City of Meridian v. Petra Inc. Clerk's Record v. 7
Dckt. 39006

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Job Range 060675 thru 060675

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**PAYROLL HISTORY DISTRIBUTION**

**Company No.** 1 PETRA Incorporated

**Employee Range** CHIPAT thru CHIPAT

**Pay Periods Ending Between** 08/01/08 and 04/30/09

**Job Range** 060675 thru 060675

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Job Range 060675 thru 060675

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Total: 370
RECEIVED

SEP 14 2007

CITY OF MERIDIAN

CITY CLERK OFFICE

PROJECT: Meridian City Hall

TO: City of Meridian
33 E Idaho Avenue
Meridian, ID 83642

ATTN: CONTAMINATED SOIL

DATE: 9/14/2007

REF: COR 1 CM FEE
Contaminated Soil

PHONE: 888.4433
FAX: 887.4813
CELL: 631.6469

ITEM NO. COPIES DATE ITEM NUMBER REV. NO. DESCRIPTION STATUS

1 9/12/2007 COR No.1 for CM FEE on Contaminated Soil Removal with supporting documentation. OPN

Remarks:

Will:

Originals have been transmitted to Keith Watts and Ted Baird for review as well.

Signed: Wes Bettis

CC: File

This Communication contains proprietary business information and may contain confidential information. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately destroy, discard, or erase this information.
**TITLE:** Contaminated Soils Removal  
**PROJECT:** Meridian City Hall  
**TO:** Attn: Wes Bettis  
Petra Incorporated  
1097 N Rosario St  
Meridian, Idaho 83642  
Phone: 208-323-4500  
Fax: 208-323-4507  
**DATE:** 6/27/2007  
**CONTRACT NO:** 1

**DESCRIPTION OF WORK TO BE DONE:**  
Additional CM Fee, Supervision, General Conditions and Reimbursable's during the identification, classification and removal of the contaminated soils found on site. This increase in Fee is in accordance with the Construction Management Agreement between the City of Meridian and Petra Incorporated, Articles 6.2.2 (a), 6.2.2 (b) and 7 (b) relative to Changes in project complexity, size, and conditions.

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**Unit Cost:** $52,502.45  
**Unit Tax:** $0.00  
**Lump Sum:** $0.00  
**GC markup:** $0.00  
**Lump Tax:** $0.00  
**Total:** $52,502.45

**APPROVAL:**  
By: Keith Watts  
Date:  
Explosion:  
By: Wes Bettis  
Date:  

CM002713  
006016
September 12, 2007

Mr. Will Berg, City Clerk
Mr. Keith Watts, Purchasing Agent
CITY OF MERIDIAN
33 E. Idaho St.
Meridian, ID

RE: Construction Management Fee Change Order Request No. 1

Gentlemen:

Enclosed is Change Order Request No. 1 for the Construction Management Fee, General Conditions Reimbursable Expenses and Reimbursable Temporary Expenses in accordance with the Agreement Between the City of Meridian and Petra Incorporated, the Construction Manager of Record for the New City Hall construction project. In particular as noted in Articles 6.2.2 (a), 6.2.2 (b) and 7 (b) relative to changes in project size, complexity and conditions.

The Agreement Between the City of Meridian and Petra Incorporated called for an 80,000 SF building valued at $12.2 Million dollars for the purpose of setting the CM Fee and establishing the construction schedule. During the Site Preparation Phase, unforeseen conditions were encountered that were not part of the Owner’s Request for Services nor were these conditions identified in the Owner provided subsurface exploration documentation. These conditions consisted of petroleum based products found in the soil beginning at the South side of the old boiler house foundation and extending to the South property line. These deposits were found in multiple locations in the Southern 1/3 of the site and were anywhere from 3-0 below surface to 16-0 below surface.

A narrative timeline noting the process involved with the discovery and removal of the contaminated soils is included with this letter, along with a graphical representation of the additional work and the impact to the construction schedule these contaminated soils invoked on the project.

When initially uncovered, it appeared that the contaminated soils were confined to a small area corresponding to possible fuel oil storage tanks possibly located on the South side of the boiler house of the
original creamery complex. Exploratory excavation around this find supported an estimate of 1,000 CY of removal required. Within just a few days after the initial contaminated soil discovery, a second pocket of "gooey-dirt" was uncovered. More exploration found multiple sources of contamination that were migrating in a South to Northwest direction in the subsurface strata.

Compounding this issue was the confirmation of a clay layer or lens at approximately the 16-0 below surface level that was containing the ground water below the lens and the soil contamination above the lens. Extra care was utilized in association with the Geo-technical Consultant, Terracon; the Contamination Consultant, MTI; Petra, and Ideal Demolition to first confirm that no ground water contamination was occurring from the site due to the contaminated soil and secondly to keep the clay lens intact while the contaminated soil was removed to preserve the integrity of the protective membrane and insulate the City from creating a ground water contamination issue.

The discovery of the contaminated soils and the extent of the ground water under the clay lens eventually influenced the design of the City Hall building when no entity was found that would accept the discharge of the ground water during the construction dewatering or the long term dewatering that would be required to keep the basement dry due to ground water migration. Raising the building finish floor elevation ~ four feet put the bottom of the basement floor above the clay lens and out of any ground water influence, except for normal surface water migration. This decision required re-design of the site elevations, the building exterior elevations and the basement foundation drain, all after the Phase II-Shell and Core packages had been awarded.

Upon discovery of the contaminated soils, Petra Incorporated brought Project Superintendent Jon Anderson on site a full month before he was scheduled to start the site excavation which was to be April 4, 2007. Jon arrived on site March 5, 2007 and began directing the contaminated soil removal. Due to the extent of the contamination and the change in design, the contaminated soil removal and correction to the site elevations began on March 12, 2007 and the last load of contaminated soil left the site on May 14, 2007. The Site Contractor for the new construction, MJ's Backhoe and Excavation, Inc. mobilized on site on May 7, 2007 and began working on importing structural fill to replace the material removed as contaminated and removing unsuitable soils identified by Terracon, Inc. that did not meet the Geo-technical report requirements.

Petra Incorporated is asking for 336 of the 380 man hours that Mr. Anderson spent on the Meridian City Hall project during this period of contaminated soil removal from March 5, 2007 through May 14, 2007 managing the contaminated soil removal and well closures which were not part of the original scope of work in the Site Preparation Phase of Petra's CM agreement with the City of Meridian. In addition, Petra is asking for reimbursement for 169.5 man hours of Project Engineer time spent during this same time period of the 294 man hours spent by the Project Engineer. No request for compensation for Project Director/Manager Gene Bennett's 82.0 man hours has been requested. In comparison the contract for the Site Preparation Phase was to include 5% of the Project Manager and Project Engineer's time.

H:\PROJECTS\2006\West Meridian City Hall\Change Order Requests\CM Fee Contaminated Soil 09-12-07.doc

CM002715

006018
No Project Superintendent time was included since no extensive work was anticipated, based on the Brownsfield Report provided by the City.

The additional CM Fee that is being requested is in accordance with Articles 6.2.2 (a), 6.2.2 (b) and 7.(b) due to changes in project complexity, size and conditions. The total cost for the removal of the contaminated soils, as confirmed by Meridian City Purchasing is $422,000.00 in compensation to Ideal Demolition, Inc. Petra is requesting 4.7% of the amount paid to Ideal Demolition, Inc. in additional CM Fee or $19,384.00.

Since this was an unforeseen issue that could not be anticipated and included multiple participants including Hydrologic for the well closures, Terracon for soil and water testing beyond their original contract and MTI for all of the contamination testing, work plan and documentation with IDEQ; Petra has only included the costs for the actual contaminated soil removal by the abatement contractor rather than include the costs of all of the activities that Petra was managing during that time frame.

Best Regards,

Wesley W Betts Jr.
Construction Manager

Encl

c: Ted Baird City Attorney’s Office
File
Date: 09/07/2007
Time: 01:54:28 PM

**DAILY JOB COST DETAIL**

Report Code: 28.71

Company No. 1 PETRA Incorporated
Printing: Open Jobs Only Job Range: Multiple Selected
Phase Codes 01 thru 01 Cost Codes 410 thru 420
Transaction Date Range 02/26/07 thru 05/31/07

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Job No. 060675 Meridian City Hall

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**DAILY JOB COST DETAIL**

Report Code: 28.71

Transaction Date Range: 02/26/07 thru 05/31/07

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### Job No. 060675 Meridian City Hall (continued)

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Keith

Attached are copies of the contractor invoices for the winter weather protection and miscellaneous job conditions that you had questions on. I have written a short explanation on each invoice to try to better explain what and why in each case.

If you have any further questions please contact me. Can you let me know what the timing on our payment will be?

Thanks
Tom C
COLD WEATHER CHANGE ORDER #3

Date: March 25, 2008

General Contractor: Petra Inc.

Project Name & Address: Meridian City Hall
33 E. Broadway Ave.
Meridian, ID 83642

Cold Weather for the Month of February 2008

Labor

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<tr>
<td>February 17</td>
<td>$ 126.00</td>
</tr>
<tr>
<td>February 24</td>
<td>$ 84.00</td>
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<td>March 2</td>
<td>$ 105.00</td>
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Material

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<td>Expendables (Freeze Beads)</td>
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<td>3 Heaters - Rental</td>
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Subtotal $ 2534.62
OH & P $ 380.19
Total $ 2914.81

Thank you for your consideration. If you have any questions or require clarification please call at your convenience.

TMC, Inc.

Todd Olson

ID-10335-AA-4(04000), DBA McGourty Masonry NV-47227, CA-759884 OR-82857,
WA-TMCIN**088PZ, UT-99 371303-5501, AZ-155419

CM009979

006026
**Communication Result Report (Feb. 15, 2008 3:34 PM)**

**Date/Time:** Feb. 15, 2008 3:34 PM

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**Reason for error**
- E. 1) Manual error or line fail
- E. 2) Busy
- E. 3) No answer
- E. 4) Exceeded max. E-mail size

**TMC INC. MASONRY CONTRACTORS**

**DATE:** 7/45/67

**BAX #:** 323-456-7

**FROM:** CM009980

**TO:** Peter

**ATTN:**

**RE:** Chris Hall

**COMMENT:**

Call writer about

(Not a bill)

---

**Number of pages including cover page:**
COLD WEATHER LABOR REPORT #7

Date: February 15, 2008

General Contractor: Petra Inc.

Project Name & Address: Meridian City Hall
33 E. Broadway Ave.
Meridian, ID 83642

Cold Weather Week Ending February 10, 2008

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<td>0.00</td>
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Total $297.00

This is not a bill. We will be sending you a bill with all labor and material regarding cold weather for January later this month.

Thank you for your consideration. If you have any questions or require clarification please call at your convenience.

TMC, Inc.

Todd Olson

ID-10335-A4(04000), DBA McGourty Masonry NV-47227, CA-759834 OR-82857, WA-TMCIIN**088PZ, UT-99 371383-5501, AZ-155419

CM009981
Daily Cold Weather Protection

Foreman: Ron Shortt
Job Name: Meridian City Hall

Date: Feb 4, 2008

Work Description: Poured 11-08 - Reheld seals.

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<td>Mark Larkin</td>
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<td>John Cordova</td>
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</tr>
<tr>
<td>Mark Williams</td>
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Notices:

Equipment

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Materials

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<th>Item</th>
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NOTES:

TMC, Inc. Foreman: Ron Shortt
General Contractor: [Signature]

CM009982
Date/Time: Feb. 22, 2008 11:59AM

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COLD WEATHER LABOR REPORT #8

Date: February 22, 2008

General Contractor: Petra Inc.

Project Name & Address: Meridian City Hall
33 E. Broadway Ave.
Meridian, ID 83642

Cold Weather Week Ending February 17, 2008

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Total $126.00

This is not a bill. We will be sending you a bill with all labor and material regarding cold weather for January later this month.

Thank you for your consideration. If you have any questions or require clarification please call at your convenience.

TMC, Inc.

Todd Olson

ID-10335-AA-4(04000), DBA McGourty Masonry NV-47227, CA-759884 OR-82857, WA-TMCIN**088PZ, UT-99 371303-5501, AZ-155419

CM009984
Daily Cold Weather Protection

Foreman: K. Lindig  Job Name: Meridian City Hall

Date: Feb 11-15  Work Description: Preparing for winter, worklist, etc.

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<td>John Peterson</td>
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<tr>
<td>Mark Schmitt</td>
<td>1/2</td>
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<tr>
<td>John Peterson</td>
<td>1/2</td>
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<td>Type of Equip.</td>
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NOTES: All forms must be signed by the General Contractor
**Immunization Result Report (Feb. 29, 2008 3:53PM)**

**Date/Time:** Feb. 29, 2008 3:52PM

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**Reason for error**

1. Hang up or line fail
2. Busy
3. No answer
4. Exceeded max. fax time

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**TMC INC. MASONRY CONTRACTORS**

**TO:** Peter

**FROM:** Mayor City Hall

**COMMENTS:** Cold weather shutdown

**_dirs:** Peter

**Date:** 2/25/07

**Fax:** 322-3507

**PROM:** T-BQ OK"
Cold Weather Week Ending February 24, 2008

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Total $ 84.00

This is not a bill. We will be sending you a bill with all labor and material regarding cold weather for February next month.

Thank you for your consideration. If you have any questions or require clarification please call at your convenience.

TMC, Inc.

Todd Olson

ID-10335-AA-4(04000), DBA McGourty Masonry NV-47227, CA-759884 OR-82857, WA-TMCIN**088PZ, UT-99 371303-5501, AZ-155419
Daily Cold Weather Protection

Foreman: [Signature]  Job Name: [Signature]  Date: [Signature]  Work Description: [Signature]

<table>
<thead>
<tr>
<th>Name</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jose Estrella</td>
<td>1/2</td>
</tr>
<tr>
<td>Jose Estrella</td>
<td>1/2</td>
</tr>
<tr>
<td>Jose Estrella</td>
<td>1/2</td>
</tr>
<tr>
<td>Jose Estrella</td>
<td>0</td>
</tr>
<tr>
<td>Jose Estrella</td>
<td>1/2</td>
</tr>
</tbody>
</table>

Equipment

<table>
<thead>
<tr>
<th>Name</th>
<th>Type of Equip.</th>
</tr>
</thead>
</table>

Materials

<table>
<thead>
<tr>
<th>Item</th>
<th>Quantity</th>
</tr>
</thead>
</table>

NOTES:

TMC, Inc. Foreman: [Signature]  General Contractor: [Signature]

All forms must be signed by the General Contractor.
**Communication Result Report (Mar. 10, 3:07PM)**

- **Date/Time:** Mar. 10, 2008 3:06PM

<table>
<thead>
<tr>
<th>File No.</th>
<th>Mode</th>
<th>Destination</th>
<th>Pg(s)</th>
<th>Result</th>
<th>Page Not Sent</th>
</tr>
</thead>
<tbody>
<tr>
<td>3426</td>
<td>Memory TX</td>
<td>3234507</td>
<td>P. 3</td>
<td>OK</td>
<td></td>
</tr>
</tbody>
</table>

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**Reason for error**
- E.1) Hang up or line fail
- E.2) Busy
- E.3) No answer
- E.4) Exceeded max. E-mail size
- E.5) No facsimile connection

---

**TMC INC. MASONRY CONTRACTORS**

**DATE:** 3/10/08  
**FAX:** 323-4507  
**FROM:** CM009989

---

**TO:** Pat

**ATTN:**  
**TO:**  
**COMMENTS:** Cold Weather Shant

---

**Thks, Ted**
# COLD WEATHER LABOR REPORT #10

**Date:** March 7, 2008  
**General Contractor:** Petta Inc.  
**Project Name & Address:** Meridian City Hall  
33 E. Broadway Ave.  
Meridian, ID 83642

## Cold Weather Week Ending March 2, 2008

<table>
<thead>
<tr>
<th>Labor</th>
<th>Hours</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tender</td>
<td>2.50</td>
<td>$42.00</td>
<td>$105.00</td>
</tr>
<tr>
<td>Bricklayer</td>
<td>0.00</td>
<td>$48.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>Foreman</td>
<td>0.00</td>
<td>$62.00</td>
<td>$0.00</td>
</tr>
</tbody>
</table>

**Total** $105.00

This is not a bill. We will be sending you a bill with all labor and material regarding cold weather for February next month.

Thank you for your consideration. If you have any questions or require clarification please call at your convenience.

TMC, Inc.

Todd Olson

---

ID-10335-AA-4(04000), DBA McGourty Masonry NV-47227, CA-759884 OR-82857, WA-TMCIN**088PZ, UT-99 371303-5501, AZ-155419
Daily Cold Weather Protection

Foreman: Lee Stoff
Job Name: Meridian City Hall
Date: 7/25-29/2003

Work Description: Heating of water for winter only

<table>
<thead>
<tr>
<th>Labor</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jose Estrella</td>
<td>1/4</td>
</tr>
<tr>
<td>Jose Estrella</td>
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<tr>
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<td>1/3</td>
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</table>

<table>
<thead>
<tr>
<th>Equipment</th>
<th>Type of Equip.</th>
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</thead>
<tbody>
<tr>
<td>Name</td>
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<tr>
<td>Type of Equip.</td>
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<table>
<thead>
<tr>
<th>Materials</th>
<th>Quantity</th>
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</thead>
<tbody>
<tr>
<td>Item</td>
<td></td>
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NOTES:

TMC, Inc. Foreman

General Contractor

CM009991
### Job Detail Report

**TMC INC.**

**, 3/20/2005**

**Contract:** 0.00  
**Change Orders:** 0.00  
**Revised:** 0.00  
**Prev. Billed:** 0.00  
**Open:** 0.00

**Meridian City Hall**  
33 Emsl Broadway Ave.  
Meridian, ID 83642

---

**Job: 10719**

<table>
<thead>
<tr>
<th>Description</th>
<th>Date</th>
<th>Invoice</th>
<th>P.O.</th>
<th>Contract</th>
<th>Billings To Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase 3D - Cold Weather</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MORTAR COLD WEATHER ADSTIVES</td>
<td>2/7/2003</td>
<td>185043</td>
<td>10719-3</td>
<td>1 1/2# Freezcan Bag Basalt-Boise</td>
<td></td>
</tr>
</tbody>
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**Category: 44160**  
**Totals:** 0.00  
**Phase 3C Totals:** 0.00  
**Job 10719 Totals:** 0.00

<table>
<thead>
<tr>
<th>Material</th>
<th>Actual</th>
<th>Budget</th>
<th>Over</th>
<th>Quantity</th>
<th>Bill No.</th>
<th>Date Posted</th>
<th>Billing Cycle</th>
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<tr>
<td></td>
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<td>0.00</td>
<td>0.00</td>
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**Contact:** 0.00  
**Change Orders:** 0.00  
**Revised:** 0.00  
**Prev. Billed:** 0.00  
**Open:** 0.00

**Meridian City Hall**  
33 Emsl Broadway Ave.  
Meridian, ID 83642

---

**Job: 10719**

<table>
<thead>
<tr>
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<td>0.00</td>
<td>120</td>
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<td></td>
</tr>
</tbody>
</table>

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**Contact:** 0.00  
**Change Orders:** 0.00  
**Revised:** 0.00  
**Prev. Billed:** 0.00  
**Open:** 0.00

**Meridian City Hall**  
33 Emsl Broadway Ave.  
Meridian, ID 83642

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**Job: 10719**

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<thead>
<tr>
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<td>185043</td>
<td>10719-3</td>
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</table>

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**Totals:** 0.00  
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<tbody>
<tr>
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<td>0.00</td>
<td>0.00</td>
<td>120</td>
<td>2/15/2008</td>
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</tr>
<tr>
<td>No.</td>
<td>Description</td>
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<td>Invoice</td>
<td>P.O.</td>
<td>Contract</td>
<td>Billing</td>
<td>To Date</td>
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<td><strong>Phase 3 - Cold Weather</strong></td>
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<tr>
<td>400</td>
<td>COLD WEATHER LAB</td>
<td>2/10/2008</td>
<td>CW: 18/2008</td>
<td>Todd</td>
<td>176.00</td>
<td>24,000.00</td>
<td>7.00</td>
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<td>2/17/2008</td>
<td>CW: 2/17/2008</td>
<td>Todd</td>
<td>75.00</td>
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<td>2/24/2008</td>
<td>CW: 1/22/2008</td>
<td>Todd</td>
<td>50.00</td>
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<td>3/2/2008</td>
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<td><strong>Category 0400 Totals</strong></td>
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<td><strong>Phase 3 Totals</strong></td>
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<td></td>
<td><strong>Job 10719 Totals</strong></td>
<td></td>
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</tbody>
</table>

- Actual: 362.50
- Budget: 24,000.00
- Over: -23,637.50
- 14.50 hrs

Total Labor: 14.5 hrs
DATE: 3/25/08

FAX#: 323.4507

FROM: J. D. G.

