

2010

Kilgore Pavement Maintenance, LLC, a Utah limited liability company v. City of West Jordan : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jeffrey Robinson, David M. Bernstein; E. Jay Sheen; attorneys for appellee.

Graden P. Jackson, William B. Ingram; Strong & Hanni; attorneys for appellant.

Recommended Citation

Brief of Appellee, *Kilgore Pavement v. West Jordan*, No. 20100123 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2175

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

KILGORE PAVEMENT
MAINTENANCE, LLC, a Utah limited
liability company,

Plaintiff/Appellant,

vs.

CITY OF WEST JORDAN,

Defendant/Appellee.

Case No. 20100123-CA

BRIEF OF APPELLEE
APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
JUDGE SANDRA PEULER
CASE NO. 090901586

Graden P. Jackson (8607)
William B. Ingram (10803)
STRONG 7 HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508
Attorneys for Kilgore Pavement
Maintenance LLC

Jeffrey Robinson (4129)
West Jordan City Attorney
David M. Bernstein (8301)
Civil Litigator
8000 South Redwood Road
West Jordan, Utah 84088
Telephone: (801) 569-5140
Facsimile: (801) 569-5149

E. Jay Sheen (3749)
Prince, Yeates & Geldzahler
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 524-1000
Facsimile: (801) 524-1098

Attorneys for City of West Jordan

**FILED
UTAH APPELLATE COURT**

SEP 03 2010

IN THE UTAH COURT OF APPEALS

KILGORE PAVEMENT
MAINTENANCE, LLC, a Utah limited
liability company,

Plaintiff/Appellant,

vs.

CITY OF WEST JORDAN,

Defendant/Appellee.

:
:
:
:
:
:

Case No. 20100123-CA

BRIEF OF APPELLEE
APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
JUDGE SANDRA PEULER
CASE NO. 090901586

Graden P. Jackson (8607)
William B. Ingram (10803)
STRONG 7 HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508
Attorneys for Kilgore Pavement
Maintenance LLC

Jeffrey Robinson (4129)
West Jordan City Attorney
David M. Bernstein (8301)
Civil Litigator
8000 South Redwood Road
West Jordan, Utah 84088
Telephone: (801) 569-5140
Facsimile: (801) 569-5149

E. Jay Sheen (3749)
Prince, Yeates & Geldzahler
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 524-1000
Facsimile: (801) 524-1098
Attorneys for City of West Jordan

TABLE OF CONTENTS

STATEMENT OF JURISDICTION.....	4
STATEMENT OF THE ISSUES.....	4
STANDARD OF REVIEW	4
A. 12(b)(6) Motion to Dismiss.....	4
B. Contract Interpretation	5
C. Commercial Impracticability.....	5
STATEMENT OF THE CASE.....	5
A. Nature of the Case.....	5
B. The Course of Proceedings	6
C. Statement of the Facts	6
SUMMARY OF ARGUMENTS	10
ARGUMENT	11
I. AN “EQUITABLE ADJUSTMENT” IS NOT LEGALLY AVAILABLE	12
A. The Doctrine of Impracticability Is a Shield, Not a Sword	12
B. The City Did Not Make Any Changes to the Work Causing Added Costs	14
II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE DOCTRINE OF IMPRACTICABILITY DOES NOT APPLY IF THE PARTIES HAVE ALLOCATED THE RISK	16
III. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE PARTIES ALLOCATED THE RISK TO KILGORE.....	18
A. Unambiguous Contracts Cannot Be Rewritten.	18
B. The Unambiguous Contract Establishes That Kilgore Assumed the Risk.....	19
C. The Increase in Cost of Liquid Asphalt Oil was not Unforeseen.....	22
CONCLUSION.....	24
ADDENDUM	
APPENDIX A. Historical Gasoline Price Charts	28
APPENDIX B. May 19, 2007 Salt Lake Tribune Article.....	29
APPENDIX C. History of Illinois Basin Posted Crude Oil Prices	30
APPENDIX D. Kilgore’s Bid	31
APPENDIX E. The Contract	32
APPENDIX F. General Conditions of the Contract 6.2(d), 9.9(c), 11.1, 14.14	33

TABLE OF AUTHORITIES

Cases

<i>Aluminum Co. of America v. Essex Group, Inc.</i> , 499 F. Supp. 53 (W.D. Pa. 1980).....	17
<i>Bitzes v. Sunset Oaks, Inc.</i> , 649 P.2d 66 (Utah 1982).....	13
<i>Jones v. ERA Brokers Consolidated</i> , 2000 UT 61	19
<i>M.J. Paquet, Inc. v. N.J. Dept. of Transportation</i> , 794 A.2d 141, 148-49 (N.J. 2002)	13, 14
<i>Mooney v. G.R. & Associates</i> , 746 P.2d 1174 (Utah Ct. App. 1987)	17
<i>Palmer v. Davis</i> , 808 P.2d 128 (Utah Ct. App. 1991)	19
<i>Publicker Industries, Inc. v. Union Carbide Corp.</i> , 17 UCC Rep. 989 (E.D. Pa. 1975)	17
<i>Quagliana v. Exquisite Home Builders, Inc.</i> , 538 P.2d 301, 305-08 (Utah 1975).....	17
<i>Raytheon Co. v. Sec. of the Army</i> , 305 F.3d 1354 (Fed. Cir. 2002).....	16
<i>Sine v. Rudy</i> , 493 P.2d 299 (Utah 1972)	17
<i>Utah Farm Bureau Insurance Co. v. Crook</i> , 980 P.2d 685, 687 (Utah 1999)	18
<i>Western Properties v. Southern Utah Aviation, Inc.</i> , 776 P.2d 656, 658 (Utah Ct. App. 1989)	12, 16, 17
<i>Williams v. Bench</i> , 2008 UT App 306, 193 P.3d 640	4

Rules

Utah R. Evid. 201 (2010).....	7
-------------------------------	---

Treatises

Arthur Linton Corbin, CONTRACTS, §§ 74.1-78.10 (2001)	12, 13, 20
Restatement (Second) of Contracts §§ 261, 265 (1981).....	12

STATEMENT OF JURISDICTION

The City of West Jordan (the “City”) agrees that the Court has jurisdiction but the correct jurisdictional statute is Utah Code Ann. § 78A-4-103(2)(j) (1953 as amended).

STATEMENT OF THE ISSUES

This case concerns only the district court’s dismissal of Kilgore Pavement Maintenance LLC’s (“Kilgore”) first cause of action, the defense of impracticability. The issues presented to the Court are:

1. May the defense of impracticability be used to obtain affirmative monetary relief?
2. Did the district court correctly conclude that the defense of impracticability is not available if the parties to a contract have allocated a particular risk?
3. Did the district court correctly conclude that the City and Kilgore allocated the risk of an increase in cost of materials to Kilgore under the contract?

STANDARD OF REVIEW

A. 12(b)(6) Motion to Dismiss

Whether a district court properly granted a rule 12(b)(6) motion to dismiss is a question of law , reviewed for correctness, affording the district court’s decision no deference. *Williams v. Bench*, 2008 UT App 306, 193 P.3d 640.

B. Contract Interpretation

The City concurs that an unambiguous contract's interpretation is a question of law, reviewed for correctness and affording the district court's decision no deference.

C. Commercial Impracticability

The City contends that whether a contract is impracticable is not an issue in this case and, therefore, the standard of review for such an issue is not applicable.

Notwithstanding Kilgore's statements to the contrary, it does not claim the contract was impracticable in the sense that Kilgore was prevented from completing the work under the contract. Kilgore did complete its work and now merely seeks more money.

STATEMENT OF THE CASE

A. Nature of the Case

This is a simple contract case. The City solicited bids for a road construction project. R. 2, 166. Kilgore prepared and submitted a bid for the project. R. 2. The City awarded the project to Kilgore. R. 2. The City and Kilgore entered into a written contract, by which Kilgore agreed to perform the road construction and the City agreed to pay Kilgore its bid price as a fixed contract price. R. 2, 15, 28. After entering the contract and while Kilgore was performing, the price of liquid asphalt oil increased. R. 2. Kilgore did not allege that the City made any changes to the project work causing Kilgore additional work or costs. R. 2-7. Kilgore completed the project, and the City paid

Kilgore the full contract price. R. 5. Kilgore now seeks to rewrite the contract to increase the contract price by an additional \$91,000. R. 3, 4, 7.

B. The Course of Proceedings

In January 2009, Kilgore commenced this action seeking to recover from the City the additional \$91,000. R. 2-7. Kilgore's Complaint asserted four claims: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment; and (4) commercial impracticability. *Id.* The City moved to dismiss the Complaint. R. 82. The district court dismissed all but the commercial impracticability claim. R. 260, at 39. The City then moved to reconsider the district court's ruling on the commercial impracticability claim, which the district court subsequently dismissed. R. 204 and 245-46. Kilgore has not appealed the district court's dismissal of the breach of contract, breach of the implied covenant of good faith, and unjust enrichment claims. R. 248-49. Nor does Kilgore challenge the district court's reconsideration of its initial decision not to dismiss the commercial impracticability claim. Kilgore only appeals the district court's final decision to dismiss the commercial impracticability claim. *Id.*

C. Statement of the Facts

At least as early as 2006, the U.S. began to feel the impact of high crude oil prices. Appendix A. From 2006 through 2008, high crude oil prices pushed the price of gasoline upward. Although somewhat volatile, gasoline prices progressively increased, peaking in 2008. *Id.* Anyone owning and using a motor vehicle felt the impact of those prices. In May 2007, it was reported that: "The high price of crude oil has pushed up more than just

the cost of filling up the family automobile with gasoline It also has forced up the cost of laying down pavement for new roads” Appendix B. The Illinois Basin posted a near 100% increase in average crude oil prices from 2005 to 2008. Appendix C. Ron Case of Ron Case Roofing and Asphalt Paving in Salt Lake City was reported as saying, “The price of asphalt these days is outrageous,” noting a “7 percent to 10 percent” increase in asphalt prices “every month or so.” Appendix B. In the May 2007 publication, it was reported that “the cost of a ton of asphalt oil in Utah has risen from \$192.50 to \$395, a more than 100 percent increase” since January 2006. Such increases were reported in “the Argus Asphalt Report, a weekly publication that tracks the asphalt market worldwide.”¹ *Id.*

In spring of 2008, the City solicited bids for the 9000 South road reconstruction project, including asphalt labor and materials (the “Project”). R. 2 ¶ 6. Kilgore prepared and submitted a bid to the City for the Project (the “Bid”). R. 2 ¶ 6, 15-17.² Kilgore is a sophisticated asphalt contractor, one of the largest in the State. R. 260, at 25-27. Kilgore’s legal counsel advised the district court that “there are three or four primary paving companies that have most of the market share” in Utah. *Id.* at 26. Kilgore is number three and has its own asphalt plant. Because Kilgore had its own asphalt plant it

¹ Although these facts are not contained in the record below, they are not subject to reasonable dispute because they are generally known within the territorial jurisdiction of the Court and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Judicial notice may be taken at any stage of the proceedings. Utah R. Evid. 201 (2010).

² A copy of the Bid is attached as Appendix D.

received a greater priority in receiving liquid asphalt oil from producers, like Sinclair. *Id.* at 27.

