. 4, 105-106). Importantly, the parties did not state in writing that they considered this award to be final because a substantial claim was yet to be determined by the arbitrator. Further, the arbitrator did not state in his decision that it was a final award which could be modified by the arbitrator under § 11-15-123, MCA, or amended by the circuit court under § 11-15-135, MCA. (RE. 4, 105-106). This is perfectly logical in that a major claim sought by Precision was still to be decided.

The City asserts that its Motion for Reconsideration of Arbitrator's Decision and Supplemental Decision was timely filed under § 11-15-123, MCA with respect to the 20-day time constraint of the statute. However, the arbitrator made an erroneous decision to bifurcate his decision and supplemental decision with respect to this 20-day requirement without giving notice to either party that his intention was to treat his decision as final on July 02, 2014, and then treat his supplemental decision as final on July 24, 2014. (RE. 5, 297). Indeed, if the parties had been aware of the arbitrator's intention to treat his two decisions in that manner, then (1) the City would certainly have filed a motion for reconsideration within twenty days of July 02, 2014 and (2) Precision would

have raised this as issue in response for the denial of the City's motion for reconsideration. It quite apparent that counsel for both parties did not view the arbitrator's initial decision as being final with a substantial claim still pending.

The City filed its motion for reconsideration of the many substantial and evident miscalculations made by the arbitrator in his decision and supplemental decision. In doing this, the City complied with that part of § 11-15-123, MCA that states the party seeking reconsideration enumerate those grounds identified in § 11-15-135, MCA for seeking an amendment or correction of the arbitrator's decisions.

"An arbitration award must be final, complete, and coextensive with the submission." 4 Am.Jr.2d, Alternative Dispute Resolution, §§ 186, 177. One of the characteristics which distinguishes arbitration from other forms of alternative dispute resolution ("ADR") is the finality of the award and the fact that it is enforceable at that time. *Id.* An essential element inducing parties to submit to arbitration is that the award or decision has finality. Otherwise, it defeats the purposes of reducing litigation costs and time for the parties. *Id.* See also, *St. John's Mercy Medical Center v. Delfina*, 414 F.3d 882 (8th Cir. 2005); *American Federation of State, County and Municipal Employees v. Metropolitan Water Dist. of Southern California*, 126 Cal.App. 4th 247, Cal. Rptr. 3d 285 (2d. Dist. 2005). "The award must conform to and fully satisfy the questions submitted, . . . and no further act must remain to be done or inquiry remain to be made so far as the matters submitted are concerned." *Id.* "An award is indefinite or nonfinal within the meaning of the statute 'only if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy.'" *Yoonessi v. Givens*, 2010 NY Slip Op 08312 [78AD3d 1622] (App.Div. 4th Dept. November 12, 2010), citing, *Matter of Meisels v. Uhr*, 79 NY2d 526, 536 (1992).

In the instant case, the arbitrator's decision was not final nor complete with respect to all issues submitted to him by the parties. Basically, an arbitration award is final upon the resolution of "the rights and obligations of the parties definitively enough to preclude the need for further adjudication with respect to the issue submitted to arbitration." *Ecopetrol S.A. v. Offshore Exploration and Production LLC*, 46 F.Supp. 3d 327, 336 (S.D. N.Y. 2014). The initial decision of the arbitrator in the underlying case was not complete in that omitted and left for latter determination an important claim raised by Precision in its demand for arbitration and in its complaint filed in the circuit court.

In a case with an analogous issue, the Mississippi Court of Appeals observed that under M.R.C.P. 54(b) it is commented that "[i]f the court chooses to enter such a final order, it must do so in a definite, unmistakable manner." *Pearson's Fireworks, Inc. v. City of Hattiesburg*, 66 So.3d 1276, 1279 (¶ 8) (Miss.Ct.App.2011). This case involved the lower court not deciding all issues before it and before the action was appealed the Supreme Court of Mississippi. The lower court did not, in its judgment, "reflect a grant of summary judgment in favor of Hattiesburg 'on all claims.' Instead, the circuit court disposed of only one claim in Pearson's motion" *Id.*, (¶ 10). *Pearson's* judgment is very similar to the arbitrator's decision in this appeal. Here, the arbitrator failed resolve all claims sought by Precision in its arbitration demand and complaint in the circuit court. Therefore, it is reasonable to expect that a motion for correction or modification of the decision to the arbitrator should be filed within twenty days of the final or supplemental award and decision.