TO: Petra

ATTN: ___________________________

RE: Meridian City Hall

COMMENTS: Cold Weather Billing

for February 2008


Thanks,

T. D.

NUMBER OF PAGES INCLUDING COVER SHEET: __________
Davis Constr.  
362 Rio Vista E.  
McCall, ID 83638  
Phone 573-9732  
Fax 208-634-1612

**INVOICE #**

<table>
<thead>
<tr>
<th>ITEM</th>
<th>DESCRIPTION</th>
<th>QTY</th>
<th>RATE</th>
<th>AMOUNT</th>
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</thead>
<tbody>
<tr>
<td>Meridian City Hall</td>
<td>labor</td>
<td>92</td>
<td>10.00</td>
<td>920.00</td>
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</table>

- **WINDOW WRAP**

- **WINTER CONDITIONS**
  - **TEMPORARY PROTECTION**
  - **WINDS**
  - **OUI & TEMP**

- **DAVIS - WORST CONDITION**
  - **MORE SLOW THAN**
  - **TEMP & LABOR**

**Subtotal** | **Total** |
<table>
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<tbody>
<tr>
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**DATE** | **INVOICE #** |
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<td>128</td>
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</table>

**DUE DATE** | **P.O. NUMBER** |
<table>
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</thead>
<tbody>
<tr>
<td>4/25/2008</td>
<td>CM009995</td>
</tr>
</tbody>
</table>

**BILL TO**

Petra Inc.

**SHIP TO**

**Enters**

MAR 26 2008

**ENTERED**
**SIDEWALKS, LLC**

1735 S Millenium Way
Meridian ID 83642

---

**Bill To**

Petra
1097 N. Rosario St.
Meridian, ID 83642

---

**Meridian City Hall**

<table>
<thead>
<tr>
<th>Quantity</th>
<th>Description</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Water pump north elevator November Labor 7 men hours $350 Material $150</td>
<td>500.00</td>
<td>500.00</td>
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</table>

**Job Name:** M66
**Job Number:** 06 96 25
**Cost Code:** Q1-630
**Authorized by:**
**Date Posted:** By:
**Budget:**
**Over Budget:**

**Note:** LABOR & EQUIPMENT TO
Remove water from the building - elevator pits
Winter Conditions

---

**Total**

$500.00

**Payments/Credits**

$0.00

**Balance Due**

$500.00
### Invoice

**SIDEWALKS, LLC**

1735 S Millenium Way
Meridian, ID 83642

**Meridian City Hall**

<table>
<thead>
<tr>
<th>Quantity</th>
<th>Description</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Heating, rental, visqueen, and set up $1175</td>
<td>$1,175.00</td>
<td>$1,175.00</td>
</tr>
</tbody>
</table>

**Due Date:** 4/10/2008  
**P.O. No.:** City Hall

**Description:**

- **Dec-08**
  - Set up tent to protect concrete from the weather.

**Job Name:**  
**Job Number:**  
**Cost Code:** 02-630  
**Authorized by:**  
**Date Posted:**  
**Budget:**  
**Over Budget:**

---

**Total:** $1,175.00

<table>
<thead>
<tr>
<th>Phone #</th>
<th>Fax #</th>
</tr>
</thead>
<tbody>
<tr>
<td>(208)955-9000</td>
<td>(208)955-9050</td>
</tr>
</tbody>
</table>

**Payments/Credits:** $0.00

**Balance Due:** $1,175.00

---

CM009997  
006044
Bill To:
Petra Contractors
1097 N Rosario
Meridian ID 83642

<table>
<thead>
<tr>
<th>Quantity</th>
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<th>Extended Price</th>
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<td>FWA 12/5/07</td>
<td>311.00</td>
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<tr>
<td>1.00</td>
<td>FWA 12/20/07</td>
<td>311.00</td>
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<tr>
<td>1.00</td>
<td>FWA 1/4/08</td>
<td>220.00</td>
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<tr>
<td>0.02</td>
<td>2% BOND INCREASE</td>
<td>17.66</td>
<td></td>
</tr>
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</table>

NO BOND

LABOR & EQUIPMENT TO REPAIR & MAINTAIN
THE CONSTRUCTION ENTRANCES FOR THE SUPPORT

Thank You For Your Business!
Amount Now Due: 859.00

Terms: Thirty Days from Invoice
PROJECT: Meridian City Hall

TO: Petra Contractors
1097 N. Rosario Street
Meridian, ID 83642
Phone: 208-323-4500 Fax: 208-323-4507

ATTN: Tom Coughlin

WE ARE SENDING:

<table>
<thead>
<tr>
<th>ITEM</th>
<th>DATE DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item 1 Shop Drawings</td>
<td>03/31/2008 Direct invoice work per your request</td>
</tr>
</tbody>
</table>

REMARKS:
Please call if you have any questions. Thank you.

Signed: [Signature]

Date: 04/01/2008
PROJECT: Meridian City Hall

TO: Petra Contractors
1097 N. Rosario Street
Meridian, ID 83642
Phone: 208-323-4500 Fax: 208-323-4507

ATTN: Tom Coughlin

WE ARE SENDING: □ Shop Drawings
□ Letter
□ Prints
□ Change Order
□ Plans
□ Samples
□ Specifications
□ Other:

SUBMITTED FOR: □ Approval
□ Your Use
□ As Requested
□ Review and Comment
□ Submit
□ Other:
□ Attached
□ Separate Cover Via:
□ Other:

ACTION TAKEN: □ Approved as Submitted
□ Approved as Noted
□ Resubmit
□ Submitted
□ Returned
□ Returned for Corrections
□ Due Date:

DRAWING ITEM NO. COPIES DATE DESCRIPTION
1 01/31/2008 COR #10 - FWA work 12/5 - 1/4/08

REMARKS:
Please call if you have any questions. Thank you.

P.S. I would also like to follow up on RCO #s 8 and 9. They are the only outstanding change orders to date and I believe they may be causing a hold up on our payment for December. Please let me know. Thank you.

Signed: Chris Apostolou

Date: 01/31/2008
Change Order

Status: Estimated

Date: 01/31/08
Internal CO: 10
Internal Job No: 7004

MERIDIAN CITY HALL
1037 N Rosario
Meridian, ID 83642

P'aira Contractors
1037 N Rosario
Meridian, ID 83642

Attention:
Owner CO No: COR #10

FORCED WORK FROM 12/5/07 THROUGH 1/4/08
FWA 12/5/07
FWA 12/20/07
FWA 1/4/08
2% BOND INCREASE

Total this Change Order: 859.00

Original Contract: 610,314.00
Previously Approved Change Orders: 162,782.00
Revised Contract to Date: 773,955.00

Accepted Date: ____________________________
Accepted By: ______________________________

Please sign and return a copy as soon as possible

CM010001

006048
# WORK ORDER

**PETRA INCORPORATED**

**PROJECT NAME:** Meridian City Hall

**ADDRESS:**

**DESCRIPTION OF WORK:** Repair BMP to site off Broadway

## JOB #

**OWNER:** City of Meridian

**DATE:** 12/6/2008

### LABOR HRS

<table>
<thead>
<tr>
<th>NAME</th>
<th>OCCUPATION</th>
<th>STANDARD HOURS</th>
<th>STANDARD RATE</th>
<th>OVERTIME HOURS</th>
<th>OVERTIME RATE</th>
<th>AMOUNT</th>
</tr>
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<tbody>
<tr>
<td>Jim Gordon</td>
<td>Foreman</td>
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<td>$ 46</td>
<td></td>
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**SUBTOTAL**

**EQUIPMENT**

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<tr>
<th>EQUIPMENT</th>
<th>DAYS</th>
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<tbody>
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<td>950 4-YARD LOADER</td>
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<td>$ 79</td>
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<tr>
<td>315 EXCAVATOR</td>
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<td>$ 79</td>
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<tr>
<td>310SG JD BACKHOE</td>
<td></td>
<td></td>
<td></td>
<td>$ 79</td>
</tr>
<tr>
<td>260 SKIDSTEER</td>
<td></td>
<td></td>
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<td>$ 79</td>
</tr>
<tr>
<td>TK #12 W/PUP</td>
<td></td>
<td></td>
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<td>$ 79</td>
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<tr>
<td>TK #32 SINGLE</td>
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<td>$ 79</td>
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**SUBTOTAL**

**SUPPLIES & MATERIAL**

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<thead>
<tr>
<th>INVOICE</th>
<th>QUANTITIES</th>
<th>UNITS</th>
<th>PRICE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ada Sand &amp; Gravel</td>
<td>DRAIN ROCK</td>
<td>6.25/cy + tx</td>
<td>$ 104</td>
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</table>

**SUBTOTAL**

**CONTRACTOR SIGNATURE**

<table>
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<th>AMOUNT</th>
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<tbody>
<tr>
<td>$ 46</td>
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<tr>
<td>$ 133</td>
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<tr>
<td>$ 104</td>
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<td>$ 28</td>
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**PETRA SUPERINTENDENT**

**TOTAL**

$ 311
**WORK ORDER**

**PETRA INCORPORATED**

**PROJECT NAME:** Meridian City Hall

**ADDRESS:**

**DESCRIPTION OF WORK:** repair BMP to site off Broadway.

**DATE:** 12/5/2007

**JOB #**

**OWNER:** City of Meridian

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<thead>
<tr>
<th>LABOR MJS</th>
<th>OCCUPATION</th>
<th>STANDARD HOURS</th>
<th>RATE</th>
<th>OVERTIME HOURS</th>
<th>RATE</th>
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<tbody>
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**SUBTOTAL**

**SUPPLIES & MATERIAL**

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<td>16.68 yds</td>
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**SUBTOTAL**

**CONTRACTORS**

**NOTE**

**SUBTOTAL**

**SUMMARY**

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<td>SUPPLIES &amp; MATERIAL</td>
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<td>SUBCONTRACTOR</td>
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<td>PETRA OVERHEAD &amp; PROFIT</td>
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**TOTAL**

Received Time Jan. 5, 12:07PM
**Daily Report**

**MJ'S backhoe & Excavation, Inc.**

**6679 S. Supply Way * Boise, ID 83716 * Phone (208) 433-9933 * Fax (208) 433-0935**

**DATE: 12-5-07**

**WEATHER/CONDITIONS:**

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<tr>
<th>MANPOWER</th>
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<td>9</td>
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<td>RUPEE</td>
<td>4</td>
<td>SKIDSTEER</td>
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<td>ROSS</td>
<td>10.5</td>
<td>8AR ROLL</td>
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<td>GALL</td>
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<td>BUCY</td>
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**MATERIALS/CONTRACT**

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<td>ATTACH: 309.44YDS - ADA - PLAZA SUBGRADE</td>
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<td>DRAZ 60YDS - 1ST HYDR - ADA - SOUTH DUMP</td>
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<tr>
<td>T6912</td>
<td>P/R - 95.24YDS - ADA - PLAZA SUBGRADE</td>
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<td>T6912</td>
<td>P/R - 62.63YDS - ADA - PLAZA SUBGRADE</td>
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<td>P/R - 137.19YDS - ADA - PLAZA SUBGRADE</td>
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**WORK COMPLETED/COMMENTS:**

Sever inspected & approved (no pressure test to be done due to test waived by inspector - City of Meridian) 100% complete.

Built up plaza grade w/Attun (North hole); working late for crane pad build up.

*Not allocated residential/mixed grade*

Opened Broadway for traffic (after) notified/approved.

Change Orders:

- [Signatures]

**FOREMAN'S SIGNATURE:**

**RECEIVED TIME:** Jan 5, 12:07PM

CM010004
**WORK ORDER**

**PETRA INCORPORATED**

**PROJECT NAME:** Meridian City Hall

**DESCRIPTION OF WORK:** Repair east entrance from rain/weather

**DATE:** 12/20/2007

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<thead>
<tr>
<th>LABOR MJ'S</th>
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<th>STANDARD HOURS</th>
<th>RATE</th>
<th>OVERTIME HOURS</th>
<th>RATE</th>
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<tbody>
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<td>JIM GORDON</td>
<td>FOREMAN</td>
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**EQUIPMENT**

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<th>QUANTITIES</th>
<th>UNITS</th>
<th>PRICE</th>
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</thead>
<tbody>
<tr>
<td>Ada Sand &amp; Gravel</td>
<td>Pit run</td>
<td>20 cy</td>
<td>2.75/cy</td>
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**SUMMARY**

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**PETRA SUPERINTENDENT**

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WORK ORDER

PETRA INCORPORATED

PROJECT NAME: Meridian City Hall
ADDRESS: Han
DESCRIPTION OF WORK: repair east entrance from rain / weather

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<th>LABOR M/U</th>
<th>NAME</th>
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<th>STANDARD HOURS</th>
<th>OVERTIME HOURS</th>
<th>AMOUNT</th>
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</thead>
<tbody>
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EQUIPMENT

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<th>HOURS</th>
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<tr>
<td>310</td>
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SUPPLIES & MATERIAL

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<th>INVOICE</th>
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<th>UNITS</th>
<th>PRICE</th>
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<tbody>
<tr>
<td>pH run</td>
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CONTRACTORS

NOTES

CONTRACTOR SIGNATURE

PETRA SUPERINTENDENT

Received Time Jan. 5, 12:07PM

CM010006
**Daily Report**

**JOB NO.** City Hall

**CONTRACTOR/SUPER.**

**DATE** 12-20-07

**WEATHER/CONDITIONS** Rain

**TEMPERATURE** 45° HIGH 44° LOW

### Manpower

<table>
<thead>
<tr>
<th>Manpower</th>
<th>Hours</th>
<th>Equipment</th>
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<td>John</td>
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### Materials/Subcontract

<table>
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</table>

**Work Completed/Comments:**

Repair east approach - remove unsuitable materials and replace with bitumen.

Modulized 310SC/310MG

**Change Orders:**

**Foreman's Signature:**

**Received Time:** Jan. 5, 12:07 PM

**NOTES ON RE**

CM010007
# Work Order

## Petra Incorporated

**Project Name:** Meridian City Hall  
**Date:** 1/4/2008  
**Owner:** City of Meridian  
**Address:**

**Description of Work:** Remove temp access ramp into the building at east side

### Labor Hours

<table>
<thead>
<tr>
<th>Name</th>
<th>Occupation</th>
<th>Standard Hours</th>
<th>Overtime Hours</th>
<th>Amount</th>
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</thead>
<tbody>
<tr>
<td>JR Morel</td>
<td>Superintendent</td>
<td>2 $46</td>
<td>$36</td>
<td>$92</td>
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<td></td>
<td></td>
<td>$36</td>
<td>$36</td>
<td>$-</td>
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<tr>
<td></td>
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<tr>
<td></td>
<td></td>
<td>0 $36</td>
<td>$-</td>
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### Equipment Rental

<table>
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<th>Days</th>
<th>Hours</th>
<th>Rental Rate</th>
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<td>79</td>
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<td>315 Excavator</td>
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<td>89</td>
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<td>310SG JD Backhoe</td>
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<td>54</td>
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<td>$108</td>
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<td>260 Skid Steer</td>
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<td>TK #62 Endump</td>
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### Supplies & Material

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### Summary

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**Petra Superintendent**

CM010008
**WORK ORDER**

**PETRA INCORPORATED**

**PROJECT NAME:** Meridian City Hall

**ADDRESS:**

**DESCRIPTION OF WORK:**

remove temp access ramp into the building at east side.

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<th>RATE</th>
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</table>

**Received Time:** Jan. 5, 12:07PM

**CM010009**

006056
# MJ'S BACKHOE & EXCAVATION INC.
6879 S. Supply Way * Boise, ID 83716
Phx: (208) 433-0833 * Fax (208) 433-0935

### Equipment Used

<table>
<thead>
<tr>
<th>Description</th>
<th>Total HRs</th>
<th>Rate</th>
<th>Subtotal</th>
</tr>
</thead>
<tbody>
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<td>62 Hrs</td>
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</tr>
<tr>
<td>Dump Truck / Single</td>
<td></td>
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</tr>
<tr>
<td>Dump Truck / End of Pup</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Backhoe (4 x 4)</td>
<td>310.56 Hrs</td>
<td></td>
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<tr>
<td>Mini Excavator</td>
<td></td>
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</tr>
<tr>
<td>Skidsteer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Crawler / Dozer</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Trackhoe Excavator (316L)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loader (3 yd bucket)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drum Roller 48&quot; / 68&quot;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Motor Grader (1st Blade)</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Water Truck (4,000 gal)</td>
<td></td>
<td></td>
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<tr>
<td>Laborer(s)</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Extra / Rental Equipment</td>
<td></td>
<td></td>
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</tbody>
</table>

### Material(s)

- Inv. No.

### Permits

- No.

### Other Subcontractors

- Inv. No.

### Remarks / Work Done

Mob. on site, Dig out pit run ramp up 770 on west side of building.

### Operator

- Name: [Redacted]
- Signature: [Redacted]

### Driver

- Name: [Redacted]
- Signature: [Redacted]

### Authorized Signature

- Name: [Redacted]
- Signature: [Redacted]

### Date

- 1-4-08

The LESSEE agrees that the owner and/or operators shall NOT be held responsible for any accident or damages resulting from the use of the equipment. Not responsible for delays beyond our control.

Costs for materials, permits, rental equipment & other subcontractors are subject to a minimum of 10% mark-up for overhead & profit.