Kilgore's Bid contained prices for materials and labor, including liquid asphalt oil prices. R. 15-17. The prices were calculated by Kilgore. The total price proposed by Kilgore for its work under the Contract was \$697,901.00. *Id.* at 16-17. The City accepted Kilgore's Bid. R. 2 ¶ 7.

After awarding Kilgore the contract, Kilgore and the City then entered into a written contract (the "Contract"). *Id.* Kilgore's total bid amount of \$697,901.00 was incorporated into the Contract as the fixed "Contract Price". R. 28.³

Kilgore agreed to accept the Contract Price as full payment for its performance under the Contract. In its Bid, Kilgore agreed as follows:

Bidder agrees to . . . all Bid Schedule(s) . . . and said **Bidder further agrees to complete the Work . . . and to accept in full payment therefore the Contract Price** based on the . . . Unit Bid Price(s) named in the afore-mentioned Bid Schedule(s).

R. 15. The Contract also provides:

ARTICLE 3 – CONTRACT PRICE

The CITY shall pay the CONTRACTOR for the completion of the Work the sum of \$697,901.00 in accordance with the Contract Documents and the CONTRACTOR's Bid and Bid Schedule(s).

R. 28. Article 11.1(a) of the General Conditions of the Contract further provides that the "Contract Price constitutes the total compensation . . . payable to the Contractor for

³ Relevant excerpts of the Contract are attached as Appendix E.

performing the Work.” R. 51.⁴ Finally, Article 14.14 of the General Conditions of the Contract releases the City upon payment to Kilgore:

Final Payment Terminates Liability of the City:

The acceptance by the Contractor of the final payment referred to in Article 14.11 herein, shall be a release of the City and its agents from all claims of liability to the Contractor for anything done or furnished for or relating to the Work or for any act or neglect of the City or of any person relating to or affecting the Work . . .

R. 61.

The Contract does not contain an asphalt price escalation clause. R. 3 ¶ 12.

Before submitting its Bid, Kilgore knew that any proposed asphalt price escalation clause would be rejected by the City. R. 166-67. When Kilgore entered into the Contract, it knew that the Contract did not contain an asphalt price escalation clause. *Id.*

Not only did Kilgore know that there was no price escalation clause, it also knew about and expressly assumed the risk of increases in the cost of materials. In Article 6.2(d) of the General Conditions of the Contract, Kilgore expressly assumed “full responsibility for all materials . . . necessary for the . . . Work.” R. 44. Furthermore, in Article 11.1(a) of the General Conditions of the Contract, Kilgore agreed that all Kilgore’s obligations “shall be at its expense without change in the Contract Price.” R. 51. Moreover, the City expressly disclaimed in Article 9.9(c) any responsibility for Kilgore’s “failure to perform or furnish the Work.” R. 50. The effect of those terms is

⁴ Relevant excerpts of the General Conditions of the Contract are attached as Appendix F.

that Kilgore voluntarily assented to accept the risk of increases in the cost of materials, a risk it knew to be real based on its own experience over the prior two years.

Kilgore undertook and completed its performance under the Contract. There is no allegation that the City made any changes to the project work causing additional work or costs to Kilgore. The City paid Kilgore the Contract Price of \$697,901.00 for its performance under the Contract. R. 5 ¶ 27. After completing the work, Kilgore requested that the City increase the Contract Price by \$91,000. R. 3 ¶ 12. The City denied the request. R. 3 ¶ 14.

SUMMARY OF ARGUMENTS

Kilgore is not entitled to use the doctrine of impracticability to obtain an equitable adjustment in the Contract Price. The doctrine of impracticability is not a sword to obtain affirmative monetary relief. It is a defense used to excuse one's performance under a contract before performance is complete. Kilgore is not seeking to have its performance excused. Kilgore completed its performance and now asserts that the defense of impracticability allows it to rewrite the Contract and increase the Contract Price. Using the impracticability defense as a sword in that manner is not legally allowed in Utah and would unfairly burden the City, among other things.

Kilgore's reliance on the impracticability defense to obtain monetary relief is further misplaced because the City did not make any changes to the Contract. The legal authorities on which Kilgore relies suggest an equitable adjustment may be permitted in public contracts. However, those same legal authorities make it clear that any such equitable adjustment is based on changes made by the government to the agreement.

Kilgore does not assert that the City made any changes to the Contract, and the City made no changes to the Contract causing additional work or costs.

Even if the Court were inclined to allow use of the impracticability defense to obtain affirmative monetary relief, Kilgore cannot use the doctrine in this case. It is well settled law that the doctrine of impracticability cannot be invoked, even as a defense, if the parties to the agreement have allocated a particular risk under the agreement. The district court properly concluded that the defense of impracticability does not apply if Kilgore assumed the risk of an increase in the cost of materials.

The district court properly concluded that Kilgore assumed the risk of an increase in the cost of materials, including the cost of liquid asphalt oil. The Contract is clear and unambiguous. Kilgore entered into a fixed price contract, agreeing to accept the Contract Price in full payment for its performance under the Contract. Kilgore expressly assumed responsibility for the cost of all materials, and the City expressly disclaimed any responsibility for Kilgore's failure to perform. Kilgore completed its performance under the Contract, and the City paid Kilgore the Contract Price. Pursuant to the express terms of the Contract, the City is released of any further liability. Because the Contract is unambiguous, it must be enforced as written, and Kilgore cannot be allowed to rewrite the Contract to increase the Contract Price.

ARGUMENT

This appeal concerns only the district court's dismissal of Kilgore's attempt to obtain affirmative monetary relief via the defense of impracticability. Kilgore has abandoned its affirmative relief claims for breach of contract, unjust enrichment and

breach of good faith and fair dealing. The district court dismissed those claims, and Kilgore has not appealed them.⁵ The Court must reject Kilgore's attempt to use the impracticability defense to obtain affirmative monetary relief.

I.

AN "EQUITABLE ADJUSTMENT" IS NOT LEGALLY AVAILABLE

A. The Doctrine of Impracticability Is a Shield, Not a Sword

Kilgore seeks an "equitable adjustment" in the Contract Price. Appellant's Brief, at 16-17. In essence, Kilgore attempts to use the doctrine of impracticability to obtain affirmative monetary relief. However, the doctrine of impracticability is universally recognized as a defense against a breach of contract action, not as a sword to obtain affirmative monetary relief. See e.g., *Western Properties v. Southern Utah Aviation, Inc.*, 776 P.2d 656, 658 (Utah Ct. App. 1989)("[A]n obligation is deemed discharged" under the **defense** of impossibility or impracticability.); Arthur Linton Corbin, *CONTRACTS*, §§ 74.1-78.10 (2001)(discussing the interchangeable **defenses** of impossibility, impracticability and frustration of purpose); Restatement (Second) of Contracts §§ 261, 265 (1981)(discussing the interchangeable **defenses** of impracticability and frustration of purpose). The impracticability defense is asserted as a shield to excuse or discharge a party's performance under a contract.

Kilgore did not seek discharge of its obligation to perform under the Contract in the trial court, and it does not now seek discharge. At no time in this action has Kilgore

⁵Kilgore's counsel conceded in the district court that its contract claims (breach of contract, breach of duty of good faith and unjust enrichment) were not applicable. R. 260, at 33-34.

contended that it was impracticable to complete its performance under the Contract. Nor could it. Kilgore obtained the liquid asphalt oil, completed the project, and the City paid Kilgore the Contract Price. Only after completing the project, did Kilgore ask the City to increase the Contract Price. In the district court and on appeal Kilgore improperly seeks to use the impracticability defense to obtain monetary relief, an increase in the Contract Price, instead of properly using it as a defense to excuse a failure to perform under the Contract.

Kilgore's sole argument on appeal is that the impracticability defense can be used as a sword. The City has not found any judicial opinion or other legal authority recognizing use of the impracticability defense as a sword. Even the legal authorities cited by Kilgore describe the doctrine as a defense to excuse one's nonperformance under a contract. See Corbin at §§ 74.1-78.10 (discussing the interchangeable defenses of impossibility, impracticability and frustration of purpose all of which result in the discharge of one's performance); *Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66 (Utah 1982)(Defendant asserted the "defense of 'impossibility'" to discharge its obligation to perform under the contract. The Utah Supreme Court upheld the trial court's rejection of the defense.); *M.J. Paquet, Inc. v. N.J. Dept. of Transportation*, 794 A.2d 141, 148-49 (N.J. 2002)(The parties' nonperformance under the contract was excused based on the defense of impracticability.). Kilgore's authorities do not allow use of the impracticability defense as an offensive weapon to obtain affirmative monetary relief.

Kilgore should not be allowed to use the impracticability defense as a sword. First, to do so would be contrary to hundreds of years of jurisprudence and contrary to

legions of cases applying the doctrine only as a defense. Second, Kilgore should not be allowed to contort the impracticability defense to obtain affirmative monetary relief having purposefully abandoned its contract and unjust enrichment claims. Having failed to appeal the dismissal of its breach of contract, breach of good faith and unjust enrichment claims, Kilgore must now live with its chosen remedy, which is only a defense. Third, allowing offensive use of the impracticability defense would deprive the City of its right to mitigate its damages. If Kilgore had ceased work, claiming impracticability, the City could have sought another contractor to complete the project; or, the City could have chosen not to complete the project, to utilize its funds elsewhere for another project and to wait to complete the road project when prices decreased. Allowing Kilgore to use the impracticability defense to obtain monetary relief would unfairly burden the City.

B. The City Did Not Make Any Changes to the Work Causing Added Costs

Kilgore relies primarily on *M.J. Paquet, Inc. v. N.J. Dept. of Transportation*, 794 A.2d 141, 148-49 (N.J. 2002) for the proposition that it can use the impracticability defense to obtain an “equitable adjustment.” Conceding that Utah has not addressed the issue, Kilgore cites *Paquet* for the proposition that: “Some states provide for equitable adjustments in public contracts even without reference to a specific clause in the given contract.” Appellant’s Brief, at 17. Kilgore misunderstands *Paquet*.

Although the *Paquet* court acknowledged cases in which an equitable adjustment was permitted in public contracts, it noted that an equitable adjustment was permitted in those cases because the government modified the contract. Because New Jersey had not

adopted the concept, the *Paquet* court looked to federal government cases. *Id.* at 149-50. The *Paquet* court noted several federal court cases permitting an equitable adjustment in public contracts both where the contract contained an express equitable adjustment clause and where the contract did not. The *Paquet* court noted, however, that a “significant majority” contained an express equitable adjustment clause in the public contract. Under both circumstances, however, the equitable adjustment was allowed because the government modified the contract. “Stated simply, the purpose of an equitable adjustment is “to keep a contractor whole when the Government modifies a contract.”” *Id.* at 149. The “proper measure” of an equitable adjustment is “the difference between what it would have cost to perform the work as originally required and what it cost to perform the work as changed.”” *Id.*

The *Paquet* court granted the contractor an equitable adjustment because the New Jersey Department of Transportation modified the contract. *Id.* at 154. The DOT solicited bids for certain highway improvements including bridge painting work, and the contractor submitted a bid covering the work. *Id.* at 144-45. Subsequently, OSHA regulations changed the work. Therefore, the DOT eliminated the bridge painting work from the contract. The contractor asserted its entitlement to an equitable adjustment, which the court granted, because the DOT modified the contract. *Id.* at 150-54.⁶ See

⁶ *Paquet* is also inapplicable because the contractor in *Paquet* did not seek an increase in the original DOT contract price. *Id.* at 152. The contractor inflated its bid for bridge painting work and understated its bid for non-bridge painting work. *Id.* at 151. The equitable adjustment sought was “compensation for work that has not been deleted from the contract by the DOT—work that *Paquet* has performed and for which the DOT is contractually obligated to pay. It is not ‘increased’ or ‘augmented’ compensation,

also, *Raytheon Co. v. Sec. of the Army*, 305 F.3d 1354 (Fed. Cir. 2002), another case cited by Kilgore (a highly technical case evaluating a claim under federal government contract rules for additional contract compensation because of over 300 contract changes by the government.).