The arbitrator should not have treated its initial decision as final and complete when, by his own statements, a major claim—that of awarding attorney's fees—was yet to be determined thereby necessitating a supplemental decision. Had the arbitrator noted in his initial decision that the issues

resolved in it were final, then the parties would have known that any anticipated actions were governed by the time constraints in the applicable statutes on arbitration. For example, if that decision had been final, then Precision would have been able to move the circuit court for confirmation. However, had that been the case, a major claim for attorney's fees would have been omitted. It appears that the correct interpretation of § 11-15-123, MCA is that a motion for reconsideration should be filed within twenty days of the receipt the decision—in the case, the supplemental decision—that represents a final, complete and enforceable decision.

II. Whether the Arbitrator made material and evident miscalculations in determining the award for claims against the City for Precision's mobilizations without deducting a previous payment to Precision of \$93,000.00 for mobilizations?

IV. Whether the Forrest County Circuit Court erred in denying the City's motion to correct material and evident miscalculations in the Arbitrator's decision to award \$93,000.00 in excessive damages to Precision for its mobilizations?

In the Arbitrator's decision, he noted that "[i]t was undisputed that the Plaintiff remobilized five times. He estimated that cost him [Precision] approximately \$31,000.00 each time." (RE. 4, 140). The total damages awarded for this claim was \$155,000.00. The er mobilization calculation of \$31,000.00 is consistent with the amount of money requested for mobilizations under the original contract. This was shown as Item No. 82, requesting the a total of \$93,000.00 for mobilizations. (R., 25). Based upon Precision's testimony that mobilizations were valued at \$31,000.00 each, the \$93,000.00 request would clearly appear to anticipate three mobilizations.

On May 02, 2012, Precision invoiced the City for twenty percent (20.0%) of the lump sum "mobilization" cost identified in Item No. 82 of the contract. (R., 164-166). On May 30, 2012, Precision invoiced the City for an additional thirty percent (30.0%) of the lump sum "mobilization" cost identified in Item No. 82 of the contract. (R., 167-169). On July 02, 2012, Precision invoiced

the City for the final additional fifty percent (50.0%) of the lump sum “mobilization” cost identified in Item No. 82 of the contract. (R., 210-212). This sum paid by the City for mobilizations is further identified as being a legitimate payment by being included as an exhibit to Precision’s motion for confirmation filed August 07, 2014. (R., 151A-151B). All of these invoices were presented to the Arbitrator as part of Precision’s case.

As of the payment of the July 02, 2012 invoice, Precision would have received the full sum of \$93,000.00 as a lump sum payment for mobilizations under the contract between it and the City. The invoice date, invoice number, payment date, check number and amount of payment are included within Precision’s materials for its case. (R., 213). This document shows clearly that the invoice for May 11, 2012; June 15, 2012; and July 13, 2012, respectively, were properly paid by the City. If this sum of \$93,000.00 is divided by three, the result is the cost of \$31,000.00 per mobilization. The testimony and evidence as shown in the arbitrator’s decision unequivocally demonstrates that Precision had five mobilizations at a stated cost of \$31,000.00 each. By virtue of the evidence before the arbitrator and his findings on this issue in his decision, it clearly is evident that \$93,000.00 of the \$155,000.00 award for mobilizations had already been paid to Precision by the City. Consequently, only \$62,000.00 remained to paid for the five mobilizations performed by Precision on its work under the contract with the City. Therefore, because of this material and evident miscalculation, Hattiesburg is entitled to a reduction of \$93,000.00 from that given in the arbitrator’s decision.

The “Daily Observation Reports” on the project were maintained by Steve Tingle, the project inspector under the contract which is in dispute in this case. He testified in the hearing, and the City made these reports available to the parties and the arbitrator. His daily reports supported the Precision’s testimony that it mobilized or remobilized only five times. The material and evident miscalculation of the award for unpaid mobilizations is clearly shown above. The daily observation

reports are referenced here only as support for Precision's testimony of five mobilizations during the project, and for the obvious additional support they add to the material and evident miscalculation of these damages by the arbitrator. Specifically, the daily observation reports for April 09, 2012; April 26, 2012; May 29, 2012; July 20, 2012; and September 03, 2012 support and clearly demonstrate that Precision mobilized and demobilized only five times during its work on the project. (R., 214-217A). An examination of the July 02, 2012 invoice to the City shows that Precision had already been paid for the first three mobilizations identified above. (R., 151A-151B).