Received Time Jan. 5, 12:07PM

CM010010
Project Name: Meridian City Hall
Location: Meridian, ID
Date: February 18, 2008
Attn: Tom Coughlin/Petra
RE: Construction DFA 2 Log

DFA 28 $560.00
DFA 29 $210.00
DFA 30 $455.00

ADD ADDITIONAL FRAMING TO SUPPORT
R2 LAUNDRY TOPS. NO LEGS SHOWN.
FRAMING HAD TO BE STIFFENED
TO SUPPORT THE LAUNDRY TOP FRAME

Subtotal $1,225.00
Bond $24.50
Total $1,249.50

Sincerely,

Mike K. Crawford
Project Manager/American Wallcover, Inc.
**DFA 28**

**SUBCONTRACTOR:** American Wallcon, Inc.  
**PROJECT DIVISION:** Commercial Tenant Improvement  
**PROJECT TYPE:** Malden City Hall  
**PROJECT SUPER:** John Anderson  
**DESCRIPTION OF WORK:** Frame buildup for to be converted to penthouse

<table>
<thead>
<tr>
<th>NAME</th>
<th>CLASSIFICATION</th>
<th>HOURS</th>
<th>RATE</th>
<th>TOTAL</th>
<th>BUILDING</th>
<th>AMOUNT</th>
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<td>Jeremy Redman</td>
<td></td>
<td>$35.00</td>
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<tr>
<td>Hilary Alvarez</td>
<td></td>
<td>$35.00</td>
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<tr>
<td>Bill Hansen</td>
<td></td>
<td>$35.00</td>
<td></td>
<td></td>
<td>m.c. H. 270.00</td>
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<tr>
<td>Jorge Garbay</td>
<td></td>
<td>$35.00</td>
<td></td>
<td></td>
<td>m.c. H. 270.00</td>
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<tr>
<td>Gabriel Correa</td>
<td></td>
<td>$35.00</td>
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<tr>
<td>Rodinrio Bano</td>
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<td>$35.00</td>
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<tr>
<td>Anthony De Jesus</td>
<td></td>
<td>$35.00</td>
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<tr>
<td>Edgar De Jesus</td>
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<td>$35.00</td>
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<td>$35.00</td>
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**TOTAL:** $560.00

**10' 16 g9 Track 10**

**TOTAL LABOR:** $560.00

**TOTAL MATERIAL AMOUNT:**

**TOTAL EQUIPMENT AMOUNT:**

**GRAND TOTAL:**
**Description of Work:**

Install Box Headings for Bathroom Counters

**Base Plate & 2nd Fl.**

<table>
<thead>
<tr>
<th>Name</th>
<th>Classification</th>
<th>Hrs</th>
<th>Rate</th>
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<tr>
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<td>Framing</td>
<td>6</td>
<td>$35</td>
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<td>Hluaro Alvarez</td>
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<tr>
<td>Bill Hansen</td>
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<tr>
<td>Jorge Garitay</td>
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<td>Gabriel Corra</td>
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<td>Rodolfo Baros</td>
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<tr>
<td>Anthony De Jesus</td>
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</tr>
<tr>
<td>Edgar De Jesus</td>
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<tr>
<td>Gonzalo Soto</td>
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<tr>
<td>Jose Felix</td>
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**Total:** $210.00
**WORK ORDER**

- **PROJECT SUPER:** John Anderson
- **DESCRIPTION OF WO:** Install Box Headers For Bathroom Counters
- **DATE:** 2-27-08

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<thead>
<tr>
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<th>RATE</th>
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<tr>
<td>Andy Haines</td>
<td>Frame</td>
<td>$35.00</td>
<td>8</td>
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<tr>
<td>Hector</td>
<td>Frame</td>
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<tr>
<td>Jorge Garibay</td>
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<tr>
<td>Gabriel Corza</td>
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<td></td>
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<tr>
<td>Rodolfo Baez</td>
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<tr>
<td>Anthony De Jesus</td>
<td></td>
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<tr>
<td>Edgar De Jesus</td>
<td></td>
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<tr>
<td>Gonzalo Solo</td>
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<tr>
<td>Jose Felix</td>
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**TOTAL** 455.00

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<th>QUANTITY</th>
<th>CITY</th>
<th>AMOUNT</th>
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</thead>
<tbody>
<tr>
<td>16' x 3 1/2' S Tos</td>
<td>5</td>
<td>City Hall</td>
<td></td>
</tr>
<tr>
<td>10' x 3 1/2' Track</td>
<td>5</td>
<td>City Hall</td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL** 455.00

---

**CM010014**

006061
February 19, 2008

Pac-West was given the wrong benchmark elevation to use in setting the floor. Petra Surt confused the numbers.

RE: MERIDIAN CITY HALL

SUBJECT: REQUESTED EXTRA PRICING

Per Work Authorization

1. Labor worked 02/12/2008 (see attached):
   Amount: 55 Man Hours $2,062.50

2. Labor worked 02/13/2008 (see attached):
   Amount: 66 Man Hours $2,475.00

   TOTAL: $4,537.50

Thank you,
Steve Packard

Job Name: [Redacted]
Job Number: [Redacted]
Cost Code: [Redacted]
Authorized by: [Redacted]
Date Posted: 01-930
Budget: [Redacted]
Over Budget: [Redacted]
You are authorized to perform the following specifically described additional work:

Change Elevations  Second Floor South of Building

Take part 1 Build Back Again

1. Moises Salas  7:00 AM to 1:00 PM  6 hrs
2. Oswaldo Sagues  11  6 hrs
3. Israel Segura  11  6 hrs
4. Francisca Segura  11  6 hrs
5. Daniel Segura  11  6 hrs
6. Pedro Avalos  10  6 hrs
7. Rogelio Avalos  10  6 hrs
8. Luis Mora  10  6 hrs
9. Jesus Hernandez  10  6 hrs
10. Genevendo Galindo  10  6 hrs
11. Norbado Gutierrez  10  6 hrs

Total 66 men hrs

Additional Charge for Above Work is: $ __________

Payment will be made as follows: ____________________________

Above additional work to be performed under same conditions as specified in original contract unless otherwise stipulated.

Date  __________ Authorizing Signature ____________

We hereby agree to furnish labor and materials - complete in accordance with the above specifications, at above stated price.

Authorized Signature ____________________________ Date 2-14-08

This is Change Order No.  __________

Note: This Revision becomes part of, and in conformance with, the existing contract.
# Additional Work Authorization

**PacWest Interiors, Inc.**

2820 Brandt Ave.,
Nampa, Idaho 83687
(208) 467-3331

---

**Owners' Name**
Meridian City Hall

**Phone**

**Date** 2-12-08

---

**Existing Contract Number**

**Date of Existing Contract**

**City**

**State**

---

You are authorized to perform the following specifically described additional work:

**Change Elevation** Second floor South of Building

<table>
<thead>
<tr>
<th>Name</th>
<th>Time</th>
<th>Rate</th>
<th>Hrs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Moses Salas</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Rosswaldo Saez</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Israel Segura</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Daniel Segura</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Francisco Segura</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Pedro Avalos</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Luis Mara</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Jesus Hernandez</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Jason Otiro</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>LeRoy Otiro</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Georgeino Collado</td>
<td>10:00 AM</td>
<td>5</td>
<td>5</td>
</tr>
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</table>

Total man hrs: **35 hrs**

---

**Additional Charge for Above Work is:** $270.00

Payment will be made as follows:

Above additional work to be performed under same conditions as specified in original contract unless otherwise stipulated.

Date 20 Authorizing Signature

---

We hereby agree to furnish labor and materials - complete in accordance with the above specifications, at above stated price.

Authorized Signature [Signature]

Date 2-11-08 20

THIS IS CHANGE ORDER NO.

---

NOTE: This revision becomes part of, and in accordance with, the existing contract.
Fax

To: ADAM
Company: PETRA
Date: 2/19/08
Re: MERIDIAN (2/1/08)

From: STEVE
Fax:
Phones:

Pages: (Including this Sheet) 1

☑ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Tattoo to Steve P
3/12 - Bill Separately

Benign and/or material incoherent
March 13, 2008

Petra, Inc.
Attn. Mr. Tom Coughlin
9056 West Blackeagle Drive
Boise, ID 83709

RE: MERIDIAN CITY HALL

SUBJECT: ADDITIONAL WORK AUTHORIZATION

Please portion of Overtime to accelerate
Floors - Allow other to proceed to
close in around 2nd floor
AWA #3 - 22 Man Hours $ 412.50

Thank you,

Steve Packard

Job Authorizations
OK per Jan A

Job Name: 
Job Number: 06-0975
Cost Code: 04-930
Authorized by: 
Date Posted: 
Budget: 
Over Budget: 

ENTERED 
MAR 2, 2008

CM010019

006066
ADDITIONAL WORK AUTHORIZATION

Pac West Interiors, Inc.
2820 Brandt Ave.
Nampa, Idaho 83687
(208) 467-3331

DATE: 3/27-28-08

Meridian City Hall

OWNERS NAME

STREET

CITY

STATE

JOB NAME

JOB NUMBER

You are authorized to perform the following specifically described additional work:

Pac West employee work late

Over Time

Moises Salas

4 hrs

Gumerindo Collado

4 hrs

Josue Hernandez

1 hrs

Sergio Chavez

4 hrs

Pedro Avalos

5 hrs

Total: 22 hrs over time

Overtime paid at premium.

ADDITIONAL CHARGE FOR ABOVE WORK IS: $ 412.50

Payment will be made as follows:

Above additional work to be performed under same conditions as specified in original contract unless otherwise stipulated.

Date 20

Authorized Signature

We hereby agree to furnish labor and materials - complete in accordance with the above specifications, at above stated price.

Authorized Signature

Date 20

THIS IS CHANGE ORDER NO.

NOTE: This Revision becomes part of, and in conformance with, the existing contract.
### Invoice

**Date:** 12/31/2007  
**Invoice #:** 07-12126

---

**SIDEWALKS, LLC**  
1735 S Millenium Way  
Meridian ID 83642

---

**Bill To:**

Petra  
1097 N. Rosario St.  
Meridian, ID 83642

---

<table>
<thead>
<tr>
<th>Due Date</th>
<th>P.O. No.</th>
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<tbody>
<tr>
<td>1/10/2008</td>
<td>City Hall</td>
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---

**Meridian City Hall**

**Quantity** | **Description** | **Rate** | **Amount**
---|---|---|---
1 | Caution teachers install bolts  
11-14-07, 11-26-07, and 11-27-07  
Labor 15 man hours $750 Material $300 | 1,050.00 | 1,050.00

---

---

---

---

---

**Job Conditions**

**Job Name:** Metl  
**Job Number:** N6-0075  
**Cost Code:** 08-235  
**Authorized by:**  
**Date Posted:** By:  
**Budget:**  
**Over Budget:**

---

**Total**  
$1,050.00

---

**Payments/Credits**  
$0.00

---

**Balance Due**  
$1,050.00

---

**CM010021**
# Invoice

**SIDEWALKS, LLC**

1735 S Millenium Way  
Meridian ID 83642

## Bill To

Ferna  
1097 N. Rosario St.  
Meridian, ID 83642

## Meridian City Hall

<table>
<thead>
<tr>
<th>Quantity</th>
<th>Description</th>
<th>Rate</th>
<th>Amount</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Anchor Bolt Replacce-Damaged by MJ Backhoe. Drill Rental and Drill Bit $295.26, Expro $20.00, Labor 2 man hours $100</td>
<td>445.26</td>
<td>445.26</td>
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</table>

- **Job Name:** [Redacted]  
- **Job Number:** [Redacted]  
- **Cost Code:** [Redacted]  
- **Authorized by:** [Redacted]  
- **Date Posted:** [Redacted]  
- **Budget:** [Redacted]  
- **Over Budget:** [Redacted]

**Total:** $445.26

<table>
<thead>
<tr>
<th>Phone #</th>
<th>Fax #</th>
</tr>
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<tbody>
<tr>
<td>(208)955-9080</td>
<td>(208)955-9050</td>
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**Payments/Credits:** $0.00

**Balance Due:** $445.26

CM010022

006069
<table>
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<th>Description</th>
<th>Unit Price</th>
<th>Extended Price</th>
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<tr>
<td>1.50</td>
<td>Trinity Sackos - Labor to move materials for block storage</td>
<td>46.00</td>
<td>69.00</td>
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<td>1.00</td>
<td>Tates Rents inv. #190718; Rental Backhoe</td>
<td>72.00</td>
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<tr>
<td>2.50</td>
<td>Trinity Sackos - Ran Loader to build approach for crane at Broadway and load out concrete from washout</td>
<td>46.00</td>
<td>115.00</td>
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<tr>
<td>1.00</td>
<td>Ross Denney - Truck Driver to haul off spoils from concrete washout</td>
<td>36.00</td>
<td>36.00</td>
</tr>
<tr>
<td>1.00</td>
<td>Bill Newton - Truck Driver to haul off spoils from concrete washout</td>
<td>36.00</td>
<td>36.00</td>
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<tr>
<td>2.50</td>
<td>950 4-yard Cat Loader</td>
<td>79.20</td>
<td>198.00</td>
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<td>1.00</td>
<td>Tk #32 Single</td>
<td>49.00</td>
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<td>1.00</td>
<td>Tk #22 Endump</td>
<td>39.00</td>
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<td>13.08</td>
<td>Ada Sand &amp; Gravel</td>
<td>6.65</td>
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<td>0.10</td>
<td>10% O/P</td>
<td>70.00</td>
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<td>0.02</td>
<td>2% Bond Increase - No Bond</td>
<td>806.66</td>
<td>16.66</td>
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Thank You For Your Business! 
Terms: Thirty Days from Invoice

Amount Now Due: 787.00
6679 S. Supply Way
Boise, ID 83716
License RCE-8597
Phone: (208) 433-0933
Fax: (208) 433-0935

PROJECT: Meridian City Hall

TO: Petra Contractors
9056 W. Blackeagle Drive
Boise, ID 83709
Phone: 208-493-2747 Fax: 208-493-2747

ATTN: Wes Bettis

WE ARE SENDING: SUBMITTED FOR: ACTION TAKEN:
☐ Shop Drawings ☑ Approval ☐ Approved as Submitted
☐ Letter ☑ Your Use ☐ Approved as Noted
☐ Prints ☑ As Requested ☐ Resubmit
☐ Change Order ☑ Review and Comment ☑ Submit
☐ Plans ☐ Other: ☐ Returned
☐ Samples ☑ Sent Via:
☐ Specifications ☑ Attached ☐ Returned for Corrections
☐ Other: ☑ Separate Cover Via:
☐ Other:

SUBMITTAL DRAWING ITEM NO. COPIES DATE DESCRIPTION
1 11/21/2007 COR #9

REMARKS:
Please call if you have any questions. Thank you.

Signed: Chris Apostolou
Chris Apostolou
Date: 11/21/2007
**WORK ORDER**

**PETRA INCORPORATED**

**PROJECT NAME:** Meridian City Hall  
**ADDRESS:**  
**DESCRIPTION OF WORK:** Move Materials for Block Storage

<table>
<thead>
<tr>
<th>LABOR M/F</th>
<th>NAME</th>
<th>OCCUPATION</th>
<th>STANDARD HOURS</th>
<th>RATE</th>
<th>OVERTIME HOURS</th>
<th>RATE</th>
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<td></td>
<td>TRINITY SACKOS</td>
<td>OPERATOR</td>
<td>1.5 $ 46</td>
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<td>$ 69</td>
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**EQUIPMENT**

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<td>$ 59</td>
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<tr>
<td>315 EXCAVATOR</td>
<td></td>
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<td></td>
<td>$ 89</td>
</tr>
<tr>
<td>310SG JD BACKHOE</td>
<td></td>
<td></td>
<td></td>
<td>$ 54</td>
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<tr>
<td>260 SKIDSTEER</td>
<td></td>
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<td></td>
<td>$ 49</td>
</tr>
<tr>
<td>224 18&quot; DD ROLLER</td>
<td></td>
<td></td>
<td></td>
<td>$ 29</td>
</tr>
<tr>
<td>TK #22 ENDUMP</td>
<td></td>
<td></td>
<td></td>
<td>$ 49</td>
</tr>
<tr>
<td>TK #72 H20</td>
<td></td>
<td></td>
<td></td>
<td>$ 49</td>
</tr>
</tbody>
</table>

**SUPPLIES & MATERIAL**

<table>
<thead>
<tr>
<th>INVOICE</th>
<th>QUANTITIES</th>
<th>UNITS</th>
<th>PRICE</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tato's Rents</td>
<td>190718</td>
<td></td>
<td></td>
<td>$ 72</td>
</tr>
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</table>

**CONTRACTOR SIGNATURE**

<table>
<thead>
<tr>
<th>PERMITS</th>
<th>SUPPLIES &amp; MATERIAL</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>$ 72</td>
</tr>
</tbody>
</table>

**PETRA SUPERINTENDENT**

<table>
<thead>
<tr>
<th>PETRA OVERHEAD &amp; PROFIT</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$ 155</td>
</tr>
</tbody>
</table>

**DATE:** 10/19/2007  
**OWNER:** City of Meridian
**WORK ORDER**

**PETRA INCORPORATED**

**PROJECT NAME:** Meridian City Hall  
**ADDRESS:**  
**DESCRIPTION OF WORK:** move material for block storage.

<table>
<thead>
<tr>
<th>LABOR M/S</th>
<th>NAME</th>
<th>OCCUPATION</th>
<th>STANDARD HOURS</th>
<th>RATE</th>
<th>OVERTIME HOURS</th>
<th>RATE</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>TIPPIE</td>
<td>OPERATOR</td>
<td>1.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TIPPIE</td>
<td>OPERATOR</td>
<td>1.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TIPPIE</td>
<td>OPERATOR</td>
<td>1.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TIPPIE</td>
<td>OPERATOR</td>
<td>1.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TIPPIE</td>
<td>OPERATOR</td>
<td>1.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TIPPIE</td>
<td>OPERATOR</td>
<td>1.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SUBTOTAL</td>
<td>1.5</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**EQUIPMENT**  
**Rental back hoe 310-J**  
**Days**  
**Hours**  
**Rentals Rate**

<table>
<thead>
<tr>
<th>SUBTOTAL</th>
</tr>
</thead>
</table>

**SUPPLIES & MATERIAL**  
**INVOICE**  
**QUANTITIES**  
**UNITS**  
**PRICE**

<table>
<thead>
<tr>
<th>SUBTOTAL</th>
</tr>
</thead>
</table>

**CONTRACTORS**  
**NOTES**

<table>
<thead>
<tr>
<th>SUBTOTAL</th>
</tr>
</thead>
</table>

**CONTRACTOR SIGNATURE**

**PETRA SUPERINTENDENT**

*Received Time Nov.21. 10:06AM*

CM010026
**Daily Report**

**Contractor/Supervisor**: J. Hall

**Date**: 10-19-07

**Weather/Conditions**: High 65 Low 50

<table>
<thead>
<tr>
<th>Manpower</th>
<th>Hours</th>
<th>Equipment</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Material/Subcontract**