Kilgore does not assert that the City changed the Contract, and the City made no changes to the Contract work. Neither *Paquet* nor the cases it cited support Kilgore's claim for an "equitable adjustment."

II.

THE DISTRICT COURT PROPERLY CONCLUDED THAT THE DOCTRINE OF IMPRACTICABILITY DOES NOT APPLY IF THE PARTIES HAVE ALLOCATED THE RISK

Even if the Court were generally inclined to allow use of the impracticability defense as a sword, Kilgore cannot use the doctrine in this case. It is well settled that the doctrines of impossibility and impracticability cannot be invoked, even as a defense, "if the party seeking discharge assumed the risk that the disabling event might occur."

Corbin at § 74.15.

Utah law recognizes that the doctrine of impracticability does not apply if the parties have allocated a particular risk under the contract. *Western Properties v. Southern Utah Aviation, Inc.*, 776 P.2d 656, 658 (Utah Ct. App. 1989), *Quagliana v. Exquisite*

because the DOT, and ultimately the New Jersey taxpayer, will not pay any more under the contract than it would have paid" If Kilgore is awarded an equitable adjustment, the City and ultimately its taxpayers will be required to pay more under the Contract than the City would have paid.

Home Builders, Inc., 538 P.2d 301, 305-08 (Utah 1975), *Sine v. Rudy*, 493 P.2d 299 (Utah 1972), and *Mooney v. G.R. & Associates*, 746 P.2d 1174 (Utah Ct. App. 1987), all cases relied on by Kilgore in the district court,⁷ recognize that the doctrine of impracticability does not apply if the parties have allocated a particular risk under the contract. In *Western Properties*, the court observed that the failure of a city to approve development of land could be an unforeseen event sufficient to invoke the impossibility defense, but only in “the absence of any contractual allocation of the risk of the city’s non-cooperation.” 776 P.2d at 658-59. In *Quagliana*, the court observed: “[T]here is nothing in the agreement, from which an interpretation can be inferred, that it was the intention of either party to assume the risks produced by the erroneous assumptions.” 538 P.2d at 306. In *Mooney*, the court recognized that “a contract often functions primarily to insulate the parties from uncertainty and to allocate the risk of future events.” 746 P.2d at 1178. In *Sine*, the court distinguished another case in which the parties allocated the risk of zoning restrictions. It stated, “We think that [*Young v. Texas Co.*,

⁷ R. 164-73. Kilgore has abandoned its reliance on these cases proffered in the district court. Other than *Western Properties*, Kilgore’s brief makes no reference to these cases, and Kilgore’s reliance on *Western Properties* is limited to broad, general principles. The City assumes Kilgore has abandoned those cases because none of them support its position. They are both factually inapplicable, and they recognize that the doctrine of impracticability is not available to a party who assumed a particular risk. Although not Utah cases, Kilgore also relied heavily on *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980) (“ALCOA”) and *Publicker Industries, Inc. v. Union Carbide Corp.*, 17 UCC Rep. 989 (E.D. Pa. 1975) in the district court. *Id.* Both *Publicker Industries* and ALCOA essentially enforce the allocation of risk expressed in the parties’ contracts or in accordance with the parties’ intent as expressed in the contract. Hence, neither supports application of the impracticability defense in this case.

331 P.2d 1099 (Utah 1958)] not dispositive here, since both parties knew of the zoning restrictions, and one of them, as a term of the lease, agreed to obtain clearance thereof as part of the consideration,--quite dissimilar from the facts here.” 493 P.2d at 300. The common thread of all these cases is that the defense of impracticability is not available if the parties have allocated the risk between them.

The City has been unable to locate any case allowing application of the impracticability defense where the parties contractually allocated the risk between them. Kilgore, implicitly if not expressly, concedes it cannot invoke the impracticability defense if the Contract allocated the risk of an increase in the cost of materials to it. Appellant’s Brief, at 17-18.

III.

THE DISTRICT COURT PROPERLY CONCLUDED THAT THE PARTIES ALLOCATED THE RISK TO KILGORE

The issue before the Court is whether the trial court erred in determining that Kilgore assumed the risk of an increase in the price of liquid asphalt oil. If it appears that Kilgore would not be entitled to relief under the facts as alleged, the trial court’s dismissal is correct. Appellant’s Brief, at 14.

A. Unambiguous Contracts Cannot Be Rewritten.

“[C]ourts must enforce an unambiguous contract and ‘may not rewrite [a] . . . contract . . . if the language is clear.’” *Utah Farm Bureau Insurance Co. v. Crook*, 980

P.2d 685, 687 (Utah 1999). In *Palmer v. Davis*, 808 P.2d 128 (Utah Ct. App. 1991), the court held:

This court cannot rewrite the contract because appellant failed to include language to protect her rights. . . . The Utah Supreme Court has . . . [noted:] '[a] court will not . . . make a better contract for the parties than they have made for themselves,' adding that 'an express agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature.'

Id. at 132. It is implicit in the district court's dismissal of Kilgore's breach of contract, breach of good faith and unjust enrichment claims that the Contract is not ambiguous.

Kilgore does not contend otherwise. Because the Contract is clear and unambiguous, it must be enforced as written.⁸

B. The Unambiguous Contract Establishes That Kilgore Assumed the Risk

Because the Contract⁹ is unambiguous, its interpretation is a question of law. Appellant's Brief, at 15. The Contract, taken as a whole,¹⁰ combined with Kilgore's complaint and other admissions establishes that the parties allocated the risk to Kilgore and that the trial court did not err.

Risk assumption need not be express. Professor Corbin explained: "Generally speaking, risk assumption may be understood in several ways: by voluntary assent to

⁸ Kilgore's legal counsel conceded that the Contract should be upheld: "I don't think that anybody, including me, is telling this Court not to follow well established contract law that contracts should be upheld, and that both sides should live by the bargain they struck. That is the law, and I am certainly not here asking, nor was I here asking last time, for the Court to do anything but uphold those contracts." R. 261, at 17.

⁹ Kilgore's Complaint incorporated the Contract.

¹⁰ *Jones v. ERA Brokers Consolidated*, 2000 UT 61 (The Contract must be interpreted as a whole.)

accept the risk in the contract itself; by tacit assent, e.g., by failing to protect against a known risk in the contract; by implication” Corbin at § 74.15. Corbin further observed that the risk may be implicitly assumed “by having knowledge of the risk and either accepting it explicitly or failing to protect against it in the agreement.” *Id.* Corbin also noted that most reported cases do not “involve contracts where the risk was explicitly allocated to a party. More often, the allocation can be found by looking at the entire contract and other circumstances affecting the agreement.” *Id.*

The Contract is a fixed price contract. The City solicited bids for the 9000 South road reconstruction project, including asphalt labor and materials. Kilgore computed and submitted to the City a Bid which included prices for asphalt materials. Kilgore’s bid of \$697,901.00 was incorporated into the Contract as the Contract Price. In two documents, Kilgore expressly agreed to accept the Contract Price as full payment for its Work. In the Bid document, Kilgore agreed as follows:

Bidder agrees to . . . all Bid Schedule(s) . . . and said **Bidder further agrees to complete the Work . . . and to accept in full payment therefore the Contract Price** based on the . . . Unit Bid Price(s) named in the afore-mentioned Bid Schedule(s).

Appendix D (emphasis added). The Contract similarly provides:

ARTICLE 3 – CONTRACT PRICE

The CITY shall pay the CONTRACTOR for the completion of the Work the sum of \$697,901.00 in accordance with the Contract Documents and the CONTRACTOR’s Bid and Bid Schedule(s).

Appendix E. Furthermore, Article 11.1(a) states that the “Contract Price constitutes the total compensation . . . payable to [Kilgore] for performing the Work.” Appendix F.

Finally, Article 14.14 releases the City upon final payment to Kilgore. *Id.* Kilgore admits the City has paid the \$697,901.00 Contract Price.

The Contract does not contain an asphalt price escalation clause. Before submitting its Bid, Kilgore knew that any proposed asphalt price escalation clause would be rejected by the City. When Kilgore entered into the Contract, it knew that the Contract did not contain an asphalt price escalation clause and it also knew that the pricing of liquid asphalt oil had fluctuated and risen over the past two years. Those facts and admissions demonstrate that Kilgore bid on and entered into the Contract knowing that there was no price escalation clause on which it could rely if prices increased and that its Bid would have to include an appropriate risk premium for fluctuating costs.

Not only did Kilgore know that there was no price escalation clause, it also expressly assumed the risk of increases in the cost of materials by submitting a Bid for a fixed price Contract. In addition, Kilgore expressly assumed “full responsibility for all materials . . . necessary for the . . . Work” in Article 6.2(d) of the General Conditions of the Contract and in Article 11.1(a) of those conditions Kilgore agreed that all Kilgore’s obligations “shall be at its expense without change in the Contract Price.” Appendix F. Moreover, the City expressly disclaimed any responsibility for Kilgore’s “failure to perform or furnish the Work.” *Id.* Article 9.9(c). The effect of those terms is that Kilgore voluntarily assented to accept the risk of increases in the cost of materials.

Kilgore argues that Article 11.1(c) permits a change in Contract Price due to the increase in the price of liquid asphalt oil. Appellant’s Brief, at 19. Kilgore argues that

subsection c “provides a formula for adjustment of the Contract Price outside of City-approved change orders.” Kilgore further argues that the alleged formula for adjustment outside of City-approved change orders means Kilgore is entitled to increase the Contract Price based on the impracticability defense. *Id.* at 20. Kilgore misunderstands Article 11.1(c).

Article 11.1 in its entirety is contained in Appendix F. Article 11.1 consists of three subsections, a, b and c. Subsection a specifies that Kilgore’s “duties, responsibilities, and obligations” are undertaken by it at “its expense without change in the Contract Price” and that the Contract Price “constitutes the total compensation” subject only to “City-authorized adjustments.” Subsection b specifies the process that must be followed to request and obtain a City-authorized adjustment. Subsection c merely describes how a City-authorized adjustment is to be valued. Nothing in subsection c contradicts the fixed-price nature of the Contract; nor does it stand alone as a weapon for Kilgore.

The Contract is clear and unambiguous. According to the express terms of the Contract, the parties allocated and Kilgore voluntarily assumed the risk of increases in the cost of materials, including liquid asphalt oil. The Contract must be enforced as written.

C. The Increase in Cost of Liquid Asphalt Oil was not Unforeseen

Kilgore refers to a “Whitepaper” prepared by the Utah Chapter of Associated General Contractors. Appellant’s Brief, at 9. Kilgore referred to this Whitepaper in the district court suggesting that somehow it demonstrated that the increase in liquid asphalt

oil prices “was a huge issue that caught everybody by surprise.” R. 260, at 27. The Whitepaper does not demonstrate that the volatility or increase in price was unforeseen or that an increase in price had occurred only after Kilgore and the City entered the Contract.¹¹ On the contrary, it recognized the volatility and increasing prices seen over the prior two years.