The decision awarded an extra \$93,000.00 for mobilizations which had already been paid to Precision for its lump sum mobilization costs by Hattiesburg. There should have been a reduction in the award for the sum already paid for mobilizations. Both the testimony and documentary evidence presented to the arbitrator support this reduction.

Section 11-15-123, MCA permits a party to arbitration to request the arbitrator to modify or correct its award based upon the grounds set out in § 11-15-135, MCA. Under part (a) of the latter section, the award of the arbitrator may be modified or corrected where "[t]here is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award." The City made a proper request of the arbitrator to correct or modify his award under § 11-15-123, MCA, after the award was final, but the arbitrator refused, peremptorily, to hear the City's request regarding the award determinations in the arbitrator's initial decision.

It has been a long-standing rule in Mississippi jurisprudence that when an arbitrator made an evident miscalculation in an award, then the appellate court has the right and responsibility to correct and amend the error. *See, Robertson v. Wells*, 28 Miss. 90, 91 (1854). In *Robertson*, the arbitrators made a miscalculation in their award of damages, the parties moved the lower court for

a new trial and the case was appealed. The appellate court concluded that a miscalculation was made and reversed the lower court and remanded the case. *Id.*, 91-92.

Further, Mississippi state law with respect to arbitration provides two points in the process which permit a party to the arbitration to modify or correct an arbitration. It is clear that such a party must assert, at least, one of the three grounds for modifying or correcting an award as stated in § 11-15-135(a), MCA. *See, Johnson Land Co. v. C. E. Frazier Const. Co., Inc.*, 925 So.2d 80, 83 (¶¶ 5-6) (Miss. 2006); *D'Angelo v. Hometown Concepts, Inc.*, 791 So.2d 270, 271-272 (¶¶ 7-8) (Miss.Crt.App.2001). The *Johnson* case also points out the under § 11-15-123, MCA, a party to arbitration may seek to have the arbitrator modify or correct its award. *Id.*, (¶ 6). The City met its requirements in seeking to have the arbitrator reconsider its decision and supplemental decision, and because of an error by the arbitrator on a procedural issue the City was denied the right to have its assertions of material and evident miscalculations properly reconsidered under § 11-15-123, MCA.

In *D'Angelo*, the appellate court dealt with the issue of what constitutes an evident material miscalculation of figures. The appellant, in *D'Angelo*, tried to persuade the court to adopt the definition of evident miscalculation used by the Fifth Circuit Court of Appeals in *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 821 (5th Cir.1993) (citing *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 214 (5th Cir.1993)). Essentially, under the definition of “evident material miscalculation of figures” in the *Valentine Sugars* case, the moving party must demonstrate “an unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake by the arbitrator in making his award, . . .” *Id.* The Fifth Circuit Court Appeals interpreted “undisputed” to mean “we should look to see whether there is a rational basis for disputing the truth of the fact. *See, Andeman/Smith Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir.1990), *cert. denied*, _____ U.S. _____, 111 S.Ct. 2799, 115 L.Ed.2d 972 (1991) (award must at

least be rationally inferable from the agreement). Further, the Fifth Circuit Court stated that a “material” miscalculation is one where there is demonstration of “strong reliance on that mistake” in making the award.” *Valentine Sugars*, at 214.

It is generally perceived under the arbitration statutes of most states and, especially, in the Federal Arbitration Act (“FAA”) that arbitration awards “may be modified or corrected for ‘evident miscalculation of figures’ applies only to mathematical errors committed by the arbitrators” Jay E. Grenig, *After the Arbitration Award. Not Always Final and Binding*, 25 Marq. Sports L. Rev. 65, 78 (2014). “A mere error committed by the arbitrators as to questions of fact or law is not sufficient to establish the . . . power necessary to set aside an award.” *Id.*

The testimony of the owner of Precision clearly shows that Precision conducted five mobilizations during its work under the City contract, with each mobilization valued at \$31,000.00. (RE., 140). Further, the documentary evidence presented by Precision to the arbitrator and the City during the arbitration hearing and also incorporated into Precision’s motion for confirmation shows clearly that Precision had already been paid \$93,000.00 for mobilizations by the City as of July 13, 2012. (R., 151A-151B, 213). The miscalculation in not giving the City a \$93,000.00 deduction for money already paid to Precision for mobilizations is both a material and evident miscalculation by the arbitrator.