INV

**Remarks/Comments**: Area 639 with backhoe for block storage

**Time**: 1/2

**Change Orders**

**Received Time**: Nov. 21, 10:06 AM
POOR COPY
## Work Order

**Petra Incorporated**

**Project Name:** Meridian City Hall

**Address:**

**Description of Work:** Build approach for crane at Broadway. Haul out concrete from wash out.

### Labor Hours

<table>
<thead>
<tr>
<th>Name</th>
<th>Occupation</th>
<th>Standard Hours</th>
<th>Rate</th>
<th>Overtime Hours</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr. SACCON</td>
<td>Operator</td>
<td>2.5</td>
<td>$46</td>
<td></td>
<td></td>
<td>$116</td>
</tr>
<tr>
<td>Mr. Dineny</td>
<td>Driver</td>
<td>1</td>
<td>$36</td>
<td></td>
<td></td>
<td>$36</td>
</tr>
<tr>
<td>Mr. Newton</td>
<td>Driver</td>
<td>1</td>
<td>$36</td>
<td></td>
<td></td>
<td>$36</td>
</tr>
<tr>
<td>Mr. Newton</td>
<td>Driver</td>
<td>1</td>
<td>$36</td>
<td></td>
<td></td>
<td>$36</td>
</tr>
<tr>
<td>Mr. Newton</td>
<td>Driver</td>
<td>1</td>
<td>$36</td>
<td></td>
<td></td>
<td>$36</td>
</tr>
<tr>
<td>Mr. Newton</td>
<td>Driver</td>
<td>1</td>
<td>$36</td>
<td></td>
<td></td>
<td>$36</td>
</tr>
</tbody>
</table>

**Subtotal:** $187

### Equipment Rental

<table>
<thead>
<tr>
<th>Equipment</th>
<th>Days</th>
<th>Hours</th>
<th>Rental Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>950 4-Yard Loader</td>
<td>2.5</td>
<td>$79</td>
<td>$198</td>
<td></td>
</tr>
<tr>
<td>315 Excavator</td>
<td>0</td>
<td>$89</td>
<td>$ -</td>
<td></td>
</tr>
<tr>
<td>310SG JD Backhoe</td>
<td>0</td>
<td>$54</td>
<td>$ -</td>
<td></td>
</tr>
<tr>
<td>260 Skid Steer</td>
<td>0</td>
<td>$49</td>
<td>$ -</td>
<td></td>
</tr>
<tr>
<td>TK #22 Endump</td>
<td>1</td>
<td>$49</td>
<td>$49</td>
<td></td>
</tr>
<tr>
<td>TK #32 Single</td>
<td>1</td>
<td>$39</td>
<td>$39</td>
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</tr>
</tbody>
</table>

**Subtotal:** $288

### Supplies & Material

<table>
<thead>
<tr>
<th>Description</th>
<th>Invoice</th>
<th>Quantities</th>
<th>Units</th>
<th>Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ada Sand &amp; Gravel</td>
<td></td>
<td>13.08</td>
<td>cy</td>
<td>6.25/cy + tx</td>
</tr>
</tbody>
</table>

**Subtotal:** $87

### Summary

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labor</td>
<td>$187</td>
</tr>
<tr>
<td>Equipment Rental</td>
<td>$288</td>
</tr>
<tr>
<td>Permits</td>
<td>$ -</td>
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<tr>
<td>Supplies &amp; Material</td>
<td>$87</td>
</tr>
<tr>
<td>Subtotal</td>
<td>$355</td>
</tr>
<tr>
<td>Petra Overhead &amp; Profit</td>
<td>$66</td>
</tr>
<tr>
<td>Total</td>
<td>$421</td>
</tr>
</tbody>
</table>

**Total:** $421

**Contractor Signature:**

**Petra Superintendent:**

**City of Meridian**

**Date:** 11/8/2007

**Job #:**

---

CM010029

006076
WORK ORDER

PETRA INCORPORATED

PROJECT NAME: Meridian City Hall
DESCRIPTION OF WORK: build approach for crane at Broadway
haul out concrete from wash out.

<table>
<thead>
<tr>
<th>NAME</th>
<th>OCCUPATION</th>
<th>STANDARD HOURS</th>
<th>RATE</th>
<th>OVERTIME HOURS</th>
<th>RATE</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tiny</td>
<td>OPERATOR</td>
<td>2.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tiny</td>
<td>OPERATOR</td>
<td>2.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tiny</td>
<td>OPERATOR</td>
<td>2.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tiny</td>
<td>OPERATOR</td>
<td>2.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tiny</td>
<td>OPERATOR</td>
<td>2.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tiny</td>
<td>OPERATOR</td>
<td>2.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

TOTAL 2.5 0

EQUIPMENT DAYS HOURS RENTAL RATE
loader 960 2.5

TIL: Haul out concrete wash

TOTAL

SUPPLIES & MATERIAL

<table>
<thead>
<tr>
<th>INVOICE</th>
<th>QUANTITIES</th>
<th>UNITS</th>
<th>PRICE</th>
</tr>
</thead>
<tbody>
<tr>
<td>drain rock. 13.06 YDS</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

TOTAL

CONTRACTORS

NOTES

SUBTOTAL

CONTRACTOR SIGNATURE

PETRA SUPERINTENDENT

SUMMARY AMOUNT

LABOR

EQUIPMENT RENTAL

PERMITS

SUPPLIES & MATERIAL

SUBCONTRACTOR

PETRA OVERHEAD & PROFIT

TOTAL

Received Time Nov. 21, 10:06AM

CM010030

006077
# Daily Report

**Date:** 11/16/07  
**Weather/Conditions:** Clear  
**Temperature:** High 64°F  
**Low 48°F**

<table>
<thead>
<tr>
<th>Equipment</th>
<th>Hours</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>USD</td>
<td>8</td>
<td>7</td>
</tr>
<tr>
<td>9155 Min.</td>
<td>952</td>
<td></td>
</tr>
</tbody>
</table>

**Manpower**

<table>
<thead>
<tr>
<th>Name</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jim</td>
<td>8</td>
</tr>
<tr>
<td>Tom</td>
<td>8</td>
</tr>
<tr>
<td>Denis</td>
<td>8</td>
</tr>
<tr>
<td>Trinity</td>
<td>8</td>
</tr>
<tr>
<td>Loni</td>
<td>7</td>
</tr>
<tr>
<td>Scott</td>
<td>7</td>
</tr>
<tr>
<td>Bill</td>
<td></td>
</tr>
<tr>
<td>Bear</td>
<td>6</td>
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</table>

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**Materials/Subcontracts**

<table>
<thead>
<tr>
<th>INV#</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>INV#</td>
<td>TK14 - P/B - 83.74 yds - ADA - Footings</td>
</tr>
<tr>
<td>INV#</td>
<td>TK14 - P/B - 97.63 yds - ADA - Footings</td>
</tr>
<tr>
<td>INV#</td>
<td>TK14 - P/B - 10.04 yds - ADA - Footings</td>
</tr>
<tr>
<td>INV#</td>
<td>Deni Rock - 13.08 yds - ADA - N. Approved</td>
</tr>
<tr>
<td>INV#</td>
<td>Reject Sand - 81.64 yds - ADA - TriState Electric Fence (TriState Fence)</td>
</tr>
<tr>
<td>INV#</td>
<td></td>
</tr>
<tr>
<td>INV#</td>
<td></td>
</tr>
<tr>
<td>INV#</td>
<td></td>
</tr>
<tr>
<td>INV#</td>
<td></td>
</tr>
</tbody>
</table>

---

**Work Completed/Comments:**

- Finish grade fast mall footings - All footings complete.
- Required north approach for crane access (9:53 AM)
- Boss hauled in reject sand for TriState fence
- Bill hauled off concrete from without access (4 loads)

---

Received Time: Nov. 21, 10:06 AM
**BILLED FOR FOUR WEEKS 2/12/08 THRU 3/11/08**

**RENTAL PROTECTION DECLINED**

---

**WEAK BILLING INVOICE**

---

**Customer... 680182**
**Invoice #: 766321-003**
**Invoice date... 3/11/08**
**Date out... 12/18/07 2:10 PM**
**Billed thru... 3/11/08**

**Job Loc: DOWNTOWN MERIDIAN, MERIDIAN**
**Job No: 156 PETRA INC - PETR**
**P.O. #: J822007**
**Ordered By: JON ANDERSON**
**Written by: CYCLE BILL**
**Salesperson: 6734**

---

**Petra Inc. 1097 N Rosario Street**
**Meridian ID 83642-8095**

---

<table>
<thead>
<tr>
<th>Qty</th>
<th>Equipment #</th>
<th>Min Day</th>
<th>Week(s)</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>HEATER 1100 BTU INDIRECT FIRE*</td>
<td>310.00</td>
<td>1000.00</td>
<td>2250.00</td>
</tr>
<tr>
<td></td>
<td>Made: HEAT WAGON Model: VG1000 Ser #: M3743</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

**SALES ITEMS:**

**Qty Item number**
**1**

**ENVIRONMENTAL CHARGE**
**UM: (EA) EACH**

**JON 860-7516**

**Sub-total: 2260.80**
**Tax: 135.65**
**Total: 2396.45**

---

**FOR YOUR CONVENIENCE, UNITED RENTALS IS NOW OFFERING A TOLL-FREE NUMBER TO CALL EQUIPMENT OFT RENT**

**PLEASE CALL 800-UK-RENTS (800-877-3687)**

**CUSTOMER CARE REPRESENTATIVES ARE AVAILABLE 24/7 TO SUPPLY YOU WITH A TERMINATION NUMBER IN ORDER TO CLOSE THIS CONTRACT. A CLEANING CHARGE WILL APPLY TO ALL EQUIPMENT RETURNED WITH EXCESSIVE DIRT, CONCRETE, AND/OR PAINT. CUSTOMER IS RESPONSIBLE FOR ALL DAMAGES INCLUDING TIRES. THERE WILL BE AN ADDITIONAL CHARGE FOR MISSING KEYS AND A REFUELING CHARGE WILL BE APPLIED TO ALL EQUIPMENT NOT RETURNED FULL OF FUEL.**

---

**HEATER RENTAL**

**TEMP HEAT IN THE BUILDING**

---

**APPROVED: 06/25/08**
**Cost Code: 01-23**
**Authorized by: JON ANDERSON**
**Date Posted: 06/25/08**
**Budget: **
**Over Budget: **

---

**ENVIRONMENTAL CHARGE**

**The items indicated above are subject to an environmental charge which is designed to recover the company's direct and indirect expenses for the handling, managing and disposing of waste products, hazardous materials, and related administrative costs. This is not a government mandated charge.**

**FUEL**

**Fuel charges do not include federal, state or local fuel excise taxes.**

---

**OPTIONAL RENTAL PROTECTION PLAN: THE RENTAL PROTECTION PLAN IS NOT INSURANCE!**

**Upon accepting the Optional Rental Protection Plan, the Customer agrees to pay a charge equal to 1% of the rental charges on Equipment damaged by the Rental Protection Plan. In return, we will include in the rental rates, a charge for accidental damage.**

---

**X**

**CUSTOMER SIGNATURE**
**DATE**

**NAME PRINTED**
**DELIVERED BY**

---

**A LARGER FONT COPY OF THE TERMS AND CONDITIONS IS AVAILABLE UPON REQUEST.**

---

**CM010032 006079**
LEASE OR BOND BY THE LESSOR AGREES TO WAIVE CERTAIN CLAIMS FOR ACCIDENTAL DAMAGE TO EQUIPMENT SPON TERMS AND CONDITIONS SPECIFIED ON REVERSE. EQUIPMENT PROTECTION PLAN DOES NOT COVER TIRE DAMAGE.

ACCEPT: ____________________________

DECLINE: ____________________________

A finance charge of 1.75% per month (Annual Percentage Rate of 21%) may be assessed against overdue accounts. LESSEE (OR ITS AGENT) HAS READ THE ENTIRE EQUIPMENT LEASE, INCLUDING TERMS AND CONDITIONS ON REVERSE, OR HAS CHosen TO NOT READ, AND IN EITHER EVENT ACCEPTS AND SHALL BE BOUND BY THE SAME.

I EITHER KNOW HOW TO PROPERLY OPERATE THE EQUIPMENT LISTED ON THIS EQUIPMENT LEASE OR HAVE ASKED, RECEIVED, AND UNDERSTAND THE INSTRUCTIONS PROVIDED TO ME REGARDING PROPER OPERATION OF THE EQUIPMENT LISTED ABOVE. I ALSO ACKNOWLEDGE THAT TATES RENTS, INC. HAS PROVIDED A COPY OF THIS AGREEMENT TO ME.

SIGNATURE: ____________________________

PETRA, INC.
PETRA INCORPORATED  
1097 N. Rosario Pl.  
Meridian  
ID 83642

INVOICE NUMBER: 0038380-IN  
P. O. NUMBER:  
INVOICE DATE: 02/29/08  
JOB NUMBER: 0005209  
CUSTOMER NO: 00-PETRA

CONTACT:

JOB DESC: MERIDIAN CITY HALL TEMP HEAT  
COMMENT: BILL METHOD: TIME & MATERIAL

---

ORIGINAL CONTRACT AMOUNT: .00

TAXABLE AMOUNT: 2,450.00

NON-TAXABLE AMOUNT: .00

AMOUNT BILLABLE THIS INVOICE: 2,450.00

INVOICE TOTAL: 2,450.00

LAbor + MATERIALS TO OUt THE Temp HEAT INTO THE BUILDING.

---

Job Name: mca  
Job Number: 02-0675  
Cost Code: 01-630  
Authorized by:  
Date Posted:  
Budget:  
Over Budget: 

---
<table>
<thead>
<tr>
<th>DATE</th>
<th>HOURS</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/2/2008</td>
<td>22</td>
<td>$1,100.00</td>
</tr>
<tr>
<td>2/4/2008</td>
<td>17</td>
<td>$850.00</td>
</tr>
<tr>
<td>2/6/2008</td>
<td>10</td>
<td>$500.00</td>
</tr>
<tr>
<td></td>
<td>49</td>
<td>$2,450.00</td>
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</tbody>
</table>
## Change Order Authorization

**Date:** 1-2-08  
**Job Name:** MCH Temp Heat  
**Customer Name:** Petra Inc.  
**Hobson C/O #:**  
**Hobson Job #:** 5209

**Description of Work:** Install Temp Heat

<table>
<thead>
<tr>
<th>Description</th>
<th>Quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pat Clever</td>
<td>2 hrs</td>
</tr>
<tr>
<td>Scott Westfall</td>
<td>8 hrs</td>
</tr>
<tr>
<td>Cody Evans</td>
<td>8 hrs</td>
</tr>
<tr>
<td>Steve Anderson</td>
<td>4 hrs</td>
</tr>
<tr>
<td><strong>Materials</strong></td>
<td></td>
</tr>
<tr>
<td>4-22° 90° Elbows</td>
<td></td>
</tr>
<tr>
<td>30'-22° SPIRE PIPE</td>
<td></td>
</tr>
<tr>
<td>2-8&quot; Dampers</td>
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</tr>
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</table>

### BILLING SUMMARY

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Material Total</td>
<td>$</td>
</tr>
<tr>
<td>Sales Tax</td>
<td>$</td>
</tr>
<tr>
<td>Labor Total</td>
<td>$</td>
</tr>
<tr>
<td>Overhead</td>
<td>$</td>
</tr>
<tr>
<td>Subcontract</td>
<td>$</td>
</tr>
<tr>
<td>Profit</td>
<td>$</td>
</tr>
<tr>
<td>Total</td>
<td>$</td>
</tr>
</tbody>
</table>

**Authorized Signature:**  
**Printed Name:**

---

White Copy: Hobson Office  
Yellow Copy: Customer Field  
Pink Copy: Hobson Foreman

CM010036  
006083
### Change Order Authorization

**Date:** 2-4-08  
**Job Name:** MCH Temp, Heat

**Customer Name:** Perma Inc.  
**Hobson C/O #:**

**Hobson Job #:** 5209

**Description of Work:** Install Temp, Heat

<table>
<thead>
<tr>
<th>Labor</th>
<th>Quantity</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pat Clover</td>
<td>2 hrs</td>
<td></td>
</tr>
<tr>
<td>Tim Crawford</td>
<td>5 hrs</td>
<td></td>
</tr>
<tr>
<td>Cody Evans</td>
<td>5 hrs</td>
<td></td>
</tr>
<tr>
<td>Steve Anderson</td>
<td>5 hrs</td>
<td></td>
</tr>
</tbody>
</table>

**Materials**

- 1 - 304 90° Elbow
- 1 - 24" 90" Elbow
- 1 - 40 x 3" 45° Elbow
- 1 - 36" 45° Elbow
- 36 - 24" spiral

---

**BILLING SUMMARY**

<table>
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**Authorized Signature**

**Printed Name**

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*White Copy: Hobson Office*  
*Yellow Copy: Customer Field*  
*Pink Copy: Hobson Foreman*  

CM010037  
006084
Change Order Authorization

Date: 2-6-08  
Job Name: MCH Temp Heat

Customer Name: ________________  
Hobson C/O #: ________________  
Hobson Job #: 5209

Description of Work: Install Temp Heat

Pat Clover - 2 hrs.
Tim Crawford - 4 hrs.
Cody Evans - 4 hrs.

Authorized Signature: ________________  
Printed Name: ________________

BILLING SUMMARY

Material Total: ________________  
Sales Tax: ________________  
Labor Total: ________________  
Overhead: ________________  
Subcontract: ________________  
Profit: ________________  
Total: ________________

White Copy: Hobson Office  
Yellow Copy: Customer Field  
Pink Copy: Hobson Foreman

CM010038  
006085
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Total: $15,290,000

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REMARKS

1. No OF 2025
2. SPACE
3. Must be one on each floor - This assumes 4 floors
4. Buildings Services
5. Mech., elec., gen. storage, elevators
6. To be in basement
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TOTAL DEPT. GROSS SQUARE FEET (x 1.25): 5350
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November 5, 2007

Via: Hand Delivery

Mr. Keith Watts, Purchasing Agent
City of Meridian
33 E Idaho St.
Meridian, ID 83642

RE: Notice of Intent to submit formal Change Order Request.

Keith:

This letter is a Notice of Intent for Petra Incorporated to submit a formal Change Order Request to the City of Meridian for additional Construction Management Fee and additional Project Engineer compensation in accordance with the terms and conditions of the Construction Management Agreement between the City of Meridian and Petra Incorporated for the Meridian City Hall project.

In accordance with Article 7 (b) of the “Agreement Between Owner and Construction Manager”, Petra is requesting additional Construction Management Fee for significant changes to the project size, complexity and budget. The project size has increased from 80,000 SF to 100,000 SF with a full basement. The corresponding budget has increased from $12.2 Million to a current estimate of $19.6 Million, which does not include the site development costs of contaminated and unsuitable soil removal, replacement with structural fill material and the associated CM Fee to manage this site preparation scope of work. The contract CM fee was based on $12.2 Million at 4.7%. The additional fee is based on the difference of contract values, $7.4 Million at 4.7% with a Phase IV-Plaza & Site Improvements budget of $1.5 Million or a total fee increase of $347,800.00.