The increase in price was not unforeseen. At least as early as 2006, the U.S. began to feel the impact of high crude oil prices. From 2006 through 2008, high crude oil prices pushed the price of gasoline upward. Appendix A. Although somewhat volatile, gasoline prices progressively increased, peaking in 2008. *Id.* Anyone owning and using a motor vehicle felt the impact of those prices. In May 2007, it was reported that: “The high price of crude oil has pushed up more than just the cost of filling up the family automobile with gasoline It also has forced up the cost of laying down pavement for new roads” Appendix B. The Illinois Basin posted a near 100% increase in average crude oil prices from 2005 to 2008. Appendix C. Ron Case of Ron Case Roofing and Asphalt Paving in Salt Lake City was reported as saying, “The price of asphalt these days is outrageous,” noting a “7 percent to 10 percent” increase in asphalt prices “every month or so.” Appendix B. In the May 2007 publication, it was reported that “the cost of a ton

¹¹ Furthermore, the Whitepaper does not propose that existing public contracts should be rewritten to include a price escalation clause. Instead, the Whitepaper merely recognizes that public contracts traditionally do not include escalation clauses. Furthermore, it acknowledges that public contracts generally require contractors “to predict the future cost of liquid asphalts.” The Whitepaper then recommends that future public contracts consider including a price escalation clause. It does not recommend that contractors are entitled to or should demand additional compensation for work under an existing contract.

of asphalt oil in Utah has risen from \$192.50 to \$395, a more than 100 percent increase” since January 2006. Such increases were reported in “the Argus Asphalt Report, a weekly publication that tracks the asphalt market worldwide. *Id.*


Kilgore is a sophisticated asphalt contractor, one of the largest in the State. Kilgore’s legal counsel advised the district court that “there are three or four primary paving companies that have most of the market share” in Utah. Kilgore is number three and has its own asphalt plant. Because Kilgore had its own asphalt plant it received a greater priority in receiving liquid asphalt oil from producers, like Sinclair. It is not an unreasonable inference to draw that Kilgore was intimately aware of the continuously increasing crude oil prices and their impact on liquid asphalt oil prior to entering into the Contract with the City. If Kilgore did not build in a reasonable risk premium in its Bid, that is not the City’s fault.

CONCLUSION

This case is merely an attempt to rewrite a contract because Kilgore failed to make a better contract for itself, and now it is unhappy with the bargain it struck. Kilgore attempts to use the defense of impracticability to increase the Contract Price and obtain affirmative monetary relief. The defense of impracticability is not properly applied to obtain affirmative monetary relief. It is a defense recognized only to excuse performance under a contract. There is no performance to be excused in this case. Kilgore has completed its performance. Hence, the defense of impracticability is not applicable, and the Court should deny the appeal on that basis alone.

However, even if the defense could be used to obtain monetary relief, it is not available under the circumstances of this case. The Contract is clear and unambiguous. The City did not increase or change the Work required by the Contract which is the controlling key to such relief. The parties allocated and Kilgore voluntarily assumed the risk of the cost of materials increasing. Rewriting the Contract would alter the parties' express allocation of risk. The City has paid Kilgore the Contract Price and fully performed its obligations under the Contract. Kilgore received the full benefit of its bargain. Kilgore is not entitled to an "equitable adjustment" by rewriting the Contract. If Kilgore received such an adjustment, the City would be deprived of its right to mitigate its damages. The Court should deny Kilgore's appeal.

Respectfully submitted this 3rd day of September, 2010.

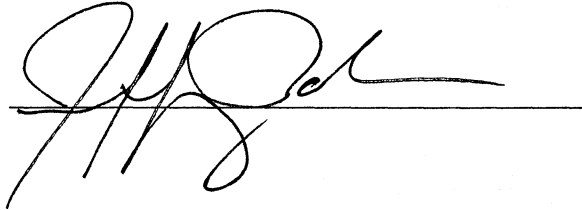


Jeffrey Robinson
West Jordan City Attorney
David Bernstein
Civil Litigator
Attorneys for City of West Jordan

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2010, I caused two copies of
West Jordan City's Brief of Appellee to be mailed to the following:

Graden P. Jackson
William B. Ingram
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180

A handwritten signature in black ink, appearing to read "G. P. Jackson", is written over a horizontal line.

ADDENDUM

APPENDIX A

zFacts.com

KNOW THE FACTS. GET THE SOURCE.

6,003,446,903,286,709
Pounds of CO₂ since 1750Free for your site.
Customize it!

About Printable

Google zFacts

SHARE

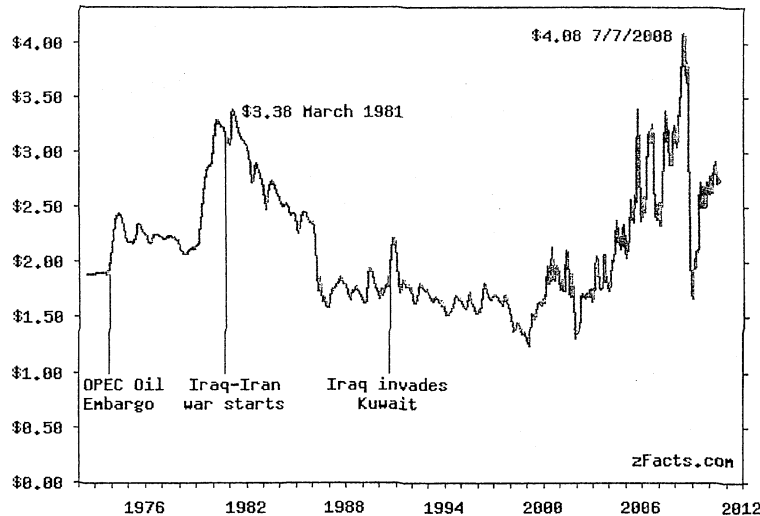
Home

Fossil Fuel
Oil Climate
Gas Prices ♦
Extra & Notes
Why Gas High?
Iraq war start
\$70 barrel oil
gas station
Water 4 Gas
More
Iraq impact

Oil Price
Peak Oil Truth
Clean Coal
Import Costs
Gas tax
World Oil
Alaska
Oil Wars
1979 Oil Peak

Current Gas Prices and Price History

Regular Gasoline Price in Today's Dollars (8/2/2010)



The graph reflects DOE's weekly survey ([Sources](#)). The changing gas-price widget at the right reflects daily data, mostly from private surveys. Enter US as the "State" to see the current US average price.

Gasoline Prices
California

Regular	Premium
August 27 th : \$3.11	\$3.37
Last week: \$3.15	\$3.41
Last year: \$3.03	\$3.25
Enter a State:	CA

Customize a Free Gas Prices
List for your web site.

Don't Miss:

National Debt Graph

National Debt

A Social Security
Crisis?

Iraq War Reasons

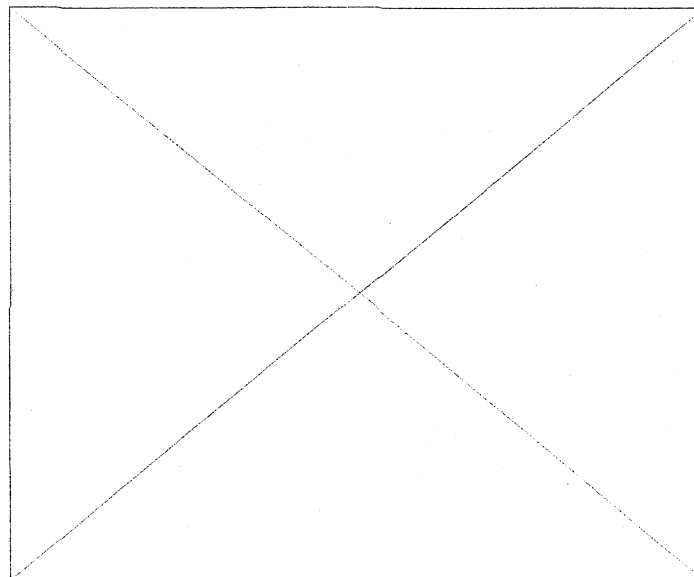
Hurricanes & Global
WarmingIraq War Coalition
Casualties

Crude Oil Price

Corn Ethanol

Baghdad, Iraq

Oil & Climate—What's the Connection?



March 6, 2010. Checking the Vets' YouTube Video

Is it true? "Oil goes up a \$1—Iran gets another \$1.5 billion to use against us."

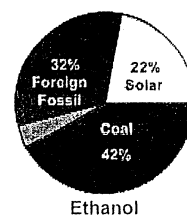
Not quite. The US DOE [says](#) Iran had net oil export revenues of \$55B in 2009, and their average price was \$60 (DOE [says](#)). So they make only \$0.9B not \$1.5B extra per year when the price goes up \$1/barrel. Did the Vets lie? Not really. They forgot that Iran does not profit from the oil it uses domestically. But with oil up \$40/barrel in a bit over a year, that's a lot of money.

Also, Iran doesn't use all that money against us. A lot goes to buy votes to keep Ahmadinejad and Supreme Leader Ayatollah Khamenei in power. That money is used, more or less, against the whole world.

Is it true? "Break our addiction by passing a clean-energy climate plan."

The basic idea is right. Cutting oil use helps the climate. Cutting oil use takes money

Free for your site

Price of Addiction
\$4,386,050,732,724.86
to Foreign OilFree Addiction Clock
Customize it.Think gas is high?
Try bombing Iran!