Under § 11-15-135(a), the circuit court had the right and authority to modify or correct an arbitration award where the arbitrator made an “evident miscalculation of figures. . . .” It is the contention of the City that the arbitrator’s error is miscalculating an accurate damage award to Precision for mobilizations is so significant as to attain to the level of a material and evident miscalculation. The circuit court should have modified or amended the arbitrator’s decision and

award to reflect a reduction in the amount of the damages award by the sum of \$93,000.00 for money already paid by the City to Precision for mobilizations.

III. Whether the Arbitrator made material and evident miscalculations in determining the award for the “lost profits” claims against the City for unused 30" PVC pipe when the cost for pipe had been previously paid to Precision by the City?

In his decision, the arbitrator argued that Precision was entitled to received “lost profits” based upon the claims asserted by Precision. Precision was awarded the following sums for “lost profits”:

- a. \$461,792.52, for “approximately 3,654 feet of 30-inch pipe remaining to be laid,” and, further, this “resulted in an estimated profit of \$461,792.52.” (emphasis added) (RE. 4, 135);
- b. \$69,190.00, for “an estimated 6,919 remaining yards of fill at \$18 a yard and \$8 per yard profit,” (RE. 4, 135-136);
- c. \$11,636.25, “for asphalt, base course, lost profit,” (RE. 4, 136); and
- d. \$11,409.58, “for lost profits on the surface course,” (RE. 4, 136).

The awarding of damages for “lost profits” should be divided into two stages for the purposes of examining whether the arbitrator made material and evident miscalculations in both stages. First, from a review of the decision of the arbitrator, it is apparent that he accepted Precision’s estimate of “lost profits” for 3,654 linear feed of 30-inch PVC pipe. The award of “lost profits” was in the amount of \$461,792.52. RE. 4, 147). As part of each invoice given to the City by Precision a chart was included named “Stored Materials.” Item No. 2 in this chart is for “30 PVC Sewer Pipe.” The last invoice submitted by Precision to the City on February 04, 2013 had this chart attached to it, and it stated there were 3,654 feet of 30-inch PVC pipe remaining. This is the number that both

Precision and the arbitrator used as basis for determining “lost profits” for this item. The calculation made for this item was based on \$126.38 per foot. However, between the original submission of these exhibits to the arbitrator, Precision did a new calculation of “lost profits” for the 30-inch pipe.

During the hearing before the circuit court, counsel for Precision admitted that miscalculations were made by the arbitrator in his determination of “lost profits,” one of which was a miscalculation in the sum \$63,520.74.¹ (RE. 10; R., 321-322). The estimate of “lost profits” for the 30-inch pipe was calculated by Precision as value of \$149.09 per linear foot with a deduction of \$48.84 per foot for “labor, fuel, equipment.” This calculation resulted in “lost profits” in the amount of \$109.07 per linear foot for 3,654 linear feet, equaling \$398,4541.78. In reality, the same miscalculation was made by Precision and the arbitrator for both the original and amended calculations. Both calculations are, essentially, estimates of “lost revenue” and not “lost profits.” Neither calculation deducted for the cost per foot of the pipe which had already been paid to Precision by the City. Not including the cost of the pipe in the calculation or miscalculation of “lost profits” was an egregiously incorrect error. In its most basic form, “lost profits” would include deductions for the cost of the pipe and the cost of “labor, fuel, equipment” used to install the pipe. Therefore the final calculation used by the arbitrator for awarding “lost profits” for the unused 30-inch pipe is grossly inaccurate in that it failed to deduct the cost per linear foot of the pipe from the estimated contract value of \$149.09 per linear foot.