Additionally, in accordance with Article 7 (b), as noted above, the construction Manager is requesting additional reimbursable expenses for the Project engineer due to the increased size, complexity and budget in the Project that requires additional man hours for the Project engineer on the project from the contract of 64 hours/month for 18 months to 94 hours/month for the final 12 months of the project. This reflects an additional 10 hours/month for 12 months at the contract rate of $45.90/hour or $5,508.00.

No additional general condition reimbursable or temporary expenses will be requested as a part of this Change Order Request, as the scheduled completion date is still within the contract timeline and no additional expenses will be incurred as a part of this change. A formal Change Order Request will be forwarded once Phase IV—Plaza and Site Improvements bids the end of this month and a final construction budget is developed.

Best Regards,

Wesley W. Bettis, Jr.
Construction Manager
SHOWING THAT PETRA’S FEES FOR ADDITIONAL SERVICES AND REIMBURSABLE COSTS ASSOCIATED WITH CHANGE ORDER NO. 2 OCCURRED AFTER THE NOVEMBER 5, 2007 NOTIFICATION OF INTENT TO SUBMIT CHANGE ORDER NO. 2

| November 5, 2007 | Petra’s notification to the City of Meridian of Petra’s Intent to Submit Change Order No. 2 for additional Construction Manager’s fee due to the change in design, size and complexity of the Project. The amount of the original change order No. 2 was 4.7% fee on the additional project cost. Notification for Change Order No. 2 was given prior to the additional costs being incurred as per C.M.A. Total costs to date at the end of November 2007 was only $8.3 million. |
### Rating Sheet for Architects & Construction Managers for Meridian City Hall Project

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<th>Freeman</th>
<th>Brown</th>
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### Architectural Services

<p>| ZGA Architects                | 93      | 96    | 94    | 84     | 85    | 98      | 83     | 96     | 89   |         | 818   | 90.9    |
| CSHQA                         | 88      | 96    | 76    | 91     | 93    | 100     | 69     | 100    | 88   |         | 801   | 89.0    |
| Lombard/Conrad Architects     | 90      | 76    | 80    | 95     | 79    | 100     | 86     | 100    | 92   |         | 798   | 88.7    |
| Cole + Poe Architects         | 92      | 81    | 78    | 95     | 84    | 98      | 72     | 79     | 87   |         | 766   | 85.1    |
| Trout Architects              | 72      | 70    | 73    | 87     | 77    | 100     | 82     | 94     | 82   |         | 737   | 81.9    |
| BRS Architects                | 89      | 82    | 77    | 81     | 59    | 99      | 68     | 100    | 76   |         | 731   | 81.2    |
| Design West Architects        | 64      | 78    | 64    | 85     | 83    | 100     | 83     | 84     | 76   |         | 717   | 79.7    |</p>
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<tr>
<td>1</td>
<td>Mark Freeman</td>
<td>888-9111</td>
<td>Foley, Freeman, Borton PLLC, Attorneys</td>
<td><a href="mailto:mfreeman@foleyfreeman.com">mfreeman@foleyfreeman.com</a></td>
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<tr>
<td>2</td>
<td>Mike Brown</td>
<td>880-2397</td>
<td>Brown Construction</td>
<td><a href="mailto:brown@meridiancity.org">brown@meridiancity.org</a></td>
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<td>3</td>
<td>Arden Davis</td>
<td>388-2404 / 866-6521</td>
<td>Idaho Power Company</td>
<td><a href="mailto:ardenavis@idahopower.com">ardenavis@idahopower.com</a></td>
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<td>4</td>
<td>Rich Nesbit</td>
<td>249-2355</td>
<td>Realty Executives of Treasure Valley</td>
<td><a href="mailto:riknesb@ridaho.com">riknesb@ridaho.com</a></td>
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<td>Chris Klein</td>
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<td>6</td>
<td>Rex Warwick</td>
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<td>7</td>
<td>Deneen Wilson</td>
<td>884-3050</td>
<td>KeyBank</td>
<td>deneen.m.wilson@keybank</td>
</tr>
<tr>
<td>8</td>
<td>Keith Bird</td>
<td>888-2108</td>
<td>City Council Member</td>
<td><a href="mailto:birdtk@meridiancity.org">birdtk@meridiancity.org</a></td>
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<td>9</td>
<td>Tammy de Weerd</td>
<td>888-4433</td>
<td>Mayor</td>
<td><a href="mailto:deweerdl@meridiancity.org">deweerdl@meridiancity.org</a></td>
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<td>10</td>
<td>Brad Watson</td>
<td>888-5500</td>
<td>Public Works Director</td>
<td><a href="mailto:watsonb@meridiancity.org">watsonb@meridiancity.org</a></td>
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<td>11</td>
<td>Ted Baird</td>
<td>888-5506</td>
<td>Deputy City Attorney</td>
<td><a href="mailto:bairdt@meridiancity.org">bairdt@meridiancity.org</a></td>
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<td>12</td>
<td>Will Berg</td>
<td>888-4433</td>
<td>City Clerk</td>
<td><a href="mailto:berge@meridiancity.org">berge@meridiancity.org</a></td>
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</tbody>
</table>
Date: March 12, 2008

To: Keith Watts, Purchasing Manager, City Of Meridian

From: Tom Coughlin, Project Manager

Re: Rule Steel – Time Extension & Liquidated Damages

In an attempt to address the time extensions that Rule Steel has requested for various ASI's and RFI's issued to-date Petra Inc. has reviewed the requests and the actual scenario involving the progress of their work.

Petra had previously informed Rule Steel that they would be assessed liquidated damages starting on 11/26/07 if the entire structural steel scope of work was not completed by that date. It is Petra's opinion that the steel scope of work was not substantial complete until 2/08/08. This date represents the date that Petra feels the structural steel was completed to a point so as not to impede any of critical path follow-on work required to complete and/or dry-in the building. This period amounts to 75 calendar days. The period of time that Rule Steel would be assessed liquidated damages for would be the 75 days minus any time extensions granted for the various ASI's & RFI's that have impacted the structural steel scope of work.

Rule Steel had previously requested a total of 27 days for the items that were included in Rule's CO#01. This request was held in abeyance pending the completion of the work.

For the items previously included in CO #01:
- ASI-7 Lower Floor Structure at 1st Floor– Time requested 5 days. OK to recommend to the City.
- ASI-8 Steel Connection Modifications – Time requested 10 days. OK to recommend to the City.
- ASI-18 Add Camber & Revise Moment Connections – Time requested 5 days. OK to recommend to the City.
- ASI-19 Connection Fix for Bsmt Wall to Low – Time requested 2 days. Not recommended, didn't impact the progress of the work.
- ASI-23 Stair Tower Support Steel – Time requested 5 days. OK to recommend to the City.

This is totals to 25 of the 27 work days requested.

For the items pending change order submittal:
- ASI-13 Elevator Tube Upgrade – Time requested 10 days. Not recommended, this work was done after the substantial completion date.
- ASI-52 Elevator Penthouse Beams – Time requested 10 days. Would recommend 5 days.
- ASI-54 Roof Elevation & Slope @ CMU Wall – Time requested 3 days. OK to recommend.
- RFI-73 Sun Shade Connection – Time requested 3 days. Not recommended, did not impact the progress of the work.
- RFI-74 Angle Clips for Support of Wall – Time requested 3 days. Not recommended, did not impact the progress of the work. As of Friday, 3/7/07 these clips had not been installed.
- Bent Plate @Grid H (Included with RFI-74) – Add bent plate, shop drawings marked incorrectly. Time requested 5 days. OK to recommend to the City.
• RFI-93 Relief Angle @ Stair Towers – Time requested 5 days. Not recommended, did not impact the work. This was for furnishing only.
• RFI-94 Furnish and install two chiller beams. Time requested 5 days. Not recommended, did not impact the work. This was issued and accomplished after the base building work on the critical path was completed.

The time for these pending changes that Petra can recommend to the City would be 13 work days.

The total time extension, considering both the CO#01 items and the new items, that Petra would propose to recommend is 38 days work days, which translates to 52 calendar days. The 52 calendar days represent a time extension that Petra feels would be fair and responsible to both Rule Steel and the City. Based on this Rule Steel would still be liable for liquidated damages for a period of 23 calendar days based on a substantial completion date for their work of 2/8/08. The total cost for these 23 days at $500/Day would be $11,500.

Please review this scenario and let me know if this line of reasoning is acceptable to the City. If this is acceptable Petra will propose this to Rule as settlement of the matter of the schedule delays and the time extensions requested for the various delays. Currently Petra has not approached Rule with proposal regarding their time extension requests.
April 3, 2007

Mr. Ted W. Baird
Deputy City Attorney
City of Meridian
33 East Idaho
Meridian, Idaho 83642

Re: Performance Concerns
New City Hall Project

Dear Ted:

As requested, the following is our response to your concerns outlined in your letter of March 30, 2007. This response is intended to be constructive and informative so that the relationship between Petra and the City of Meridian would remain positive and produce a project all parties can take pride in.

I. Project Staffing and Diligence – Petra has constantly worked to bring the Architect and multiple Owner representatives for the City together in a positive atmosphere. At no time have we shirked responsibility and in fact have gone beyond our scope of services to help the City. Currently Petra has five personnel and support staff working on the Meridian City Hall Project. In response to your specific questions we offer the following:

   a) Irrigation Ditch - The necessity of having the irrigation service operational was identified by Petra last November. Over a month ago, we noted that the delay in design decisions would require a temporary irrigation pipe ahead of the formal bids. During the week of March 26th, the contaminated soil removal to the south was sufficiently defined to allow irrigation line installation. On Monday March 26th Petra presented the temporary irrigation line solution. Petra was not aware that a one week notice for a purchase order would cause frustration on the part of the City. Since that time we have turned the temporary pipe into a permanent installation which will be completed by 4-15-07.

   b) Topo Surveyor – In CM contracts the parties responsible for securing a surveyor for topo and boundary survey is the City or the Architect. Once Petra learned that neither the City nor the Architect had secured a surveyor for this design scope of work, Petra began working with the City to solicit pre-qualified bidders for the work. After two weeks of no success in finding a Surveyor that had the time to work this project into their schedule, the City Engineer’s office was solicited for additional names of Surveyors under annual contract with the City that the City would consider having work on this project. Four names were provided and a firm was found and retained for the City Hall work to perform the boundary and topo survey as soon as the site was ready with no delay to the project. An acceptable backup firm was in place should the first firm not be able to perform.

   c) Delay in Bid Documents - Boiler plate for bid documents consist of the contract (which is produced by the City), and the bid package descriptions. The bid package descriptions are created after the plans and specifications are developed. When asked for the bid packages, the City was provided with the outlines that were created for this project and it was noted at that time...
that outlines were being provided until the plans and specifications were delivered to Petra by the
design team. The design team provided the plans and specs on schedule and the bid packages
were updated and submitted to the City approximately one week later, within the project
schedule. The bid documents were not delayed.

d) Improper Staff Substitution - The project staff outlined in the construction management services
proposal of August 2006 and transferred into the contract language was based on a project start
date provided by the City at that time. When the unforeseen conditions of contaminated soil
were realized, Petra brought in Jon Anderson. Jon was superintendent on a $33 Million
Tamarack development where he had worked with EPA and IDEQ issues, and is one of a few
superintendents in the entire Valley that can manage this unforeseen cleanup to a successful
conclusion. The finish foreman will be identified and submitted to the City, when the final
schedule is established.

2. Poor Management of Demolition Contractor - The Demolition Contractor has received public praise from
the Mayor and Council for the work that they performed at over $80,000 in savings over the next lowest bid.
The demolition contractor took precautions to protect the 3 identified well heads by covering them with fill
material prior to demolition. The fourth well was not found until after the demolition was complete and
there never was a casing above grade at this location. In demolishing concrete / brick structures and falling
a 185’ chimney, it is reasonable to assume that some surface damage will occur in spite of being covered
with fill. At the same time, the demolition contractor has some responsibility for the 3 damaged casings.
The letter on March 30th is the first time Petra has been notified of the dollar value for the damages incurred
and we will handle this with the City’s Representative in our weekly production meeting.

3. Improper Management of Contaminated Soil Removal - The sequence of events concerning the
contaminated soil issue are as follows:

   a) In January, Terracon drilled an exploratory well for groundwater design which they
characterized as containing contaminated soil. They stopped and moved to another location.
They ended-up drilling two more wells and pulled water samples from them and had them
tested for contamination migration into the ground water, which proved negative. The City
was kept notified throughout this process.

   b) Petra contacted MTI, to provide a proposal for dealing with contaminated soils. MTI pulled a
sample of dirt tested the contents in their lab for general results and noted that it was mildly
contaminated, confirming the Terracon report. Petra then contacted MTI and asked for full
labs, identifying the exact contaminants and their handling requirements and made the
appropriate recommendations to the City.

   c) With the test results in hand, Petra confirmed with the licensed abatement contractor that a
registered landfill in Ada County would take and remediate the contaminated soil and log the
removal site with the EPA. The Brownsfield Survey data information number was provided
to the landfill for their use. This is how all contaminated materials are required to be handled
per the EPA guidelines. Dual notification was also required with IDEQ, and was made by
MTI after the initial hauling had begun. MTI filed a work plan and notification with IDEQ
who acknowledged that the work would be performed under the existing Brownsfield Survey
for the property, that we had correctly documented the removal, transport and deposit of
contaminated soils, the EPA had been correctly notified of the project and then thanked us
for inviting them to the site and working with them to get all of the paper work in place.
d) There is not an additional permit required by IDEQ and at no time has the City been at risk for a tremendous environmental liability due to the actions of MTI, Ideal Demolition, or Petra. In fact, the actions of the Petra and Abatement team have gone beyond traditional contractual relationships to insure that every precaution and good practice has been taken to mitigate an unforeseen environmental liability.

In closing, it is Petra's observation that the City's frustration with "communication" and "inordinate amount of time tracking and managing issues" stems from the organizational format setup by the City. Over the past 14 years on previous CM projects that I have worked on, there has been one Owner's representative to work with and to report to. Currently you have that person in Brad Watson. I sincerely believe that Brad, Steve Simmons, and myself can bring this project to the successful conclusion desired by all parties.

Sincerely,

Eugene R. Bennett
Construction Manager
April 1, 2007

Mr. Will Berg  
City Clerk  
33 East Idaho Avenue  
Meridian, Idaho 83642-2300

Re: MERIDAIN CITY HALL - BUILDING OPTIONS  
LCA NO. 06016.01 File Code 4-a

Dear Will:

As discussed last Friday, there appears to be a substantial amount of anguish over which direction the City should take with regards to the basement and ground water issue. Although there may be others being discussed that I am not aware of, I believe the options available are fairly limited due to the current status of the project. I would like to recap the more obvious options being discussed and their individual merits.

1. Leave the project as designed: A substantial amount of time and energy has been expended to get the projects to the point it is today. Now that the amount of ground water that must potentially removed from around the basement has been determined, the various approvals from the governing agencies stand in the way. Our civil engineer has have informed that the approval process could take somewhere around 45-60 days once a design is submitted. To date, he has not been given the approval to proceed with this work. The project excavation would be delayed until all approvals are obtained. If they are denied, then an alternative solution for the building and basement would need to be determined. Currently the shell package is being bid on April 3rd and a building permit is not in hand. It would be prudent to allow Petra to gather the bid amounts as planned and compare the actual bid amounts to the projected budget. The results could force a new direction anyway and assist with a decision.

2. Delete the basement: Based on the latest budget prepared by Petra, the project is still over the original budget of twelve million dollars. By deleting the basement, there would be approximately 1.3 million dollars saved. Not all of the savings would be realized however as the existing mechanical room, electrical room, locker rooms and Clerks storage areas would have to be relocated either to other levels of added to the south end of the first floor. It is estimated that the net savings would be around 700-800 thousand dollars depending on the final solution. As suggested by Petra, the steel package for the main building shell could be salvaged and modifications to the south end or basement could be handled with the supplier at a later date. This insures our place in the manufacturing process. The design team would need approximately 30 days to redesign the building at an approximate cost of $35 thousand dollars. The redesigned building foundation package would then need to be re-bid.
3. Raise the building above ground water levels: Based on the current design, the basement floor slab is projected to be approximately at ground water level. As you know the water level can fluctuate up to 3 feet according to the geotechnical report. The preferred elevation of the basement floor would need to be supplied by the geotechnical engineer. The current finish floor level of the first floor slab is somewhat dictated by Broadway Avenue as the sidewalk abuts the building. If the first floor elevation is raised 4 feet higher, additional stairs would need to be added and ramps into the building for accessibility would need to be extended approximately 48 feet. That could be an aesthetic challenge but not insurmountable. I would be concerned about the interface of the buildings north side and Broadway Avenue. This would need to be discussed with Meridian Planning for compatibility with the “Old Town” district and the desired image. There would be minimal impact to the building shell design other than the transition at ramps, stairs and loading docks. Those alterations could be handled within the site package with a design extension of three weeks. Construction costs are not known at this time and design fees should not be a substantial amount.

4. Deleting the basement and plan for a future forth floor: Refer to Item 2 for discussion regarding the deletion of the basement. We admit that planning for an additional floor to be added at some future time sounds appealing. In reality it rarely happens. Designers cannot predict how building and seismic codes will change over an undefined period of time. The third floor occupants may not be able to occupy the building during construction while the roof is removed. The current designed mechanical system would have to be modified as it would be enclosed by occupied space. It is more practical to build the shell from the onset, which can be finished when needed. The space could even be finished now if desired, be leased out to other agencies until needed by the City. The savings gained by deleting the basement should offset a substantial amount, but not all of the cost of adding an additional floor. Petra could better determine the impact. As this is virtually a redesign of the entire building, design time would be approximately 6 weeks with an additional cost up to 50 thousand dollars.

In summary, I believe that there are two main questions that need to be answered. What exactly is the overall project budget and what is driving such an accelerated design and construction schedule? A fixed project budget will determine the building’s spatial program and the quality of construction. The construction climate will force hard decisions to be made in the name of fiscal responsibility. If however the current project scope meets the desired program and the budget is feasible, then why not start the agency review process as soon as possible to determine if the ground water can be removed as desired.

As you can see, there are many variables and numerous options. In closing it is our recommendation that either Option 1 or 3 be considered due to the current status of the project.

Sincerely,

LCA ARCHITECTS, P.A.

Steven M. Simmons AIA
Request for Statements of Qualifications:

Meridian City Hall

Construction Management Services

APRIL 06, 2006
Request for Statements of Qualifications
Construction Management Services
For
Meridian City Hall

The City of Meridian is soliciting statements of qualifications and performance data from interested persons or firms to provide construction management services for the design, bidding, site demolition, and construction of a new approximately 80,000 square foot Meridian City Hall to be located on an approximately 2 acre site located at the southeast corner of Meridian Road and Broadway Avenue, Meridian, Idaho. The project budget has not been set, and the project architect is currently being selected.