Green Energy

Save Time
Money, Energy

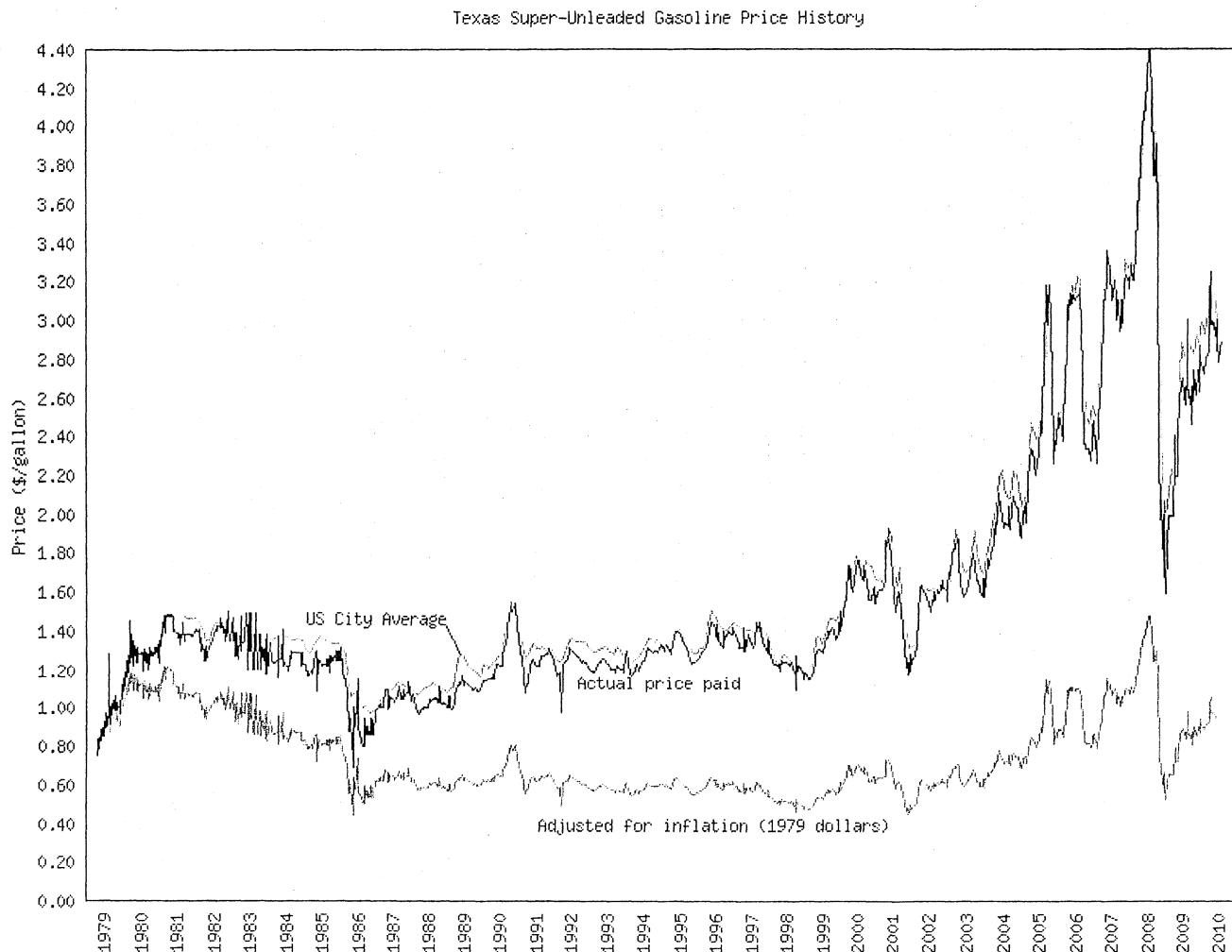
Gas tax holiday vs OPEC gas

Gasoline Price History

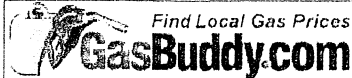
The following plots show how much I paid for each gallon of gas I bought over the past 31 years or so. The data has a somewhat varied pedigree. Most of the purchases from 1979-1982 were in the Rio Vista/Fort Worth, Texas area. From late 1982-1983 was from College Station/Rio Vista about equally. From 1984-1987 was a Rio Vista/College Station/Houston mix and from 1987 on has been mostly Houston with a little Fort Worth thrown in. Just about everything pre-1984 was full service and everything since has been self-serve. Every tank shown was "super" unleaded (92-93 octane).

Three curves are shown on the first plot. The upper, black curve shows the actual price paid for each gallon. The lower curve is the data adjusted for inflation using April, 1979 as the datum. That is, the data in this curve has been adjusted to "April 1979 dollars". The "CPI-All Urban Consumers for all items less energy" was used to adjust the data using monthly average data interpolated to the actual purchase dates. The CPI data is from the [U.S. Bureau of Labor Statistics](#). The third, faint line, shows the average price for the entire U.S., again from the BLS.

The plots contain data from 1164 fill-ups.



The second plot is similar to the first but here the prices have been adjusted for inflation based on the CPI at the time of the most recent gasoline purchase. This makes it easier to see the inflation adjusted data. For the same reason the US average price data was removed from this plot.

[\[Become A Member\]](#) [\[Log In\]](#)[Follow Us](#)[Facebook](#)[Twitter](#)

Join GasBuddy.com now
 Free Classifieds at SuperAds.com
 Local Cheap Hotel Deals at HotelSpy.com

Home GasBuddy Blog Gas Prices Historical Price Charts Gas Price Maps Points & Prizes Mobile Media Ideas Contact Us
 Past Month | Past Year | Past Two Years

Featured Sponsor

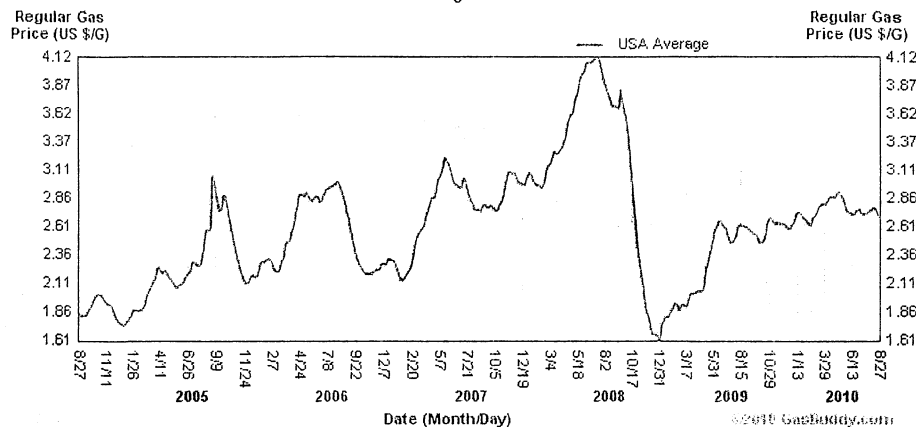
GET UP TO
40% OFF
HOTELS

[SEARCH HOTELS](#)

Historical Price Charts

Quick charts: [1 Month](#) | [3 Month](#) | [6 Month](#) | [9 Month](#) | [1 Year](#) | [18 month](#) | [2 Years](#) | [3 Years](#) | [4 Years](#) | [5 Years](#) | [6 Years](#)

72 Month Average Retail Price Chart



[Add these dynamic charts to your website](#) [Link to this Chart](#)

Customize Price Charts

Area 1: Time Period:

Area 2: ☐ Show Crude Oil Price

Area 3:

Step One - Select a single city in order to identify price trends or to identify a historical price most accurately. Select multiple cities to compare pump prices between cities.

Step Two - Selection of time duration will define how long into history the prices will be displayed. In some cities only limited price history information is available and in those cases the line will be flat for extended periods.

Step Three - When comparing US cities to Canadian cities you have a choice of price units. The standard unit of measure in the US is dollars per gallon and in Canada the standard is cents/liter. Comparison of US and Canadian cities is done using recent currency exchange rates and uses the conversion factor of 1 US gallon being equal to 3.78 liters. For simple plotting of US cities use dollars per gallon (\$/G) and for simple plotting of Canadian cities use cents/liter (c/L).

Step Four - Click the "Create Chart!" button to create the chart.

APPENDIX B

Post Carbon Cities

[Skip to content](#)

AN INITIATIVE OF POST CARBON INSTITUTE

[Home](#)
[Publications](#)
[Presentations](#)
[Research](#)
[Archives](#)
[About](#)
[News](#)

Asphalt prices pave way for higher costs

 Posted in the [United States](#) [Infrastructure](#) [Local Effects](#) [News](#) [Transportation](#)

 Published 19 May 2007 by the Post Carbon Institute (PCI) [original article](#)

The high price of crude oil has pushed up more than just the cost of filling up the family automobile with gasoline at the corner convenience store. It also has forced up the cost of laying down pavement for new roads, filling in the potholes of aging parking lots or reconditioning a home's leaky roof with a new layer of three-tab asphalt shingles.

1,694 Reads

By Steven Oberbeck

The high price of crude oil has pushed up more than just the cost of filling up the family automobile with gasoline at the corner convenience store.

It also has forced up the cost of laying down pavement for new roads, filling in the potholes of aging parking lots or reconditioning a home's leaky roof with a new layer of three-tab asphalt shingles.

"The price of asphalt these days is outrageous," said Ron Case of Ron Case Roofing and Asphalt Paving in Salt Lake City. "Every month or so, it seems, we're getting hit with another 7 percent to 10 percent increase in price. And like gasoline, there's nothing we can really do about it. We have to have it."

Asphalt is made by mixing crushed stone or gravel with bitumen, a heavy tar-like substance left over after gasoline, kerosene, jet fuel and diesel fuel are refined out of crude oil. Bitumen, which is sold by the ton, also is known as asphalt oil.

Since January 2006, the cost of a ton of asphalt oil in Utah has risen from \$192.50 to \$395, a more than 100 percent increase, according to the Argus Asphalt Report, a weekly publication that tracks the asphalt market worldwide.

"Last year we were facing a shortage of asphalt, and when the price went up, a lot of paving companies were caught flatfooted," said Richard Thorn, chief executive of the Associated General Contractors of Utah.

The shortage was caused by high demand from a booming construction industry and a drop in volume from refineries that had to install new equipment to produce low-sulfur diesel fuel that was mandated by the federal government. The production of low-sulfur diesel results in significantly less asphalt oil.

"As a result [of that shortage] we saw several big [paving] projects pushed back to this year," Thorn said.

Prices today may be up over 2006, but the surprise is out of the market.

"The big positive is that we weren't blindsided this year like we were in 2006," Thorn said. "Our paving companies planned ahead. Some had to go as far as Montana and Texas to get what they needed. It still was expensive, but they found it."

Like the retailers who sell gasoline, the producers who buy asphalt oil from refineries and mix it with gravel to produce the pavement laid down on most roads and highways in the state aren't getting rich.

"We're paying higher prices like everyone else," said Scott Parson, chief executive of Staker Parson Cos., one of Utah's largest asphalt producers. "And while we may have a long-term supply contract [to acquire asphalt oil], if the refinery goes down and there isn't anything to buy, it can be a problem."

Many oil refineries are away from selling bitumen. In recent years many have invested in specialized equipment that allows them to break apart the long petrochemical molecular chains found in asphalt oil into smaller pieces so it, too, can be refined into more valuable gasoline and diesel fuel.

Additional research and development efforts remain under way to find still better ways to wring even more gasoline from each barrel of oil.

Headwaters Inc., the synthetic fuels and building materials conglomerate based in South Jordan, late last year launched a business unit to deploy a new technology that uses a catalyst to break down the dregs left over after crude oil is refined so economically it can be used to produce additional fuel.

"Asphalt traditionally is a lower-value product, so it is appealing to refineries if they can use it to create higher-value products," Headwaters spokesman John Ward said.

"If we can get most of the refineries to adopt this technology, it would be the equivalent of discovering a new oil field capable of producing 500,000 barrels per day," Headwaters' Chief Executive Kirk Benson said last year.

Although such technology may help increase the supplies of the more highly refined petroleum products, it doesn't do a lot for asphalt users - given that those dregs normally would be used to produce asphalt and roofing shingles.

"In terms of cost and driveability, asphalt is still the preferred product for road surfaces," Utah Department of Transportation spokesman Nile Easton said, noting there are 4,968 miles of asphalt roads and highways in the state, compared with just 781 miles of road paved with concrete.

Concrete lasts much longer, but it also costs about 70 percent more than asphalt, Easton said. "With the recent price increases in asphalt, though, that gap has been narrowing a bit."

For small-business owners, especially those contractors that are unable to lock in prices, the rising cost of asphalt is creating its own set of problems.

"We've tried to stay away from bidding projects that are too big," said Case at Ron Case Roofing. "We've found that a lot of time we'll bid a project and by the time the contract is awarded, the cost of the asphalt has risen to the point where we couldn't make any money. You can really get in a bind if you're not careful."

So far, though, businesses that need a new parking lot or a homeowner who wants to extend a driveway aren't balking too much at the higher prices, said Rick Seamons, owner of R&R Paving in Salt Lake City.

Seamons said with the cost of putting in a parking lot jumping from around \$1.10 per square foot (in late 2005) to around \$2 today, it would seem logical that some businesses would hesitate to have the work done, but that generally hasn't happened yet.