As mentioned above, Precision arrived at the quantity of remaining unused 30-inch pipe from its “Stored Materials” report attached to its last invoice to the City. This report also stated that the full quantity of this pipe was purchased by Precision on February 16, 2012 as evidenced by and

¹This amount includes \$63,250.74 discrepancy on 30-inch pipe and \$270.00 discrepancy for surface course asphalt. (R., 196).

invoice from Southern Waterworks Supply, Inc., including the purchase of 4,102 linear feet 30-inch SDR 26 Sewer Pipe at a unit cost of \$75.91 per linear foot. This specific purchase totaled \$311,382.82. This is perfectly logical manner of conducting business on a construction price. What is not logical is the failure to deduct from the contract value of the pipe its cost as well as the cost of “labor, fuel, equipment.” Further, the failure to deduct for the cost of the pipe in calculating for “lost profits” results in an inequitable and unjust windfall to Precision at the expense of the City. Arbitration’s purpose is not to result in an outlandish and unfair award of damages for one party as against another party. If one takes Precision’s and the arbitrator’s assumption that the contract value of the 30-inch pipe is \$149.09 per linear foot and, further, accepts Precision’s and the arbitrator’s cost of “labor, fuel, equipment” as \$48.84 per linear foot, then this results in a material and evident miscalculation of “lost profits” for 30-inch pipe by the arbitrator’s failure calculate a deduction for the cost of the 30-inch pipe. When the linear cost of the 30-inch pipe is deducted from the \$149.09 stated contract value per linear foot along with cost for “labor, fuel, equipment,” the result is an estimate of “lost profits” of \$24.34 per linear foot. When multiplied by 3,654 linear feet of unused 30-inch pipe, the most realistic estimate of “lost profits” on 30-inch pipe is \$88,938.36. This total is 13.8 percent of the scheduled contract value of the 30-inch pipe for the project.

The full scheduled value of 30-inch pipe (including “net profit,” which is a lesser subpart of “gross profit”) is identified as Item Nos. 18-28 of Addendum No. 2 to the contract. (R., 23). The value of these eleven items when added to together equal the sum of \$657,508.00, which included for summary purposes (1) the cost of the pipe, (2) the cost of installing the pipe and (3) gross profit. If one compares the final award to Precision of \$398,541.78 in “lost profits” for 30-inch pipe to its scheduled contract value of \$657,508.00, then the “lost profit” is 60.6 percent of the total. Even though this percentage for “lost profit” is asinine and unrealistic, an even more absurd figure of 70.2

percent in “lost profit” occurs when using Precision’s original estimate of \$461,792.52 in “lost profits.” Interestingly, in the case of *DC General Contractors, Inc. v. Slay Steel, Inc.*, 109 So.3d 577, 584 (¶ 20) (Miss.Ct.App.2013), the subcontractor fabricating steel for a construction project invoiced the general contractor \$936,830.00. *Id.*, (¶ 3), 579. On this amount, the subcontractor estimated that its lost profits on the contract would be ten percent. *Id.*, (¶ 20), 584. During the trial on the case, lost profits were lowered to eight percent. *Id.*, (¶ 22), 585. The notion of a 60-70 percent “lost profit” on a construction contract defies reasonableness and credulity.

The second stage of the “lost profits” issue revolves around the proper calculation of “lost profits.” After a thorough examination of the exhibits presented by Precision in the arbitration hearing and the arbitrator’s decision, it clear that the determination of “lost profits” was materially and evidently miscalculated by the arbitrator. It is further evident from the decision and the testimony that no effort whatsoever was made to calculate or estimate “net profits” as opposed to “gross profits.” It is as if these sums used by Precision and the arbitrator were derived from some very coarse calculation of the number of feet of some item times a per unit foot cost, or the number of cubic yards of some item times a per cubic yard cost. Such calculations or “estimates” of “lost profits” are contrary to the requirements for proper documentary evidence and/or testimony required to distinguish between the two types of “lost profits.”

The Mississippi Supreme Court has long held that in a breach of contract case, one may recover for the loss of future profits “as long as such profits are proved with reasonable certainty, not based on speculation and conjecture.” *Lovett v. E. L. Garner, Inc.*, 511 So.2d 1346, 1353 (Miss. 1987). *See, A & F Properties, LLC v. Lake Caroline, Inc.*, 775 So.2d 1276, 1283 (¶¶ 24-25) (Miss.Ct.App.2000). The *Lovett* Court goes on to state that “[i]n calculating loss of future profits,

such loss is that of net profits as opposed to gross profits.” *Id.*, (citing, Dunn, *Recovery of Damages for Lost Profits 3d.*, § 6.1 (1987)).