The construction management services must be provided under the direct supervision of a Construction Manager licensed in the State of Idaho, and firms must hold a Certificate of Authority to provide Construction Management Services in the State of Idaho. The person or firm hired for this project will be selected on the basis of qualifications and demonstrated competence, and the contract for construction management services for the City Hall project will be negotiated at prices that are fair and reasonable given the estimated value of the project, and the nature, scope, and complexity of the construction management services to be provided.

Sealed Statements of Qualification must be received until, and no later than, 4:00 PM, on Monday, April 24, 2006. Submittals must be mailed or delivered to the office of the City Clerk, Meridian City Hall, 33 E. Idaho Ave., Meridian, Idaho 83642. All submittals must be marked “Meridian City Hall-CM Statement of Qualifications”. Late submissions will not be accepted.

The City of Meridian reserves the right to reject any and or all submittals and to waive informalities.

The Construction Manager (CM) will provide services for a flat fee or a percentage of total construction cost, not to exceed a certain construction price. The CM will have total responsibility under the contract to coordinate, direct, supervise and manage the project. The CM will publicly bid all subcontracts, for the City, assure that all-applicable laws and regulations are complied with and that all necessary records are complied with. The CM will not directly provide labor, materials or equipment for the project construction. The CM’s insurer will be required to name the City of Meridian as an additional named insured on all required coverages. All subcontractors will be required to be insured and provide performance and payment bonds for each contracts scope of work.

It is anticipated that the work of the project will involve multiple bid packages. During the design phase the CM will also provide value analysis, scheduling, cost estimating, constructability and phasing assistance.
INSTRUCTIONS TO RESPONDENTS

Each submittal must follow the outline below and be signed by an officer or owner of the company. Eight (8) copies of the submittal must be furnished. Brochures, photos, financial statements, annual reports not specifically requested may be appended to the back of each submittal. Selection criteria and scoring is set forth at the end of this request for submittals.

SUBMITTAL FORMAT

Submittals must be typed or printed on 8-1/2" x 11” paper. Emphasis should be placed on the specific qualifications of the people who will actually perform the work and their approach to this specific project. To assist in the evaluation, it is desirable to format the submittal similar to the headings listed below.

1. Overall Construction Experience

Give a brief description of your company history and its capabilities.

Are you a licensed Construction Manager in the State of Idaho? What is your bonding capability?

Summarize current projects and status.

Provide historical data on the separate dollar volume of commercial and public building contracts and the number of such contracts in each calendar year.

2. Relevant Construction Experience

Provide a general statement regarding knowledge and experience with the construction of similar facilities and in particular, describe your experience with the Construction Management process, demolition, pre-construction services, scheduling, value analysis, constructability reviews, cost estimating and phasing.

List Similar Projects beginning with the most recent first. Provide the following information.

1. Brief description, location, and scope.
2. Date of completion.
3. Initial construction budget.
4. Final cost of the project.
5. Total dollar amount of change orders.
6. Construction period.
3. Subcontractor Relations

Explain how you will bid work to be performed under subcontracts. What techniques will be used to coordinate the work of different subcontractors performing different divisions of work?

How will the City be protected from delay claims from subcontractors?

What program will be used to assure subcontractor compliance with OSHA rules, tax, and social security withholding rules?

Describe the CM’s role in establishing and maintaining a job site safety program and quality control program.

Familiarity with the local labor and subcontracting market.

4. City/Contractor Relations

List references for recent significant and similar construction projects. Indicate type of contract for each construction project (i.e. CM, public bid, negotiated, cost plus, etc.).

Set forth a history of litigation and arbitration regarding previous contracts. Include claims made, or litigation or arbitration threatened even though no formal lawsuit or arbitration proceeding was filed. Include actions brought by Owners, your firm, subcontractors, and third parties. This request also includes any challenges to process or procedures made by the proposed construction manager against any public entity in relationship to a project. Give the amount contested and paid, if any, for each case and a brief description of the issue. Include the names of the attorneys involved for any of the parties, case number or arbitration number, as applicable, and any other relevant information pertaining to these claims.

Provide as a reference all architectural firms with which you have worked as a Construction Manager or as an Owners Representative in the last five years.

5. Administrative Capacity and Proposed Personnel

Identify key participants with names, resumes, qualifications, and relevant experience. Please also indicate a percentage of their time to be allocated to this project and include a listing of their current project responsibilities.

Describe your approach to planning, phasing and scheduling the project.

Describe how you will monitor the work and maintain the project schedule.

Describe the scheduling method proposed.
Describe the project record keeping system. Include methodology for coordinating and accomplishing inspections, testing, and final closeout.

Describe proposed methodology and approach to value engineering.

Describe project manuals to be delivered to City at completion of the project.

Describe proposed format for weekly CM and Subcontractors meetings and monthly City, CM, and Architect meetings.

6. Managing Cost

Provide a statement regarding proposed techniques to assure that using your firms approach will result in the project being completed within the budget and for the least overall project cost to the City of Meridian.

Provide a statement regarding how unspecified, but necessary and foreseeable, facilities, equipment, fixtures, and parts will be furnished so that the completed facility will be fully operational.

Describe warranties to be provided for all facilities and equipment. Set forth call back criteria and cost to City, if any, for emergency callbacks.

Describe training of City's personnel provided in basic fee. Identify training items that will be extra cost.

Describe how monthly progress billings will be prepared and submitted.

SELECTION PROCESS

The following process will be used for the selection of the Construction Manager:

1. Respondents must submit eight (8) copies of the submittal

2. The selection committee will review, screen and rank the submittals based on the criteria described above. A minimum of three (3) firms, if qualified, will be invited to attend interviews on a date to be announced. Firms selected for interviews will be notified as soon as possible.

3. Based on the submittals, interviews and other information, the selection committee will rate and rank the firms that have been interviewed.

4. The City of Meridian will select a firm with which to negotiate a contract based on the ranking and information supplied by the selection committee. Should
negotiations prove unsuccessful, a second firm will be selected, and so forth, as necessary.

SCORING OF SUBMITTALS

1. Overall Construction Experience 20
2. Relevant Project Experience 20
3. Subcontractor Relations 10
4. Owner/Contractor Relations 10
5. Administrative Capabilities and Proposed Personnel 30
6. Managing Cost 10
Total Points 100

LIMITATION

The cost of the submittals and any related expenses, including travel shall be entirely the responsibility of the respondent.

The City of Meridian reserves the right to reject any or all submittals and to waive informalities.
PROFESSIONAL SERVICES AGREEMENT
(Architectural Services)

BETWEEN

CITY OF MERIDIAN
AN IDAHO MUNICIPAL CORPORATION

AND

LCA ARCHITECTS, P.A.
AN IDAHO PROFESSIONAL CORPORATION

FOR THE

NEW MERIDIAN CITY HALL

DATED
JULY 11, 2006
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PROFESSIONAL SERVICES AGREEMENT
(Architectural Services)

THIS PROFESSIONAL SERVICES AGREEMENT (this "Agreement") is made effective the 11th day of July, 2006, by and between CITY OF MERIDIAN, an Idaho municipal corporation ("Owner"), and LCA ARCHITECTS, P.A., an Idaho professional corporation ("Architect").

RECITALS

A. Owner is under contract to purchase that certain parcel of land located at 27 E. Broadway, Meridian, Idaho (the "Site").

B. Owner desires to develop a new city hall facility and related improvements on the Site (the "Project").

C. Architect has represented to Owner that it is has the skills, qualifications, and experience to provide professional architectural design and contract administration services for the Project on behalf of Owner.

D. Owner desires to retain Architect, and Architect desires to be retained by Owner, for professional architectural services for the Project on Owner's behalf.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises, covenants, and agreements stated herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, Owner and Architect agree as follows:

1. RELATIONSHIP OF THE PARTIES

1.1 Relationship of the Parties.

Architect acknowledges and accepts the relationship of trust and confidence established with Owner by this Agreement and that this relationship is a material consideration for Owner in entering into this Agreement. Accordingly, Architect shall, at all times, act in a manner consistent with this relationship. Architect further covenants that Architect will perform its services under this Agreement, in the exercise of ordinary and reasonable care and with the same degree of professional skill, diligence and judgment as is customary among architects of similar reputation performing work for projects of a size, scope and complexity similar to the Project. Architect shall, at all times, further the interest of Owner through efficient business administration and management.
1.2 Authorized Representative.

Owner and Architect shall designate a representative who shall be authorized to act on that party's behalf with respect to the Project. Each party's representative shall render decisions in a timely manner in order to avoid unreasonable delay in the progress of the Project. Each party may rely upon the directions and decisions of such representatives as the directions and decisions of the other party. Neither Owner nor Architect shall change its authorized representative without five (5) days prior written notice to the other party.

1.2.1 Owner's authorized representative shall be:

To be determined by Owner. Upon Owner's selection of its authorized representative, Owner will provide Architect the name and contact information for such representative.

1.2.2 Architect's authorized representative shall be:

Steve Simmons, President
LCA ARCHITECTS, P.A.
1221 Shoreline Lane
Boise, Idaho 83702
Telephone: 208-345-6677
Facsimile: 208-344-9002
Mobile: 208-830-4122
Email: ssimmonsl@lcarch.com

1.3 Architect as Owner's Representative.

Architect shall be a representative of Owner during the Project. Architect shall have authority to act on behalf of Owner only to the extent provided in this Agreement, unless otherwise set forth in writing.

2. ARCHITECT

2.1 Architect's Representations.

Architect makes the following express representations and warranties to Owner, which shall survive the execution and delivery of this Agreement:

2.1.1 Architect is or will be professionally qualified to provide architectural services for the Project and is properly licensed to practice architecture by all public entities having jurisdiction over Architect and the Project;

2.1.2 Architect has, or will as part of its services under this Agreement, become familiar with and examined the Site, including, but not limited to, the existing terrain, structures, landscaping and the local conditions under which the Project is to be designed, constructed, and operated, and correlated its observations with the Project's requirements;
2.1.3 Architect has the professional knowledge, skills, experience, education and staffing to design the Project and prepare construction documents for the Project. The individual employees of Architect that will render services pursuant to this Agreement are knowledgeable and experienced in the technical disciplines required for this Project;

2.1.4 Architect shall prepare all documents and provide all services required under this Agreement in such a manner that increases in Project costs resulting from Architect's errors or omissions do not exceed one percent (1%) of the total construction price of the Project; and

2.1.5 Architect assumes full responsibility to Owner for its own improper acts and/or omissions and those employed or retained by Architect in connection with the Project (excluding intentional acts), but not for acts and omissions expressly directed by Owner.

2.2 Communications.

Architect shall endeavor to keep Owner fully informed regarding the progress of the Project so Owner can have meaningful review and involvement in the Project. Without limiting the generality of the foregoing sentence, Architect shall, as a matter of course, promptly provide Owner with copies of all designs, documents, meeting notes and memorandums and any other information related to the Project for Owner's review and input. Architect shall notify Owner of any decisions that are required to be made by Owner, and any deadlines pertaining thereto. Architect shall consult with and advise Owner with respect to any such decisions.

2.3 Meetings with Governmental Officials.

Architect agrees to provide Owner with reasonable notice of all formal public and non-public meetings with government officials regarding the Project. Owner shall be entitled to attend any formal public or non-public meeting with governmental officials regarding the Project. Architect shall document all meetings with governmental officials related to the Project and any verbal or written interpretations related to the Project provided by any governmental officials.

2.4 Project Records.

All records relating to the Project in Architect's possession (the "Project Records") shall be made available to Owner for inspection and copying at a reasonable time and place upon the written request of Owner. The Project Records shall include, but not be limited to, all plans, specifications, submittals, correspondence, minutes, memoranda, receipts, timesheets, electronic recordings and other writings or things that document any aspect of the design and construction of the Project. Architect shall maintain the Project Records for six (6) years after substantial completion of Project or for any longer period required by law.

2.5 Value Engineering.

Architect will participate with Construction Manager to informally value engineer the Project to maximize costs savings to Owner through discounts, informal value engineering
and other actions consistent with good design and building practices for a project of the type contemplated by Owner.

2.6 Governmental Permits.

Architect shall assist Owner and Construction Manager in preparing and filing all documents necessary to obtain the approvals of governmental authorities having jurisdiction over the Project, including, but not limited to, building and occupancy permits.

2.7 Compliance with Laws.

Architect shall perform all of Architect's services in compliance with all applicable laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over the Project, any applicable permits and any recorded covenants, conditions and restrictions affecting the Site.

2.8 Independent Contractor.

Architect acknowledges that it is an independent contractor and not an employee or agent of Owner. As an independent contractor, Architect shall be and remain responsible to Owner for all its negligent acts or omissions in connection with its duties and services under this Agreement that result in damage or injury to persons or property. Architect shall indemnify and hold harmless Owner against all claims or liabilities that are asserted, incurred or recovered against Owner related to employer liabilities that arise from Architect's employment or retention of any person or entity. Owner shall have no control over the manner or method by which Architect meets Architect's obligations under this Agreement; provided that Architect's services shall be performed in a competent and efficient manner this is in compliance with this Agreement. Nothing in this Agreement shall be construed to mean that Owner employs or is responsible for compensating any consultant or Architect.

2.9 Consultants.

Architect has engaged the following consultants to provide the indicated services pursuant to this Agreement:

| Landscape Architecture | Hatchmueller PC  
| 611 Sherman Avenue  
| Coeur d' Alene, ID 83814  
| Telephone: (208) 676-8444  
| Facsimile: (208) 676-8555 |

| Structural Engineering | Stapley Engineering, Inc.  
| 8701 West Hackamore Drive  
| Boise, Idaho 83709  
| Telephone: (208) 375-8240  
| Facsimile: (208) 375-8257 |
Prior to retaining or engaging any additional consultants to provide services pursuant to this Agreement, Architect shall submit for Owner's approval a written statement listing (1) a description of the services to be provided by said consultant (2) a brief description of said consultant's qualifications to render the identified services, and (3) a disclosure of any ownership, controlling interest or affiliation between Architect and said consultant. Owner shall bear no responsibility for reimbursing Architect for services of any consultant retained or engaged by Architect unless Architect first complies with this Section.

2.10 Indemnification

To the fullest extent permitted by law, Architect shall indemnify and hold harmless Owner and its officers, directors, agents and employees from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of Architect's duties and responsibilities under this Agreement, but only to the extent caused by the negligent acts or omissions of Architect, its employees, agents or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

2.11 Outside Compensation Prohibited.

Except with Owner's knowledge and consent, Architect shall not engage in any activity or accept any employment, interest or contribution that would reasonably appear to compromise Architect's professional judgment with respect to the Project or the relationship of trust between Owner and Architect established herein; provided, however, nothing in this Section shall be deemed to limit Architect's ability to provide services for a competitor of Owner.

3. Owner

3.1 Owner's Objectives.

Owner's objective for the Project is to develop a new city hall facility and public plaza on the Site.
3.2 Owner's Duties.

3.2.1 Owner shall, at its expense, furnish Architect with documents in its possession concerning the Site, which documents shall include a legal description, environmental risk assessment, site survey, and preliminary title report.

3.2.2 Owner shall provide Architect with Owner's preliminary planning and programming information regarding Owner's requirements for the Project, including, but not limited to, Owner's purposes, concepts, desires and any design, construction, scheduling, budgetary or operational needs, restrictions or requirements, as the same may be amended from time to time ("Owner's Criteria"). Architect shall be entitled to rely upon such information only to the extent that a reasonably prudent Architect would so rely on such information.

3.2.3 When reasonably requested by Architect, Owner shall furnish, at Owner's expense, the services of professional consultants such as land surveyors, geotechnical engineers, and hazardous materials consultants. Owner shall furnish structural, mechanical, chemical, geotechnical and other laboratory or on-site tests, inspections and reports as set forth in the Construction Documents and as required by law.

3.2.4 Owner shall timely review documents provided by or through Architect;

3.2.5 Owner shall timely render its direction, decision, consent or approval on matters identified by Architect for Owner's direction, decision, consent or approval;

3.2.6 Owner shall provide for all required testing or inspections of the Work as may be mandated by law, the Construction Documents or the Construction Contracts;

3.2.7 If Owner learns of any failure to comply with the Construction Contract by Contractor, or of any errors, omissions, or inconsistencies in the services of Architect, and in the further event that Architect does not have notice of the same, Owner shall inform Architect;

3.2.8 Owner shall afford Architect access to the Site and to the Work as may be reasonably necessary for Architect to properly perform its services under this Agreement;

3.2.9 Owner's review, direction, decision, approval or consent of any document provided or matter identified by or through Architect shall be solely for the purpose of determining whether such document or matter is generally consistent with Owner's Criteria. No review of such documents shall relieve Architect of its responsibility for the accuracy, adequacy, fitness, suitability, or coordination of its services or work product.

3.2.10 Architect shall be entitled to rely upon services and information provided by or through Owner only to the extent that a reasonably prudent Architect would so rely on such services and information. Architect shall promptly notify Owner in writing if
Architect becomes aware of any errors, omissions or inconsistencies in such services or information.

3.3 Owner's Construction Manager.

Owner plans to retain a construction manager ("Construction Manager") to provide construction management services for the Project. Upon Owner's selection of Construction Manager, Owner will provide Architect the name and contact information for Construction Manager's authorized representative. Architect hereby acknowledges that it has received, reviewed, and studied the agreement form that Owner intends to use with Construction Manager (the "CM Agreement"), and the same is herein incorporated by reference. Architect shall consult and coordinate with Construction Manager as needed to fulfill its duties hereunder, and shall assist Construction Manager as need for Construction Manager to fulfill its duties to Owner under the CM Agreement.

3.4 Contractor.

Architect understands that Owner plans to retain multiple prime contractors (the "Contractors") to provide construction labor, services, materials and equipment for the Project (the "Work"). The term "Contractor" means all prime contractors retained by Owner to perform Work, but not the prime contractor's subcontractors, laborers and material suppliers.

4. SCOPE OF SERVICES

4.1 In General.

Owner has retained Architect to help it achieve the objectives set forth in Section 3.1 above by providing design and construction administration services for the Project on behalf of Owner. Therefore, the general scope of Architect's responsibilities is to do all things, or, when appropriate, require Construction Manager and each Contractor to do all things necessary, appropriate or convenient to achieve the end result desired by Owner, including, but not limited to, those tasks set forth in this Article 4. Architect's services shall include all (i) architectural design services, (ii) civil, structural, mechanical, electrical and other engineering services not identified as the responsibility of Owner herein, (iii) landscape design services (including plaza and water feature design), (iv) interior and furnishings design, and (v) phone and data consulting services that are normally and customarily provided to complete a project of the scope, quality and nature of the Project and required to obtain the approval of governmental authorities having jurisdiction over the Project. The tasks set forth in this Article 4 are not intended to be an exhaustive list of the tasks required to achieve the result desired by Owner. The general scope of Architect's responsibilities and shall include all other tasks indicated or implied in this Agreement and the implementing plans contemplated herein.

4.2 Development Strategies Phase.

Architect shall carefully examine Owner's Criteria and consult with Owner and Construction Manager in detail about the same in detail. Based on its review and consultations, and with the assistance of Construction Manager, Architect shall prepare and submit to Owner a written report detailing its understanding of Owner's Criteria and identifying any design,
construction, scheduling, budgetary, operational or other problems or recommendations that may result from Owner’s Criteria. The written report shall also include proposed solutions addressing each problem identified, alternative strategies for the cost effective design and construction of the Project, and alternative strategies for the cost effective future expansion of the Project. Architect shall assist Construction Manager in developing the preliminary project schedule required pursuant to Section 4.2 of the CM Agreement.