"Maybe once Utah's economy starts to slow down, we'll see an impact," Seamons said.

» 6944 reads

APPENDIX C

HISTORY OF ILLINOIS BASIN POSTED CRUDE OIL PRICES

Crude Oil Price
Chart from 1977 to 2003

Monthly Price Chart 1998-April 2009

History & Analysis of Crude Oil Prices from WTRG Economics

Year, Month, Monthly Average, and Yearly Average

2010

January	\$69.85	July	\$67.91
February	\$68.04	August	
March	\$72.90	September	
April	\$76.31	October	
May	\$66.25	November	
June	\$67.12	December	
		2010 Average	\$69.77*

*2010 Average through July

2009

January	\$33.07	July	\$56.16
February	\$31.04	August	\$62.80
March	\$40.13/\$39.88	September	\$60.98
April	\$42.45/\$42.20	October	\$67.43
May	\$51.27/\$51.02	November	\$69.43
June	\$61.71/\$61.46	December	\$66.33
		2009 Average	\$53.56/\$53.48

Prior to February 26th, 2009, the posted price for CountryMark, Plains and Bi-Petro was identical. After that date CountryMark posted price is 25 cents higher.

2008

January	\$84.70	July	\$126.16
February	\$86.64	August	\$108.46
March	\$96.87	September	\$96.13
April	\$104.31	October	\$68.50
May	\$117.40	November	\$49.29

June	\$126.33	December	\$32.94
		2008 Average	\$91.48

42%
jump

2007

January	\$46.53	July	\$65.96
February	\$51.36	August	\$64.23
March	\$52.64	September	\$70.94
April	\$56.08	October	\$77.56
May	\$55.43	November	\$86.92
June	\$59.25	December	\$83.46
		2007 Average	\$64.20

10%
jump

2006

January	\$58.30	July	\$66.28
February	\$54.65	August	\$64.93
March	\$55.42	September	\$55.73
April	\$62.50	October	\$50.98
May	\$62.94	November	\$50.98
June	\$62.85	December	\$54.06
		2006 Average	\$58.30

16%
jump

2005

January	\$42.21	July	\$52.13
February*	\$42.91/\$41.11	August	\$58.07
March*	\$48.55/\$47.80	September	\$58.56
April*	\$46.63/\$46.38	October	\$55.12
May*	\$43.27/\$43.02	November	\$51.18
June*	\$49.56/\$49.80	December	\$52.31
		2005 Average*	\$50.04/\$49.81

*From February through June the posted price was not the same for all three crude purchasers in the Illinois Basin. The first price is Countrymark Coop posted price average, the second price is Plains/Bi-Petro posted price average.

2004

--	--	--	--

APPENDIX D

NOTE TO BIDDER: USE TYPEWRITER OR BLACK INK FOR COMPLETING THIS BID

BID

BID TO: CITY OF WEST JORDAN, UTAH

The undersigned Bidder proposes and agrees, if this Bid is accepted, to enter into Agreement with the City in the form included in the Contract Documents (as defined in Article 4 of the Agreement) to perform the Work as specified or indicated in said Contract Documents entitled:

9000 SOUTH ROAD RECONSTRUCTION – PROJECT NO. RD-08-08

Bidder accepts all of the terms and conditions of the Contract Documents, including without limitation those in the Notice Inviting Bids and Instructions to Bidders, dealing with the disposition of the Bid Security.

This Bid will remain open for the period stated in the Notice Inviting Bids unless otherwise required by law. Bidder will enter into an Agreement within the time and in the manner required in the Instructions to Bidders, and will furnish the insurance certificates, Payment Bond, Performance Bond, and Permits required by the Contract Documents.

Bidder has examined copies of all the Contract Documents including the following Addenda (receipt of which is hereby acknowledged):

Number 01
Number _____
Number _____

Date 6/25/2008
Date _____
Date _____

Bidder has familiarized itself with the nature and extent of the Contract Documents, the Work, the site, the locality where the Work is to be performed, the legal requirements (federal, state, and local laws, ordinances, rules, and regulations), and the conditions affecting cost, progress or performance of the Work and has made such independent investigations as Bidder deems necessary.

In conformance with current statutory requirements of the State of Utah, the Bidder shall be insured against liability for worker's compensation before commencing the performance of the work of this contract.

Bidder agrees to all the foregoing, including all Bid Schedule(s), List of Subcontractors, Non-collusion Affidavit, Equipment or Material Proposed, Bidder's General Information, and Bid Bond contained in these Bid Forms, and said Bidder further agrees to complete the Work required under the Contract Documents within the Contract Time stipulated in said Contract Documents, and to accept in full payment therefore the Contract Price based on the Lump Sum or Unit Bid Price(s) named in the afore-mentioned Bid Schedule(s).

Dated: 7/01/08 Bidder: Kipore Paving & Maintenance
By: [Signature]
(Signature)
Title: President

BID SCHEDULE
Schedule of Prices for Construction of

9000 SOUTH ROAD RECONSTRUCTION – PROJECT NO. RD-08-08

In West Jordan, Utah

SCHEDULE NO. 1; BASE BID

Item No.	Description of Unit Price Work	Quantity	Unit	Unit Price	Amount
1	Mobilization and Demobilization	1	Lump Sum	\$ 14,700 ⁰⁰	\$ 14,700 ⁰⁰
2	Traffic Control	1	Lump Sum	\$ 22,700 ⁰⁰	\$ 22,700 ⁰⁰
3	Quality Control	1	Lump Sum	\$ 7,500 ⁰⁰	\$ 7,500 ⁰⁰
4	Construction Surveying	1	Lump Sum	\$ 3,500 ⁰⁰	\$ 3,500 ⁰⁰
5	Remove and Replace Waterway	1700	SF	\$ 17 ⁰⁰	\$ 28,900 ⁰⁰
6	Remove and Replace Concrete Curb and Gutter	200	LF	\$ 33 ⁵⁰	\$ 6,700 ⁰⁰
7	Roadway Demolition and Removal (Minimum 26- inch depth)	60,000	SF	\$ 1.47	\$ 88,200 ⁰⁰
8	Roadway Milling	140,000	SF	\$ 0.11	\$ 15,400 ⁰⁰
9	Roadway Reconstruction – Granular Borrow, 12-inch Minimum Thickness	60,000	SF	\$ 0.55	\$ 33,000 ⁰⁰
10	Roadway Reconstruction – ¾-inch minus Untreated Base Course, Class A, 8-inch Minimum Thickness	60,000	SF	\$ 0.50	\$ 30,000 ⁰⁰
11	Roadway Reconstruction – Asphalt Restoration, PG 64-22 DM-3/4, 6-inch Minimum Thickness	60,000	SF	\$ 2.32	\$ 139,200 ⁰⁰
12	Asphalt Concrete Overlay – PG 64-22 DM-3/4 3-inch Minimum Thickness	140,000	SF	\$ 1.14	\$ 159,600 ⁰⁰
13	Asphalt Concrete Level Course – PG 64-22 DM-3/4	100	CY	\$ 63.83	\$ 6,383 ⁰⁰
14	Raise / Lower Manholes	27	EA	\$ 594 ⁰⁰	\$ 16,038 ⁰⁰
15	Raise / Lower Water Valves	15	EA	\$ 515 ⁰⁰	\$ 7,725 ⁰⁰
16	Raise / Lower Street Monuments	1	EA	\$ 515 ⁰⁰	\$ 515 ⁰⁰
17	Replace Pavement Markings (Reflective Tape)	1	Lump Sum	\$ 39,900 ⁰⁰	\$ 39,900 ⁰⁰
18	Furnish and Install Storm Drain Combination Boxes	3	EA	\$ 3,250 ⁰⁰	\$ 9,750 ⁰⁰
19	Remove and Replace Traffic Signal Detector Loops	1	LS	\$ 9,190 ⁰⁰	\$ 9,190 ⁰⁰

Total SCHEDULE NO. 1; Base Bid = \$ 643,901⁰⁰

ADDITIVE ALTERNATE A

Item No.	Description of Unit Price Work	Quantity	Unit	Unit Price	Amount
A1	Remove and Replace Pedestrian Ramps – 3900 West per Detail sheet 9	1	Lump Sum	\$ 9000 ⁰⁰	\$ 9000 ⁰⁰
A2	Remove and Replace Pedestrian Ramps – 3780 West per Detail sheet 9	1	Lump Sum	\$ 9000 ⁰⁰	\$ 9000 ⁰⁰
A3	Remove and Replace Pedestrian Ramps – Elmhurst per Detail sheet 10	1	Lump Sum	\$ 9000 ⁰⁰	\$ 9000 ⁰⁰
A4	Remove and Replace Pedestrian Ramps – Judd Lane per Detail sheet 10	1	Lump Sum	\$ 9000 ⁰⁰	\$ 9000 ⁰⁰
A5	Remove and Replace Pedestrian Ramps – Judd Lane per Detail sheet 10	1	Lump Sum	\$ 9000 ⁰⁰	\$ 9000 ⁰⁰
A6	Remove and Replace Pedestrian Ramps – Winthrop per Detail sheet 10	1	Lump Sum	\$ 9000 ⁰⁰	\$ 9000 ⁰⁰

Total ADDITIVE ALTERNATE A = \$ 54,000.00

The owner reserves the right to increase, decrease or to entirely eliminate any of the bid items or bid schedules as it is determined to be in the best interest of the owner.

END DOCUMENT

APPENDIX E

AGREEMENT

THIS AGREEMENT made this 22nd day of July in the year 2008, by and between City of West Jordan, a legal entity organized and existing in Salt Lake County, under and by virtue of the laws of the State of Utah, herein designated as the CITY, and Kilgore Paving and Maintenance, dba hereinafter designated as the CONTRACTOR.

The CITY and the CONTRACTOR, in consideration of the mutual covenants hereinafter set forth, agree as follows:
9000 SOUTH ROAD RECONSTRUCTION – PROJECT NO. RD-08-08

ARTICLE 1 - THE WORK

The CONTRACTOR shall complete the Work as specified or indicated under the Bid Schedule(s) of the CITY's Contract Documents entitled:

9000 SOUTH ROAD RECONSTRUCTION – PROJECT NO. RD-08-08

The Work is generally described as follows: The Work generally includes, but is not limited to the removal and replacement of asphalt concrete pavement, the removal and replacement of crushed aggregate base, the removal and replacement of granular borrow, the removal and replacement of concrete curb, sidewalk, and pedestrian ramps, the raising and lowering of manholes, valves, and monuments as well as the removal and replacement of traffic striping.

ARTICLE 2 - COMMENCEMENT AND COMPLETION

The Work to be performed under this Contract shall be commenced on the date specified in the Notice to Proceed by the CITY, and the Work shall be fully completed within 60 calendar days from the date of the Notice to Proceed.

The CITY and the CONTRACTOR recognize that time is of the essence of this Agreement and that the CITY will suffer financial loss if the Work is not completed within the time specified in Article 2, herein, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. They also recognize the delays, expense, and difficulties involved in proving in a legal proceeding the actual loss suffered by the CITY if the Work is not completed on time. Accordingly, instead of requiring any such proof, the CITY and the CONTRACTOR agree that as liquidated damages for delay (but not as a penalty) the CONTRACTOR shall pay the CITY the sum of **\$1000.00** for each calendar day that expires after the time specified above.