The Court stated further that to “ascertain net profits, a party must deduct such items as overhead, depreciation, taxes and inflation Further, future profits should always be discounted at an appropriate rate to arrive at present value.” *Id.* Simply, “‘profits’ have been defined as ‘the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them.’” *Drews Company, Inc. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 210, 371 S.E.2d 532 (S.C. 1988) (citing, *Restatement of Contracts* § 331, Comment B (1932)). In *Coastal Hardware and Rental Company, LLC v. Certain Underwriters at Lloyds, London*, 120 So.3d 1017, 1028 (¶ 43) (Miss.Ct.App.2013), the court stated that “[l]ost profits are recoverable . . . ‘as long as such profits are proved with reasonable certainty, not based on speculation or conjecture.’” (citing, *Lovett*, at 1353). The Mississippi Supreme Court has stated that “the plaintiff bears the burden of proof as to the amount of damages.” *Jackson HMA, LLC v. Morales*, 130 So.3d 493, 499 (¶ 20) (Miss.2014). (citing, *J.K. v. R.K.*, 30 So.3d 290, 299 (Miss.2009)). It also noted that damages “must not place the injured party in a better position than they otherwise would have been in.” *Id.* (citing, *Polk v. Sexton*, 613 So.2d 841, 845 (Miss.1993)). The *Morales* court stated “damages for lost future profits must be ‘proved with reasonable certainty’ and should reflect ‘net profits as opposed to gross profits.’” *Id.*, (citing, *Lovett*, at 1353). Finally, the court noted that “gross profits must be reduced by reasonable overhead expenses common to the Jackson HMA service area for the contract period at issue.” *Id.*

In Precision’s “Opposition to Motion for Reconsideration” filed by the City, Precision tried to make distinctions between the case of *Lovett* and this pending case. In so doing, its purported distinctions are without substance and meaning. The rulings of our Supreme Court in *Lovett* and

other similar cases are applicable to the calculation of recoverable “lost profits,” generally. The court did note in *Lovett* that damages for lost future profits was requested by Lovett. Of course, in that case, the contract between the parties identified that Garner “would pay one-half of the net profits on all gasoline Lovett sold to the public” over the five-year term of the contract. *Lovett*, at 1347-1348. Consequently, it is quite logical that Lovett would try to recover for the contractual net profits it lost when the breach of contract occurred.

Further, in *Lovett*, our Court relied heavily upon Robert L. Dunn’s work on Recovery of Damages for Lost Profits (3d. 1987). Dunn defines “lost profits” in a breach of contract case as “lost net profits,” with “all costs . . . deducted.” *Id.* § 6.1. Dunn makes no distinction in “future lost profits” and “present lost profits.” This is most likely due to the fact that there are many different types of contracts and breaches of such contracts. Therefore, the developed law on the issue of “lost profits” is clear that “lost net profits” are recoverable but not “lost gross profits.” “Gross profit is not the same as net profit. There is a big component separating gross profit from net profit, namely all overhead costs.” Halpin and Senior, Financial Management and Accounting Fundamentals for Construction, pg. 33 (2000). It is not possible to eliminate overhead costs such that gross profit equals net profit. “[S]alaries for management must be paid, along with office rent, electricity and other normal operation items.” Halpin and Senior, at 34.

The Mississippi Court of Appeals noted in *A & F Properties* that the *Lovett* court’s decision to enter “a zero damage judgment . . . on appeal,” because there was insufficient proof on net profits, and “lost profits” was based on a party “whose proof solely was of gross profits; . . .” “To calculate lost profits as damages, the lost profit a party must prove are the ‘net profits as opposed to gross profits.’” *Ballard Realty Co., Inc., v. Okazuriki*, 97 So.3d 52, 62 (¶ 22) (Miss.2012).