4.3 Preliminary Design Phase.

4.3.1 After reviewing Architect’s written report and Construction Manager’s written report with Owner and Construction Manager, and reaching agreement upon proposed alternatives and solutions, Architect shall, within the time frames set forth in the preliminary project schedule developed pursuant to Section 4.2 of the CM Agreement and in cooperation with Construction Manager’s efforts, prepare and submit to Owner a preliminary design for the Project (the “Preliminary Design”), which shall be consistent with Owner’s Criteria and shall include:

(a) A site plan that depicts each of the basic aspects of the site development for the Project including, but not necessarily limited to, the size, location, and dimensions of each structure;

(b) Elevations that depict each exterior view of each structure;

(c) Floor plans that depict each room within the Project and the dimensions thereof;

(d) Preliminary specifications, together with preliminary plans architectural, electrical, mechanical, structural, engineering, and, if relevant, other systems to be incorporated in the Project;

(e) A written description of the equipment and materials to specified for the Project and the location of same; and

(f) Any other documents or things necessary or appropriate to describe and depict the Project and illustrate the conformity of the same with Owner’s Criteria.

4.3.2 Owner shall timely review and approve or disapprove the Preliminary Design. If Owner disapproves the Preliminary Design, Owner shall set forth the reasons therefor in writing. Architect shall then revise the Preliminary Design as required by the reasons for disapproval and resubmit the revised Preliminary Design to Owner for approval, which approval shall not be unreasonably withheld or delayed. This process shall repeat until Owner approves the Preliminary Design.

4.3.3 Architect shall assist Construction Manager in the preparation of the documents required under Section 4.4.1 of CM Agreement.
4.3.4 If the Preliminary Price Estimate developed pursuant to Section 4.4.1(f) of the CM Agreement exceeds the Project Budget developed pursuant to Section 4.4.1(c) of the CM Agreement, Owner may require Architect, at no cost to Owner, to (i) consult with Owner and Construction Manager to identify cost saving measures and (ii) revise the Preliminary Design to reflect approved cost savings measures, as necessary to bring the Final Cost Estimate below the Maximum Price. Absent clear and convincing evidence of gross negligence, provided Architect completes its obligations under this Section, Architect shall not be financially responsible to Owner for the failure of the Preliminary Cost Estimate to be within the Project Budget.

4.3.5 Prior to directing Architect to proceed with Construction Documents, Owner may establish and communicate the maximum price Owner desires to pay for the construction of the Project (the "Maximum Price").

4.4 Construction Documents Phase.

4.4.1 Upon Owner's approval of the Preliminary Design and authorization to proceed with Construction Documents, Architect shall, within the time frames set forth in the Project Schedule, prepare and submit to Owner construction documents for the Project (the "Construction Documents"). The Construction Documents shall be consistent with the Preliminary Design (as modified) and the Maximum Price. The Construction Documents shall include, but not necessarily be limited to, plans and specifications that describe with specificity all systems, elements, details, components, materials, equipment, and other information necessary for construction. The Construction Documents shall be accurate, complete, coordinated and in all respects adequate for the bidding and construction of the Project on a fixed-price, multi-prime contractor basis. The Construction Documents shall also comply with all applicable law, codes, regulations and orders of governmental authorities having jurisdiction over the Project. All products, equipment and materials specified shall be readily available in the area unless otherwise directed by Owner in writing.

4.4.2 To the extent deemed necessary or appropriate by Architect, Owner shall retain an experienced, qualified geotechnical engineer at Owner's expense to evaluate the geotechnical considerations relating to the Site and Project. Architect shall design and engineer the Project in accordance with the analyses and recommendations of the geotechnical engineer.

4.4.3 Owner shall review and approve or disapprove the Construction Documents. If Owner disapproves the Construction Documents, Owner shall set forth the reasons therefor in writing. Architect shall then revise the Construction Documents as required by the reasons for disapproval and resubmit the revised Construction Documents to Owner for approval, which approval shall not be unreasonably withheld or delayed. This process shall repeat until Owner approves the Construction Documents.

4.4.4 If the Final Cost Estimate exceeds the Maximum Price, Owner may require Architect, at no cost to Owner, to (i) consult with Owner and Construction Manager to identify cost saving measures and (ii) revise the Construction Documents to reflect approved cost savings measures, as necessary to bring the Final Cost Estimate below the Maximum Price.
Absent clear and convincing evidence of gross negligence, and provided Architect completes its obligations under this Section, Architect shall not be financially responsible to Owner for the failure of the Final Cost Estimate to be within the Maximum Price.

4.5 Bidding Phase.

4.5.1 Architect, following Owner’s approval of the Construction Documents, shall assist Owner and Construction Manager in preparing bid packages and reviewing bids for construction.

4.5.2 If the combined lowest bids from qualified bidders exceeds the Maximum Price, Owner may require Architect, at no cost to Owner and as necessary to bring bids for the Project below the Maximum Price (i) to consult with Owner and Construction Manager to identify cost saving measures, (ii) to revise the Construction Documents to reflect approved cost savings measures, and (iii) to assist Owner and Construction Manager in rebidding the Work. Absent clear and convincing evidence of gross negligence, and provided Architect completes its obligations under this Section, Architect shall not be financially responsible for the failure of the Project to bid within the Maximum Price.

4.6 Construction Phase.

During construction of the Project, from commencement of construction activities until final payment to all Contractors, Architect shall have and perform the following duties, obligations, and responsibilities:

4.6.1 Architect shall have and perform those duties, obligations and responsibilities set forth in the construction agreements between Owner and each Contractor (the “Construction Contracts”). Architect hereby acknowledges that it has received, reviewed, and studied a form that Owner intends to use for the Construction Contracts, and the same is herein incorporated by reference. Architect acknowledges that Owner may modify the Construction Contracts, and that such modified Construction Contracts shall be applicable to this Agreement; provided, however, to the extent such modified Construction Contracts are materially inconsistent with the terms of this Agreement, this Agreement shall control as between Owner and Architect.

4.6.2 Architect shall, as contemplated herein and in the Construction Contract, but not otherwise, act on behalf, and be the agent, of Owner throughout construction of the Project. Any instructions, directions or other communications from Architect to any Contractor shall be given to Contractor through Construction Manager. Architect shall copy Construction Manager on any communications to Owner.

4.6.3 Upon receipt, Architect shall carefully review and examine the each Contractor’s schedule of values (“Schedule of Values”), together with any supporting documentation or data that Owner, Architect or Construction Manager may require. The purpose of such review and examination shall be to protect Owner from an unbalanced Schedule of Values that allocates greater value to certain elements of the Work than is indicated by such supporting documentation or data, or than is reasonable under the circumstances. If the Schedule of Values is not found to be appropriate, or if the supporting documentation or data is deemed to
be inadequate, and unless Owner directs Architect to the contrary in writing, the Schedule of Values shall be returned to Contractor for revision or supporting documentation or data. After making such examination, if the Schedule of Values is found to be appropriate as submitted, or if necessary, as revised, Architect shall sign the Schedule of Values thereby indicating its informed belief that the Schedule of Values constitutes a reasonable, balanced basis for payment of the Contract Price to Contractor. Architect shall not sign such Schedule of Values in the absence of such belief unless directed to do so, in writing, by Owner.

4.6.4 Architect shall promptly examine, study, approve or otherwise respond to each Contractor’s shop drawings and other submittals. Architect’s approval of such submittal shall constitute Architect’s representation to Owner that such submittal is in general conformance with the Construction Documents.

4.6.5 Architect shall carefully observe the work of Contractor whenever, wherever, and as often as necessary, and shall, at a minimum, observe work at the Project site no less frequently than every two weeks. The purpose of such observations shall be to determine the quality and quantity of the work in comparison with the requirements of the Construction Contract. In making such observations, Architect shall help Owner identify, and attempt to protect Owner from, continuing deficient or defective work, from continuing unexcused delays in the schedule and from overpayment to Contractor. Following each observation, Architect shall submit a written report of such observation to Owner and Construction Manager together with any appropriate comments or recommendations.

4.6.6 Architect shall promptly notify Owner and Construction Manager of Work that is not in compliance with the Construction Documents, and timely recommend, in writing, the rejection of any Work that is not in compliance with the Construction Documents, unless otherwise directed by Owner in writing.

4.6.7 Architect shall require inspections and testing (and, if necessary, reinspections and retesting) of the Work where required by law or the Construction Documents.

4.6.8 Architect shall review periodic and final payment requests from Contractors predicated upon observations of the Work, as required in Section 4.6.5 above, and evaluations of Contractor’s rate of progress in light of the Project Schedule. Architect shall issue payment approvals to Owner only if, and to the extent, Architect has observed the Work as pursuant to Section 4.6.5 above and that the Work for which payment is approved (i) reaches the quantities or percentages of completion shown, (ii) meets or exceeds the requirements of the Construction Documents, and (iii) Owner is obligated to pay the amount approved to such Contractor under the terms and conditions of the Construction Contract.

4.6.9 Architect shall promptly respond to requests for information and issues clarifications for any errors, omissions, conflicts or inconsistencies in the Contract Documents.

4.6.10 Architect shall promptly examine requests for change orders and advise Owner and Construction Manager regarding such requests. Upon Owner’s request,
Architect shall draft Change Orders and supporting specifications, drawings, and other documentation in accordance with the Construction Contracts.

4.6.11 Based upon inspections of the Project, Architect shall certify in writing to Owner the fact that, and the date upon which, each Contractor achieves Substantial Completion of the Project and the date upon which Contractor has achieved Final Completion of the Project.

4.6.12 Architect shall review any as-built drawings furnished by Contractor and shall certify to Owner that such drawings are adequate and complete.

4.6.13 Architect shall assist Construction Manager in creating organized binders with all manuals, operating instructions, warranties, guarantees and other similar items required by the Construction Documents. Architect shall retain a set of such binders in its Project file.

4.6.14 Architect shall promptly correct any errors, omissions, inconsistencies or deficiencies in Architect’s services or work product.

4.6.15 Architect shall promptly notify Owner of any claim filed by any Contractor and shall provide Owner with a timely written response to such claim.

4.6.16 Architect shall testify in any judicial proceeding concerning the design and construction of the Project, when requested in writing by Owner, and Architect shall make available to Owner any personnel or consultants employed or retained by Architect for the Project when necessary to review, study, analyze or investigate any claims, contentions, allegations, or legal actions relating to, or arising out of, the design or construction of the Project.

5. SCHEDULE

5.1 Schedule of Performance.

Architect shall commence the performance of its obligations under this Agreement upon Owner’s notice to proceed and shall diligently and expeditiously continue its performance in accordance with the Project Schedule until all services hereunder have been fully completed. The time limits established by the Project Schedule are of the essence and shall not be exceeded by Architect without Owner’s prior written consent or as permitted in Section 5.2 below.

5.2 Delays.

If Architect is delayed at any time in progress of its services under this Agreement by an act or neglect of Owner, or an employee of Owner, or of a separate contractor employed by Owner, or by changes in its scope of work, unavoidable casualties, or other causes beyond Architect’s reasonable control or by other causes which Owner determines may justify the delay, then the Project Schedule equitably adjusted for such reasonable time as Owner may determine to be appropriate for the extent of the delay. Architect’s sole right and remedy against Owner shall be an extension of time unless such delay is caused by acts of Owner constituting active
interference with Architect's performance, and only to the extent such acts continue after Architect furnishes Owner with written notice of such interference. In the event of delay from active interference by Owner, Architect’s sole right and remedy shall an equitable adjustment in its compensation pursuant to Article 7 below.

6. COMPENSATION

6.1 Architect’s Fee.

As full compensation for Architect’s performance under this Agreement, Owner agrees to pay Architect a fee of Eight Hundred Fifty-four Thousand and No/100ths Dollars ($854,000.00) (the “Architect’s Fee”). For purposes of progress payments, Architect’s compensation shall be divided into the following phases:

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<th>Phase</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Development Strategies Phase</td>
<td>Ten Percent (10%)</td>
</tr>
<tr>
<td>Preliminary Design Phase</td>
<td>Twenty Percent (20%)</td>
</tr>
<tr>
<td>Construction Documents Phase</td>
<td>Forty Percent (40%)</td>
</tr>
<tr>
<td>Bidding Phase</td>
<td>Five Percent (5%)</td>
</tr>
<tr>
<td>Construction Phase</td>
<td>Twenty-five Percent (25%)</td>
</tr>
</tbody>
</table>

6.2 Compensation for Additional Services.

If the services of Architect are changed as described in Article 7 below, Architect’s Fee shall be adjusted as Owner and Architect may agree, or in the absence of agreement, on an hourly basis in accordance with the hourly rates approved by Owner in advance.

6.3 Reimbursable Expenses.

Reimbursable Expenses are in addition to Architect’s Fee and shall include only the following expenditures incurred by Architect in the interest of the Project:

6.3.1 Expenses of reproductions, postage and handling of drawings, specifications and other documents, excluding reproductions for the office use of Architect and Architect’s consultants;

6.3.2 Expenses of photographic reproduction techniques used in connection with providing Architect’s services hereunder;

6.3.3 Other similar direct Project related expenditures approved by Owner in advance.

6.4 Payments.

6.4.1 As a condition precedent for any payment due under this Article 6, Architect shall submit to Owner a monthly application for payment no later than the tenth day of the calendar month for services properly rendered and expenses properly incurred during the preceding month. The services rendered during the previous month shall be
calculated as a percentage of each phase completed, with any services performed on an hourly basis separately itemized. Hourly services shall be described with reasonable particularity each service rendered, the date thereof, the time expended, and the persons rendering such service. The invoices shall be itemized and supported by data substantiating Architect's right to payment as Owner may require. Each invoice shall be signed by Architect, which signature shall constitute Architect's representation to Owner that (i) the services indicated in the invoice have reached the level stated and have been properly and timely performed, (ii) the expenses included in the invoice have been reasonably incurred in accordance with this Agreement or otherwise approved by Owner in writing, (iii) all obligations of Architect covered by prior invoices have been paid in full, and (iv) the amount requested is currently due and owing, there being no reason known to Architect that payment or any portion thereof should be withheld. Submission of Architect's invoice for final payment shall further constitute Architect's representation to Owner that, upon receipt by Owner of the amount invoiced, all obligations of Architect to others, including its consultants, incurred in connection with the Project, will be paid in full. During the construction phase, Architect shall present its statement of services to Owner concurrently with the approved Certificates for Payment, when possible.

6.4.2 Owner shall pay Architect sums properly invoiced within 30 days of Owner's receipt of such invoice. If payment is not made within thirty (30) days, the outstanding balance shall bear interest at the rate of .75% per month until paid.

7. CHANGES

Changes in Architect's services (not involving a cardinal change to the scope of the services) may be accomplished after the execution of this Agreement upon Owner's request or if Architect's services are affected by any of the following:

(a) A change in the instructions or approvals given by Owner that necessitate revisions to previous approvals;
(b) Significant change to the Project, including, but not limited to size, quality, complexity, Owner's schedule, budget or procurement method;
(c) Architect performs additional services because of active Owner interference pursuant to Section 5.2 above, or
(d) Preparation for and attendance at a dispute resolution proceeding or a legal proceeding except where Architect is a party thereto.

If any of the circumstances affect Architect's services, Architect shall be entitled to an equitable adjustment in the Schedule of Performance and/or Architect's Fee, as mutually agreed by Owner and Architect. Prior to providing any additional services, Architect shall notify Owner of the proposed change in services and receive Owner's approval for the change. Except for a change due to the fault of Architect, a change shall entitle Architect to an equitable adjustment in the Schedule of Performance and Architect's Fee as mutually agreed by Owner and Architect. In the event Owner and Architect are unable to agree upon the equitable adjustment to Architect's Fee, the services shall be performed on a "time and materials" basis in accordance with Architect's standard hourly rate schedule and standard reimbursable expenses, approved by Owner.
8. CLAIMS.

8.1 Claims.

In the event that any claim, dispute or other matter in question between Owner and Architect arising out of or related to this Agreement or the breach hereof (a "Claim"), Owner and Architect shall first endeavor to resolve the Claim through direct discussions. Claims must be initiated by written notice. The responsibility to substantiate Claims rests with the party making the Claim. Except as otherwise agreed in writing, Architect shall continue to diligently perform its obligations under this Agreement and Owner shall continue to make payments in accordance with this Agreement pending the final resolution of any Claim. Architect acknowledges that Owner's ability to evaluate a Claim depends in large part on Owner being able to timely review the circumstances of the Claim. Therefore, Architect agrees that it shall submit a Claim to Owner by written notice no later than twenty-one (21) calendar days after the event or the first appearance of the circumstances giving rise to the Claim, and that such written notice shall set forth in detail all facts and circumstances supporting the Claim.

8.2 Mediation.

All Claims shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party. Request for mediation shall be filed in writing with the other party to this Agreement. The request may be made concurrently with the filing of a legal or equitable proceeding but, in such event, mediation shall proceed in advance of legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. The parties shall endeavor to mutually agree on an independent, professional mediator within 15 days of the request for mediation. The parties shall endeavor to have the mediation completed within 60 days of the request for mediation. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof. Owner and Architect agree that all parties with an interest in a Claim being mediated may be included in the mediation, including, but not limited to, Construction Manager and Contractors.

9. SUSPENSION AND TERMINATION

9.1 Suspension by Owner For Convenience.

Owner may order Architect in writing to suspend, delay, or interrupt the performance of this Agreement, or any part thereof, for such period of time as Owner may determine to be appropriate for its convenience and not due to any act or omission of Architect. In that event, Architect shall immediately suspend, delay or interrupt the performance of this Agreement, or that portion of this Agreement, as ordered by Owner. On the resumption of Architect's services, Architect's Fee and Project Schedule shall be equitably adjusted for reasonable costs and delay resulting from any such suspension.
9.2 Termination by Owner for Convenience.

Upon written notice to Architect, Owner may, without cause, terminate this Agreement. Architect shall follow Owner's instructions regarding shutdown and termination procedures, strive to mitigate all costs and stop the performance of its services. Upon such termination, Architect shall invoice Owner for all services actually performed and any reasonable costs or expenses incurred by Architect in connection with the termination (such as services necessary to shutdown performance), but not lost profits, unabsorbed overhead or lost opportunity.

9.3 Termination by Owner for Cause.

If Architect fails to fully and faithfully perform its duties and responsibilities under this Agreement, Owner may give Architect written notice of such failure and Owner's intent to terminate Architect's services if Architect fails to commence and diligently continue satisfactory correction of such failure within ten (10) days. If Architect fails to commence and diligently continue satisfactory correction of the failure within such 10-day period, Owner may terminate Architect's services by written notice. Upon such termination, Architect shall not be entitled to receive further payment until the Project is finished. If the unpaid balance of Architect's Fee exceeds costs of finishing Architect's services and other damages incurred by Owner, such excess shall be paid to Architect. If such costs and damages exceed the unpaid balance, Architect shall pay the difference to Owner.