ARTICLE 3 - CONTRACT PRICE

The CITY shall pay the CONTRACTOR for the completion of the Work the sum of \$697,901.00 in accordance with the Contract Documents and the CONTRACTOR's Bid and Bid Schedule(s).

ARTICLE 4 - THE CONTRACT DOCUMENTS

The Contract Documents consist of: Notice Inviting Bids, Instructions to Bidders, the prevailing rate of per diem wages as determined by the State of Utah, the accepted Bid and Bid Schedule, the Schedule of Values, List of Subcontractors, Equipment or Material Proposed, Bidder's General Information, Bid Security or Bid Bond, this Agreement, Worker's Compensation Certificate, Performance Bond, Payment Bond, Notice of Award, Notice to Proceed, Notice of Completion, General Conditions of the Contract, Supplementary General Conditions of the Contract, Technical Specifications, Drawings listed in The Schedule of Drawings in the Supplementary General Conditions or on the Cover Sheet of the Drawings, Addenda numbers 1 to 1 inclusive,

and all Change Orders, and Work Directive Changes which may be delivered or issued after the Effective Date of the Agreement and are not attached hereto, all of which are incorporated herein by reference.

ARTICLE 5 - PAYMENT PROCEDURES

The CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions and the Supplementary General Conditions. Applications for Payment will be processed by the Engineer or Architect or the CITY as provided in the General Conditions and shall include the CITY's purchase order number.

ARTICLE 6 - NOTICES

Whenever any provision of the Contract Documents requires the giving of written notice, it shall be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to the giver of the Notice.

ARTICLE 7 - MISCELLANEOUS

Terms used in this Agreement which are defined in Article 1 of the General Conditions and Supplementary General Conditions will have the meanings indicated in said General Conditions and Supplementary General Conditions. No assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound; and specifically but without limitation monies that may become due and monies that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

The CITY and the CONTRACTOR each binds itself, its partners, successors, assigns, and legal representatives to the other party hereto, its partners, successors, assigns, and legal representatives in respect of all covenants, agreements, and obligations contained in the Contract Documents.

REPRESENTATION REGARDING ETHICAL STANDARDS FOR CITY OFFICERS AND EMPLOYEES AND FORMER CITY OFFICERS AND EMPLOYEES: The bidder, offeror, or contractor represents that it has not: (1) provided an illegal gift or payoff to a city officer or former city officer or employee, or his or her relative or business entity; (2) retained any person to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, other than as exempted in the City's Conflict of Interest ordinance; or (3) knowingly influenced (and hereby promises that it will not knowingly influence) a city officer or employee or former city officer or employee to breach any of the ethical standards set forth in the City's Conflict of Interest ordinance, Chapter 2.4, West Jordan City Code.

IN WITNESS WHEREOF, the CITY and the CONTRACTOR have caused this Agreement to be executed the day and year first above written.

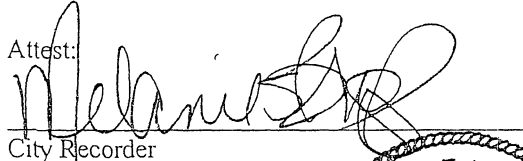
CITY OF WEST JORDAN, UTAH

By:



Mayor - David B. Newton

Attest:



City Recorder

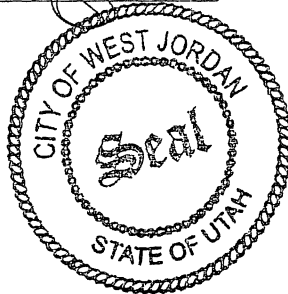
Address for giving Notice:

City of West Jordan
Engineering Department
8000 South Redwood Road
West Jordan, Utah 84088

Approved as to Legal Form:



City Attorney



CONTRACTOR:

Kilgore Paving & Maintenance

By:



Title: President

Address for giving Notice:

PO Box 189

Magna, UT 84044

License

No. 4757588-5501

Agent for service of process:

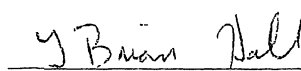
STATE OF Utah) :SS

COUNTY OF SL)

On this 14 day of July, 2011,
personally appeared before me,

Jason Kilgore

_____, who being by me duly sworn did say
that he/she is the PRESIDENT of
KILGORE PAVING corporation, and that the
foregoing instrument was signed in behalf of said
corporation by authority of its Board of Directors,
and he/she acknowledged to me that said corporation
executed the same.



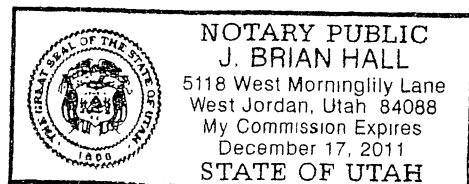
NOTARY PUBLIC

My Commission Expires:

12-17-2011

Residing in SL County,

Utah



APPENDIX F

a. The Contractor shall purchase and maintain the insurance required under this Article. Such insurance shall include the specific coverages set forth herein and shall be written for not less than the limits of liability and coverages provided in the Supplementary General Conditions, or required by law, whichever is greater. All insurance shall be maintained continuously during the life of the Agreement up to the date of Notice of Completion, as applicable, pursuant to acceptance of the Work by the City, but the Contractor's liabilities under this Agreement shall not be deemed limited in any way to the insurance coverage required.

b. The Contractor shall furnish the City with certificates showing the type, amount, class of operations covered, effective dates and dates of expiration of policies for each of the following listed insurance coverages. In addition, each party named as an additional insured shall be provided with an original copy of the policy endorsement naming them as an additional insured under the Contractor's policies of insurance required under the Contract. All of the policies of insurance so required to be purchased and maintained (or the certificates or other evidence thereof) shall contain a provision or endorsement that the coverage afforded will not be canceled, materially changed, or renewal refused until at least 30 days' prior written notice has been given to the City by Certified Mail. All such insurance shall remain in effect until the date of Substantial Completion and at all times thereafter when the Contractor may be correcting, removing, or replacing defective work in accordance with Article 13.6, herein. In addition, the Insurance required herein (except for Worker's Compensation and Employer's Liability) shall name the City, the Engineer, and their Consultants and Subconsultants for the project and their officers, agents, and employees as "additional insureds" under the policies:

1. Worker's Compensation Insurance
2. Commercial General Liability
3. Business Automobile Liability
4. Builder's Risk

c. Policy Requirements: The insurance provided by the Contractor hereunder shall be (1) with companies licensed to do business in the state of Utah, (2) with companies with a Best's Financial Rating of XI or better, and (3) with companies with a Best's General Policy Policyholders Rating of not less than B, except that in case of Worker's Compensation Insurance, participation in the State Fund, where applicable, is acceptable.

ARTICLE 6 -- THE CONTRACTOR'S RESPONSIBILITIES

6.1 Supervision and Superintendence:

The Contractor shall supervise and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the contract Documents. The Contractor shall be solely responsible for the means, methods, techniques, sequences and procedures of construction, but the Contractor shall not be responsible for the negligence of others in the design or selection of a specific means, method, technique, sequence or procedure of construction which is indicated in and required by the contract documents. The Contractor shall be responsible to see that the finished Work complies accurately with the Contract Documents.

6.2 Labor, Materials, and Equipment:

a. The Contractor shall provide competent, suitably qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. The Contractor shall at all times maintain good discipline and order at the site. Except in connection with the safety or protection of persons or the Work or property at the site or adjacent thereto, and except as otherwise indicated in the Contract Documents, all Work at the site shall be performed during regular working hours, and the Contractor will not permit overtime work or the performance of Work on Saturday, Sunday, or any legal holiday without the City's written consent given after prior written notice to the Engineer. If the Contractor performs any work after regular working hours, or on Saturday, Sunday, or any legal holiday, it shall pay the City any additional cost incurred by the City as a result of such work.

b Except as otherwise provided in this Article, the Contractor shall receive no additional compensation for overtime work, i.e., work in excess of 8 hours in any one calendar day or 40 hours in any one calendar week, even though such overtime work may be required under emergency conditions and may be ordered by the Engineer in writing. Additional compensation will be paid to the Contractor for overtime work only in the event that extra work is ordered by the Engineer, and the Change Order specifically authorizes the use of overtime work and then only to such extent as overtime wages are regularly being paid by the Contractor for overtime work of a similar nature in the same locality.

c All costs of inspection and testing performed by the City or its authorized representatives before 7:00 am or after 4:00 pm on any regular work day, or all day on Saturdays, Sundays, and legal holidays by the Contractor which is allowed solely for the convenience of the Contractor shall be borne by the Contractor at the City's standard overtime rates. The City shall have the authority to deduct the cost of all such inspection and testing from any partial payments otherwise due the Contractor.

d Unless otherwise specified in the Contract Documents, the Contractor shall furnish and assume full responsibility for all materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, temporary facilities and all other facilities, and incidentals necessary for the furnishing, performance, testing, start-up, and completion of the Work.

e All materials and equipment to be incorporated in the Work shall be of good quality and new, except as otherwise provided in the Contract Documents. If required by the Engineer, the Contractor shall furnish satisfactory evidence (including reports of required tests) as to the kind and quality of materials and equipment. All materials and equipment shall be applied, installed, connected, erected, used, cleaned, and conditioned in accordance with the instructions of the applicable Supplier except as otherwise provided in the Contract Documents, but no provision of any such instructions will be effective to assign to the Engineer, nor any of the Engineer's consultants, agents, or employees, any duty or authority to supervise or direct the furnishing or performance of the Work or any duty or authority to undertake responsibility contrary to the provisions of Articles 9.9c or 9.9d.

6.3 Concerning Subcontractors, Suppliers, and Others:

a The Contractor shall be fully responsible to the City and the Engineer for the acts and omissions of its subcontractors and their employees to the same extent as the Contractor is responsible for the acts and omissions of its own employees. Nothing contained in this Article shall create any contractual relationship between the City or the Engineer and any sub-contractor, nor shall it relieve the Contractor of any liability or obligation under the prime Contract.

b The Divisions and Sections of the Specifications and identifications of any Drawings shall not control the Contractor in dividing the Work among Subcontractors or Suppliers or in delineating the Work to be performed by any specific trade.

6.4 Permits, License Fees, and Royalties:

a Unless otherwise provided in the Supplementary General Conditions, the Contractor shall obtain and pay for all construction permits and licenses from the agencies having jurisdiction, including the furnishing of insurance and bonds if required by such agencies.

b The Contractor shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work or the incorporation in the Work of any invention, design, process, product, or device which is the subject of patent rights or copyrights held by others. The Contractor shall indemnify and hold harmless the City from and against all claims, damages, losses, and expenses (including attorney's fees and court and arbitration costs) arising out of any infringement of patent rights or copyrights incident to the use in the performance of the Work or resulting from the incorporation in the Work of any invention, design, process, product, or device not specified in the Contract Documents, and shall defend all such claims in connection with any alleged infringement of such rights.

acceptability of the Work thereunder. Claims, disputes, and other matters relating to the acceptability of the Work, the interpretation of the requirements of the Contract Documents pertaining to the performance of the Work, and those claims under Articles 11 and 12, herein, in respect to changes in the Contract Price or the Contract Time will be referred initially to the Engineer in writing with a request for formal decision in accordance with this Article, which the Engineer will render in writing within 30 days of receipt of the request. Written notice of each such claim, dispute, and other matter shall be delivered by the Contractor to the Engineer promptly (but in no event later than 30 days) after the occurrence of the event giving rise thereto. Written supporting data shall be submitted to the Engineer within 60 days after such occurrence unless the Engineer allows an additional period of time to ascertain more accurate data in support of the claim.

b. When functioning as initial interpreter and judge, the Engineer will not show partiality to the City or the Contractor and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity. The rendering of a decision by the Engineer with respect to any such claim, dispute, or other matter (except any which have been waived by the making or acceptance of final payment as provided in Article 14.14) will be a condition precedent to any exercise by the City or the Contractor of such rights or remedies as either may otherwise have under the Contract Documents or by Laws or Regulations in respect of any such claim, dispute, or other matter.