It is reasonable to conclude that Precision's failure to meet its burden of proof by establishing "lost net profits" significantly hindered the arbitrator in making proper calculations of "lost net profits" in this matter. Instead, Precision's coarse estimate of "lost profits" lacked reasonable certainty, causing the resultant material and evident miscalculations by the arbitrator for damages for "lost profits" to occur.

Since Precision chose not to put on proper proof of lost profits which would have allowed the arbitrator to properly calculate "lost net profits," in its opposition to the City's motion for reconsideration it fabricated a framework for condoning the arbitrator's material and evident miscalculation of the applicable, if any, "lost net profits." The City has relied, and continues to rely, on both case law and scholarly treatises regarding its position on the necessity of a proper calculation of "lost net profits." It appears that Precision is relying on a fictional framework that obviates the consideration of what is "lost net profits" and what is required to prove them. The City understands that it is entirely possible, maybe even probable, that Precision is entitled to some "lost net profits." The City desires only that "lost net profits," if applicable in this case, be calculated according the rules set out by our state courts and the construction industry.

Therefore, the City asserts that the arbitrator's decision with respect to the award for "lost profits" be substantially reduced to adjust (1) for the arbitrator's material and evident miscalculation in failing to deduct for the actual cost of the 30-inch pipe as referenced in the City's "stage one" analysis above, and (2) in accord with the legal requirements to prove "net profits as opposed to gross profits." Alternatively, the City asserts that the award for "lost profits" be reduced to zero since Precision produced no evidentiary proof with certainty that would substantiate Precision's "lost net profits."

CONCLUSION

There are four issues raised by the City in its appeal of the lower court action and the results of the binding arbitration ordered by the circuit court. The City asserts that there is sufficient evidence to show that following occurred:

1. The arbitrator erred in not hearing the City's motion with respect to reconsideration of the decision of the arbitrator with respect to material and evident miscalculations. The arbitrator erroneously ruled that the City had not filed its motion for reconsideration within twenty days of the receipt of his decision by the parties. However, the arbitrator had not disposed of all the claims asserted by Precision against the City. He noted in his decision that he would render a supplemental decision on the remaining issue raised by Precision. This supplemental decision was rendered on July 24, 2012. There was not a final decision of the arbitrator for which the City could seek reconsideration or Precision file for confirmation until July 24, 2012. Further, the arbitrator did not state in his decision that it was final as to the claims he decided and, therefore, could be reconsidered under § 11-15-123, MCA and also be confirmed circuit court.
2. The arbitrator made a material and evident miscalculation in the award of \$155,000.00 for five mobilizations of Precision without deducting \$93,000.00 already paid to Precision by the City for mobilizations.
3. The circuit court erred in not amending or modifying the arbitrator's decision regarding his miscalculation of damages for mobilizations. The arbitrator made a material and evident miscalculations of these damages that should be corrected or modified under § 11-15-35(a), MCA.

4. The arbitrator made (a) a material and evident miscalculation of the damages award to Precision for “lost profits” on unused 30-inch pipe and (b) a material and evident miscalculation in his failure to calculate “lost net profits” as the measure of damages for Precision against the City.

The City of Hattiesburg requests that the judgment of the Forrest County Circuit Court be reversed as to the award for damages for mobilizations for Precision, and that the arbitrator be ordered to hear the City’s motion for reconsideration or, in the alternative, the arbitrator’s decision be corrected and modified to correct for the material and evident miscalculations made in his determination of damages for mobilizations by Precision and for damages for “lost profits” awarded to Precision against the City.

DATED this 13th day of July 2015.

Respectfully submitted,

CITY OF HATTIESBURG, MISSISSIPPI

S/ *James W. Gladden, Jr.*

by _____
JAMES W. GLADDEN, JR., Counsel for
the Appellant

CERTIFICATE OF SERVICE

I, **JAMES W. GLADDEN, JR.**, attorney for the Appellant, hereby certify that a true and correct copy of the foregoing Brief for Appellant has been mailed, postage prepaid, and has been filed electronically *via* **ECF FILING** to the following attorneys of record:

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I also certify that a true and correct copy of the foregoing Brief for Appellant has been mailed, postage prepaid to the Forrest County Circuit Court Judge:

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GIVEN on this 13th day of July 2015.

S/ *James W. Gladden, Jr.*

JAMES W. GLADDEN, JR.