9.9 Limitations on the Engineer's Responsibilities:

a. Neither the Engineer's authority to act under this Article 9 or other provisions of the Contract Documents nor any decision made by the Engineer in good faith either to exercise or not exercise such authority shall give rise to any duty or responsibility of the Engineer to the Contractor, any Subcontractor, any Supplier, any surety for any of them, or for any other person or organization performing any of the Work.

b. Whenever in the Contract Documents the terms "as ordered," "as directed," "as required," "as allowed," "as reviewed," "as approved," or terms of like effect or import are used, or the adjectives "reasonable," "suitable," "acceptable," "proper," or "satisfactory" or adjectives of like effect or import are used to describe a requirement, direction, review, or judgment of the Engineer as to the Work, it is intended that such requirement, direction, review, or judgment will be solely to evaluate the Work for compliance with the Contract Documents, unless there is a specific statement indicating otherwise. The use of any such term or adjective shall not be effective to assign to the Engineer any duty or authority to supervise or direct the performance of the Work or any duty or authority to undertake responsibility contrary to the provisions of Articles 9.9c or 9.9d, herein.

c. Except as may be otherwise specified in the Technical Specifications, the Engineer will not be responsible for the Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, and the Engineer will not be responsible for the Contractor's failure to perform or furnish the Work in accordance with the Contract Documents.

d. The Engineer shall not be responsible for the acts or omissions of the Contractor nor of any Subcontractor, Supplier, or any other person or organization performing any of the Work.

ARTICLE 10 -- CHANGES IN THE WORK

10.1 General:

a. Without invalidating the Agreement and without notice to any surety, the City may, at any time or from time to time, order additions, deletions, or revisions in the Work, these will be authorized by a Change Order or a Work Directive Change issued by the Engineer or the City. Upon receipt of either such document, the Contractor shall promptly proceed with the Work involved, which will be performed under the applicable conditions of the Contract Documents.

b. If the City and the Contractor are unable to agree as to the extent, if any, of an increase or decrease in the

Contract Price or an extension or shortening of the Contract Time that should be allowed as a result of a Work Directive Change, a claim may be made therefore as provided in Article 11 or Article 12, herein

c The Contractor shall not be entitled to an increase in the Contract Price or an extension of the Contract Time with respect to any Work performed that is not required by the Contract Documents as amended, modified and supplemented by Change Order, except in the case of an emergency and except in the case of uncovering Work as provided in Article 13 3, herein

d If notice of any change is required by the provisions of any Bond to be given to a surety, the giving of any such notice will be the Contractor's responsibility, and the amount of each applicable bond shall be adjusted accordingly

10.2 Allowable Quantity Variations on Unit Price Contracts:

In the event of an increase or decrease in a bid item quantity of a unit price contract, the total amount of work actually done or materials or equipment furnished shall be paid for according to the unit price established for such work under the Contract Documents, wherever such unit price has been established, provided, that an adjustment in the Contract Unit Price may be made for changes which result in an increase or decrease in the quantity of any unit price bid item of the Work in excess of 25 percent, or for eliminated items of work

ARTICLE 11 -- CHANGE OF CONTRACT PRICE

11.1 General:

a The Contract Price constitutes the total compensation (subject to City-authorized adjustments) payable to the Contractor for performing the Work All duties, responsibilities, and obligations assigned to or undertaken by the Contractor shall be at its expense without change in the Contract Price

b The Contract Price may only be changed by a Change Order Any claim for an increase or decrease in the Contract Price shall be based on written notice delivered by the party making the claim to the other party and to the Engineer promptly (but in no event later than 30 days) after the occurrence of the event giving rise to the claim and stating the general nature of the claim Notice of the amount of the claim with supporting data shall be delivered within 60 days after such occurrence (unless the Engineer allows an additional period of time to ascertain more accurate data in support of the claim) and shall be accompanied by claimant's written statement that the amount claimed covers all known amounts (direct, indirect, and consequential) to which the claimant is entitled as a result of the occurrence of said event All claims for adjustment in the Contract Price shall be determined by the Engineer in accordance with Article 9 8, herein, if the City and the Contractor cannot otherwise agree on the amount involved No claim for an adjustment in the Contract Price will be valid if not submitted in accordance with this Article 11 1b

c The value of any Work covered by a Change Order or Work Directive Change or of any claim for an increase or decrease in the Contract Price shall be determined in one of the following ways

- 1 Where the Work involved is covered by unit prices contained in the Contract Documents, by application of unit prices to the quantities of the items involved
- 2 By mutual acceptance of a lump sum (which may include an allowance for overhead and profit not necessarily in accordance with Article 11 4, herein)
- 3 On the basis of the Cost of the Work (determined as provided in Articles 11 2 and 11 3 herein) plus the Contractor's Fee for overhead and profit (determined as provided in Article 11 4, herein)

11 2 Cost of Work (Based on Time, Materials, and Equipment and Contractor's Overhead and Profit)

Documents, and after the Engineer has indicated that the Work is acceptable, the Contractor may make application for final payment following the procedure for progress payments. The final Application for Payment shall be accompanied by all documentation called for in the Contract Documents, together with complete and legally effective releases or waivers (satisfactory to the City) of all liens arising out of or filed in connection with the Work.

14.11 Final Payment and Acceptance:

a. If, on the basis of the Engineer's observation of the Work during construction and final inspection, and the Engineer's review of the final Application for Payment and accompanying documentation, all as required by the Contract Documents, the Engineer is satisfied that the Work has been substantially completed, and the Contractor's other obligations under the Contract Documents have been fulfilled, the Engineer will, within 14 days after receipt of the final Application for Payment, indicate in writing the Engineer's recommendation of payment and present the Application to the City for payment.

b. After acceptance of the Work by the City's governing body, the City will make final payment to the Contractor of the amount remaining after deducting all prior payments and all amounts to be kept or retained under the provisions of the Contract Documents, including the following items:

1. Liquidated damages, as applicable.
2. Two times the value of outstanding items of correction work or punch list items indicated on the Notice of Completion as being yet uncompleted or uncorrected, as applicable. All such work shall be completed or corrected to the satisfaction of the City within the time stated on the Notice of Completion, otherwise the Contractor does hereby waive any and all claims to all monies withheld by the City to cover the value of all such uncompleted or uncorrected items.

14.12 Release of Retainage and Other Deductions:

The Contractor shall have 30 days to complete any outstanding items of correction work remaining to be completed or corrected as listed on a final punch list made a part of the Notice of Completion. Upon expiration of the 45 days referred to in Article 14.12a, the amounts withheld pursuant to the provisions of Article 14.11b, herein, except for liquidated damages in Article 14.11b, for all remaining work items will be returned to the Contractor; provided, that said work has been completed or corrected to the satisfaction of the City within said 30 days. Otherwise, the Contractor does hereby waive any and all claims for all monies withheld by the City under the Contract to cover 2 times the value of such remaining uncompleted or uncorrected items.

14.13 Contractor's Continuing Obligation:

The Contractor's obligation to perform and complete the Work in accordance with the Contract Documents shall be absolute. Neither recommendation of any progress or final payment by the Engineer, nor the issuance of a Notice of Completion, nor any payment by the City to the Contractor under the Contract Documents, nor any use or occupancy of the Work or any part thereof by the City, nor any act of acceptance by the City nor any failure to do so, nor any review and approval of a Shop Drawing or sample submittal, will constitute an acceptance of work not in accordance with the Contract Documents or a release of the Contractor's obligation to perform the Work in accordance with the Contract Documents.

14.14 Final Payment Terminates Liability of the City:

Final payment is defined as the last progress payment made to the Contractor for earned funds, less retainage or other withheld funds, as applicable, including the deductions listed in Article 14.11b, herein. The acceptance by the Contractor of the final payment referred to in Article 14.11 herein, shall be a release of the City and its agents from all claims of liability to the Contractor for anything done or furnished for, or relating to, the Work or for any act or neglect of the City or of any person relating to or affecting the Work, except demands made against the City for the

remainder, if any, of the amounts kept or retained under the provisions of Article 14 11, herein, and excepting all pending, unresolved claims filed prior to the date of the Notice of Completion

ARTICLE 15 -- SUSPENSION OF WORK AND TERMINATION

15.1 Suspension of Work by City:

The City, acting through the Engineer, may, at any time and without cause, suspend the Work or any portion thereof for a period of not more than 90 days by notice in writing to the Contractor. The Contractor shall resume the Work on receipt from the Engineer of a Notice of Resumption of Work. The Contractor shall be allowed an increase in the Contract Price or an extension of the Contract Time, or both, directly attributable to any suspension if the Contractor makes an approved claim therefore as provided in Articles 11 and 12, herein.

15.2 Termination of Agreement by City (Contractor Default):

a In the event of default by the Contractor, the City may give 10 days written notice to the Contractor of City's intent to terminate the Agreement and provide the Contractor an opportunity to remedy the conditions constituting the default.

b In the event that the Agreement is terminated in accordance with Article 15 2a, herein, the City shall have the right to take possession of the Work and may complete the Work by whatever method or means the City may select. The cost of completing the Work shall be deducted from the balance which would have been due the Contractor had the Agreement not been terminated and the Work completed in accordance with the Contract Documents. If such cost exceeds that balance which would have been due, the Contractor shall pay the excess amount to the City. If such cost is less than the balance, which would have been due, the Contractor shall not have claim to the difference.

15.3 Termination of Agreement by City (For Convenience):

a The City may terminate the Agreement at any time if it is found that reasons beyond the control of either the City or the Contractor make it impossible or against the City's interests to complete the Work. In such a case, the Contractor shall have no claims against the City except (1), for the value of the work performed up to the date the Agreement is terminated, and (2), for the cost of materials and equipment on hand, in transit, or on definite commitment, as of the date the Agreement is terminated, which would have been needed in the Work and which meet the requirements of the Contract Documents. The value of work performed and the cost of materials and equipment delivered to the site, as mentioned above, shall be determined by the Engineer in accordance with the procedure prescribed for the making of the final application for payment and payment under Articles 14 10 and 14 11, herein.

15.4 Termination of Agreement by Contractor:

The Contractor may terminate the Agreement upon 14 days written notice to the City, whenever

- 1 The Work has been suspended under the provisions of Article 15 1, herein, for more than 90 consecutive days through no fault or negligence of the Contractor, and notice to resume work or to terminate the Agreement has not been received from the City within this time period, or
- 2 The City should fail to pay the Contractor any monies due him in accordance with the terms of the Contract Documents and within 60 days after presentation to the City by the Contractor of a request therefor, unless within said 14-day period the City shall have remedied the condition upon which the payment delay was based.

In the event of such termination, the Contractor shall have no claim against the City except for those claims specifically enumerated in Article 15 3, herein, and as determined in accordance with the requirements of said