9.4 Termination by Architect.

Upon fourteen (14) days' prior written notice to Owner, Architect may terminate this Agreement if (i) the progress of the Project has been suspended by Owner for convenience for a period of ninety (90) days through no fault of Architect; (ii) Owner fails to pay Architect in accordance with this Agreement and Architect has not defaulted; or (iii) Owner otherwise breaches this Agreement or fails to perform its duties and responsibilities under this Agreement and Owner has failed to cure the breach or failure to perform within thirty (30) days after Architect provides written notice of the breach or failure to perform to Owner. Upon such termination, Architect shall invoice Owner for all services actually performed and any reasonable costs or expenses incurred by Architect in connection with the termination (such as services necessary to shutdown performance), but not lost profits, unabsorbed overhead or lost opportunity.

10. GENERAL PROVISIONS

10.1 Ownership of Design and Work Product.

10.1.1 Architectural Design. Owner and Architect agree that Owner is developing, with the assistance of Architect, an architectural design theme for the Project (the "Architectural Design"). Architect acknowledges and agrees that Architectural Design is being developed for Owner and Owner shall be deemed to be Owner of all common law, statutory and other reserved rights thereto, subject to the provisions of Sections 10.1.3 and 10.1.4 below.

10.1.2 Work Product. Architect will document and implement Architectural Design into drawings, sketches, renderings, calculations, specifications and other...
documents, including those in electronic form, prepared by Architect and Architect’s consultants (the “Work Product”). Architect acknowledges and agrees that the Work Product is being developed for Owner and Owner shall be deemed Owner of all common law, statutory and other reserved rights thereto, subject to the provisions of Sections 10.1.3 and 10.1.4 below. Architect may reproduce and distribute the Work Product as necessary to perform its services on the Project.

10.1.3 Modification and Reuse by Owner. Owner understands that the Work Product is an expression of Architectural Design and instruments of Architect’s services for the Project, not products. Owner understands and agrees that the Work Product has been prepared for this Project only and are not suitable for reuse on other projects without first being reviewed and/or modified by an appropriately credentialed design professional, who shall then take responsibility for the accuracy and completeness thereof. Owner shall have the right to transfer and reuse the Work Product; provided, however, in such event Owner agrees to indemnify Architect against claims arising from any reuse of, or alterations made to, the Work Product not authorized by Architect.

10.1.4 Modification and Reuse by Architect. Architect shall have the right to retain and make copies of the Work Product and to reuse any of the constituent parts of Architectural Design or Work Product on any other project, except for any unique or distinctive architectural components or effects, which taken independently or in combination, would produce a project with substantially similar or distinct features.

10.1.5 Architect’s Consultants. Architect agrees that all consultants retained by Architect to provide any services on the Project shall expressly agree in writing to be bound by the terms of this Section 10.1 to the same extent as Architect.

10.2 Insurance.

10.2.1 Errors and Omissions Liability. Architect shall provide errors and omissions liability insurance on an aggregate limits “claims made” basis in an amount not less than Two Million Dollars ($2,000,000). Architect shall either (i) maintain the specified levels of aggregate limits “claims made” insurance for no less than three years after completion or termination of Architect’s services under this Agreement, or (ii) provide tail coverage for claims, demands or actions reported within six (6) years after completion or termination of Architect’s services under this Agreement for acts or omissions during the term of this Agreement.

10.2.2 General Commercial Liability. Architect shall maintain at all times commercial general liability insurance and excess liability coverage on occurrence form basis (standard, unmodified) with products and completed operations coverage in an amount not less than One Million Dollars ($1,000,000) per occurrence and Two Million Dollars ($2,000,000) annual aggregate.

10.2.3 Worker’s Compensation. Architect will maintain at all times such worker’s compensation and employer’s liability coverage insurance as required by the laws of the State in which the Project is located and any other state in which Architect or its
employees perform services for Owner. The policy must be endorsed to include a waiver of subrogation.

10.2.4 Additional Insureds. Upon Owner's request, Architect shall have Owner and Owner's lender, if any, named as additional insureds under all of Architect's liability insurance policies (not including errors and omissions and workers' compensation insurance).

10.2.5 Certificates of Insurance. Architect shall provide certificates of insurance issued by the insurer to Owner for each policy required under this Section 10.1 and, if requested by Owner, copies of each insurance policy. Each certificate issued to Owner shall contain the following covenant of the issuer: "Should any of the above described policies be cancelled before the expiration date thereof, the issuing company will mail 30 days written notice to the certificate holder."

10.2.6 Architect's Consultants. Architect shall require its consultants to maintain at all times insurance coverages consistent with the consultant's role on the Project and reasonably acceptable to Owner.

10.3 Recitals and Exhibits.

The recitals above and the exhibits referred to in this Agreement and attached hereto are incorporated into the agreement as if set out in full in the body of the Agreement. In the event of a conflict between any exhibit and the body of this Agreement, the Agreement shall control.

10.4 Counterparts; Facsimile Transmission.

This agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute but one and the same agreement. Delivery of an executed counterpart of a signature page to this agreement via facsimile transmission shall be as effective as delivery of an original signed copy, provided that an original signed copy shall be delivered to the party entitled thereto within five (5) business days after such facsimile transmission.

10.5 Attorneys' Fees.

In the event of any controversy, claim or action being filed or instituted between the parties to this agreement to enforce the terms and conditions of this agreement or arising from the breach of any provision hereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorneys' fees, incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. The prevailing party will be that party who was awarded judgment as a result of trial and determined by a judge as the prevailing party.
10.6 Governing Law.

This agreement shall be governed by the laws, including conflicts of laws, in the State of Idaho as an agreement between residents of the State of Idaho and to be performed within the State of Idaho.

10.7 Venue.

As a material part of the consideration for this agreement, each of the parties hereto agrees that in the event any legal proceeding shall be instituted between them, such legal proceeding shall be instituted in the courts of Ada County, State of Idaho, and each of the parties hereto agrees to submit to the jurisdiction of such courts.

10.8 Grammatical Usage.

In construing this agreement, feminine or neuter pronouns shall be substituted for masculine in form and vice versa, plural terms shall be substituted for singular and singular for plural in any place in which the context so requires, and the word "including" shall be construed as if the words "but not limited to" appear immediately thereafter.

10.9 Binding Effect.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns. Architect shall not assign its rights hereunder, nor shall it delegate any of its duties hereunder, without the written consent of Owner. Owner may assign this Agreement to any affiliated entity or to any lender providing construction financing without Architect's prior written consent. Architect agrees to execute all consents reasonably required to facilitate such an assignment. If either party makes such an assignment, that party shall nevertheless remain legally responsible for all obligations under this Agreement, unless otherwise agreed by the other party.

10.10 Headings.

The headings contained in this agreement are for reference purposes only and shall not in any way affect the meaning or interpretation hereof.

10.11 Additional Acts.

Except as otherwise provided herein, in addition to the acts and deeds recited herein and contemplated to be performed, executed and/or delivered by the parties, the parties hereby agree to perform, execute and/or deliver or cause to be performed, executed and/or delivered any and all such further acts, deeds and assurances as any party hereto may reasonably require to consummate the transaction contemplated hereunder.

10.12 Time of Essence.

All times provided for in this agreement, or in any other document executed hereunder, for the performance of any act will be strictly construed, time being of the essence.
10.13 Notice.

All notice between the parties shall be deemed received when personally delivered or when deposited in the United States mail postage prepaid, registered or certified, with return receipt requested, or sent by telegram or mail-o-gram or by recognized courier delivery (e.g. Federal Express, Airborne, Burlington, etc.) addressed to the parties, as the case may be, at the address set forth below or at such other addresses as the parties may subsequently designate by written notice given in the manner provided in this Section:

Owner: To be determined by Owner. Upon Owner's selection of its authorized representative, Owner will provide Architect the name and contact information for such representative.

With a copy to:
Office of the City Clerk
City of Meridian
33 East Idaho Avenue
Meridian, Idaho 83642-2300
Telephone: 208-888-4433
Facsimile: 208-884-8119
Email: bergw@meridiancity.org

City Attorney's Office
City of Meridian
33 East Idaho Avenue
Meridian, Idaho 83642-2300
Telephone: 208-898-5506
Facsimile: 208-884-8723
Email: bairdt@meridiancity.org

Architect: Steve Simmons
LCA Architects, P.A.
1221 Shoreline Lane
Boise, Idaho 83702
Telephone: 208-345-6677
Facsimile: 208-344-9002
Mobile: 208-830-4122
Email: ssimmons1@lcarch.com

With a copy to:
Russell Moorhead
LCA Architects, P.A.
1221 Shoreline Lane
Boise, Idaho 83702
Telephone: 208-345-6677
Facsimile: 208-344-9002
Mobile: 208-830-4166
Email: rmoorhead@lcarch.com
10.14 Rights and Remedies Cumulative.

Except as otherwise expressly stated in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by any party of one or more of such rights or remedies shall not preclude the exercise by it, at the same time or different times, of any other rights or remedies for the same default or any other default by the other party. In the event of a default, the parties have all of the rights and remedies afforded in law or in equity, except as provided herein to the contrary.

10.15 Third-Party Beneficiaries.

Nothing contained herein shall create any relationship (contractual or otherwise) with, or any rights in favor of, any third party. Architect's duties and responsibilities shall not relieve any other party, including Construction Manager and Contractors, from their duty to fully and faithfully perform their contractual and other obligations to Owner.

10.16 Integration; Waivers.

This is the entire agreement between the parties with respect to the matters covered herein and supersedes all prior agreements between them, written or oral. This Agreement may be modified only in writing signed by both parties. Any waivers hereunder must be in writing. No waiver of any right or remedy in the event of default hereunder shall constitute a waiver of such right or remedy in the event of any subsequent default.

10.17 Severability.

If any term or provision of this agreement shall, to any extent be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this agreement shall not be affected thereby, and each term and provision of this agreement shall be valid and be enforceable to the fullest extent permitted by law; and it is the intention of the parties hereto that if any provision of this agreement is capable of two constructions, one of which would render the provision void and the other of which would render the provision valid, the provision shall have the meaning which renders it valid.

[end of text]
The parties have executed this Agreement effective as of the date first set forth above.

“Owner”
CITY OF MERIDIAN,
an Idaho municipal corporation

By: 
Tammy de Weerd
Mayor

Date: 7-11-06

ATTEST:
Approved by City Council 7-11-06

William G. Berg, Jr.
City Clerk

Date: 7-11-06

“Architect”
LCA ARCHITECTS, P.A.,
an Idaho professional corporation

By: 
Steve Simmons, President

Date: 7-11-06
STATE OF IDAHO )
   : ss
County of Ada )

On this 14th day of July, 2006, before me, a Notary Public, personally appeared TAMMY DE WEERD and WILLIAM G. BERG, JR., known or identified to me to be the MAYOR and CITY CLERK, respectively, of the CITY OF MERIDIAN, who executed the instrument or the person that executed the instrument of behalf of said City, and acknowledged to me that such City executed the same.

(SEAL)

[Signature]
Notary Public for Idaho
Residing at: Meridian, ID
Commission expires: 10-15-11

STATE OF IDAHO )
   : ss
County of Ada )

On this 11th day of July, 2006, before me, a Notary Public, personally appeared STEVE SIMMONS, known or identified to me to be the PRESIDENT of LCA ARCHITECTS, P.A., an Idaho professional corporation, who executed the instrument or the person that executed the instrument of behalf of such corporation, and acknowledged to me that such corporation executed the same.

(SEAL)

[Signature]
Notary Public for Idaho
Residing at: Nampa, ID
Commission expires: Jan 15, 2011
<table>
<thead>
<tr>
<th>Contract Document</th>
<th>Description Status</th>
<th>Issue Date</th>
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<tbody>
<tr>
<td>Phase 2 Cold Shell &amp; Core</td>
<td>Drawings &amp; Specifications</td>
<td>2/27/07</td>
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<tr>
<td>Phase 3 Tenant Improvements/ MEP</td>
<td>Drawings &amp; Specifications</td>
<td>5/29/07</td>
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<td>Phase 3 Tenant Improvements/ MEP</td>
<td>Bid Documents</td>
<td>5/31/07</td>
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<td>Phase 3 Security/Audio-Visual Revision</td>
<td>Drawings</td>
<td>9/10/07</td>
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<td>Phase 3 Security/Audio-Visual Revision</td>
<td>Bid Documents</td>
<td>9/12/07</td>
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<tr>
<td>Phase 3 Interior Signage</td>
<td>Drawings &amp; Specs</td>
<td>2/11/08</td>
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<td>Phase 3 Interior Signage</td>
<td>Bid Documents</td>
<td>4/23/08</td>
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<td>Phase 3 – Final Clean</td>
<td>Drawings &amp; Specifications and Bid Documents</td>
<td>7/1/08</td>
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<td>Phase 4 Plaza &amp; Site Improvements</td>
<td>Drawings &amp; Specifications</td>
<td>7/27/08</td>
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<td>Phase 4 Plaza &amp; Site Improvements</td>
<td>Bid Documents</td>
<td>10/22/07</td>
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<td>Phase 4 Plaza Redesign</td>
<td>Drawings &amp; Specifications</td>
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<td>Phase 4 Plaza Redesign</td>
<td>Bid Documents</td>
<td>3/5/08</td>
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<td>Phase 5 East Parking Lot</td>
<td>Drawings &amp; Specifications and Bid Documents</td>
<td>8/01/08</td>
</tr>
</tbody>
</table>
Mr. Wesley Bettis  
PETRA, INC.  
9056 W. Black Eagle Drive  
Boise, Idaho 83709

Re: Proposal for Phase II Subsurface Investigation  
At the former Meridian Creamery  
Meridian, Idaho

Dear Mr. Bettis:

In response to your request, Materials Testing and Inspection, Inc. (MTI) is pleased to submit the following proposal for the performance of a Phase II Subsurface Investigation at the above referenced site. It is understood that a suspected petroleum release was discovered on a portion of the former Meridian Creamery, Meridian, Idaho. This investigation is to identify the contaminants of concern, determine the full lateral and vertical extent of the contamination and to determine the most appropriate approach for the project, such as performing a risk based analysis or through remediation by removal of the source area.

MTI proposes to investigate the presence and extent of soil and groundwater contamination associated with the above-defined areas in the following manner:

1. Install at least eight excavated test pits using a steel tracked hoe at separate locations on the site;  
2. Perform on-site screening of test pit locations using field techniques and equipment;  
3. Collect subsurface soil and groundwater grab samples at least eight locations on the site;  
4. Submit the samples for confirmation analysis for site specific contaminants of potential concern;  
5. Prepare a summary of our findings in a written report.

It is proposed that the fees for the performance of the outlined services be determined on a unit fee basis, and that services be provided in accordance with the attached MTI General Conditions for Environmental Site Assessment Services, which are incorporated into and made part of this proposal. Additional work required beyond the scope of services included in this proposal is not anticipated but if needed will be invoiced on a unit fee basis, in accordance with the unit rates listed below. The following estimated fees for your project are based upon the items and quantities quoted (this is not a “Not to Exceed” quote). All services and fees which are beyond the scope of this estimate will be charged at our standard rates.
SCHEDULE OF FEES AND SERVICES

<table>
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<th>Rate</th>
<th>Unit</th>
<th>Subtotal</th>
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<tr>
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<td>$450.00</td>
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<td>Soil/Water Sample Analysis via TPH (Method 8015)</td>
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<td>Report Preparation, per hour</td>
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<td>MISCELLANEOUS SERVICES</td>
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<td>$150.00</td>
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ESTIMATED PROJECT TOTALS: $14,973.00

This amount will not be exceeded without advanced justification to and authorization by our client. Please note if ground water contamination is disclosed, further investigation and notification to the Idaho DBQ may be required. MTI will proceed with the work upon receipt of a signed copy of this proposal, intact. MTI appreciates this opportunity to be of service to you. Please feel free to contact us to answer any questions you may have concerning this proposal.

Respectfully submitted,

MATERIALS TESTING AND INSPECTION, INC.

[Signature]

Rusty Boicourt, P.G.
Environmental Services Manager

Attached: Professional Services Contract
PROFESSIONAL SERVICES CONTRACT

THIS AGREEMENT is made and entered into effective this Thursday, February 15, 2007, by and between PETRA, INC. ("CLIENT") and MATERIALS TESTING & INSPECTION, INC. ("CONSULTANT") and is made with reference to the following facts and objectives:

RECEITALS:

WHEREAS, CLIENT intends to have MTI perform a Phase II Subsurface Investigation in accordance with the Proposal (Exhibit "A") on the above referenced site (hereinafter referred to as the "Project").

NOW, THEREFORE, in consideration of their mutual covenants, CLIENT and CONSULTANT herein agree, in respect of the performance of professional materials testing and construction inspection services by CONSULTANT and the payment for those services by CLIENT, as set forth below.

I. SCOPE OF SERVICE. The services to be performed by CONSULTANT under this Agreement are described in Exhibit "A" attached hereto, and incorporated herein by this reference as though fully set forth. Any estimated quantities contained in Exhibit "A" are estimates only and CLIENT agrees that CONSULTANT is entitled to payment for reasonable services rendered in excess of the estimated quantities and/or cost figures as described in Exhibit "A".

II. PAYMENTS TO CONSULTANT. CLIENT shall pay CONSULTANT for the services rendered hereunder in accordance with the fee and payment schedule attached hereto as Exhibit "A". CONSULTANT shall submit monthly statements for services rendered and for reimbursable expenses incurred. Administrative and/or management time for report review and preparation, schedule changes, and other project related activities will be added to the Inspector/technician's time. All monthly statements submitted to CLIENT shall be due and payable at the time of the billing unless otherwise specified in this Agreement. If CLIENT fails to pay CONSULTANT within thirty (30) days after receipt of monthly statements for services rendered and for reimbursable expenses incurred, CLIENT agrees to pay one percent (1%) interest per month until the monthly statements are paid in full. CLIENT further agrees that nonpayment of monthly statements beyond a seventy-five (75) day period constitutes a material breach of this Agreement with the exception of reasonably disputed amounts that upon written notice from CONSULTANT, the duty, obligations and responsibilities of CONSULTANT under this Agreement are terminated. In such event CLIENT shall promptly pay CONSULTANT for all fees, charges and services as outlined in Exhibit "A" provided by CONSULTANT up to the date of termination.

III. SERVICES. CONSULTANT will act for CLIENT in a professional manner, using that degree of care and skill ordinarily exercised by and consistent with the standards of the professional practicing in the same or similar locality of the Project site. CONSULTANT makes no warranty, either expressed or implied, as to its findings, recommendations, specifications or professional advice. CONSULTANT will provide only those services that, in the opinion of CONSULTANT, lie within the technical and professional areas of expertise of CONSULTANT as set forth in Exhibit "A" and which CONSULTANT is adequately staffed and equipped to perform. CLIENT shall request in writing if CLIENT desires CONSULTANT to provide services outside of the scope of services described in Exhibit "A", attached hereto. CONSULTANT will advise CLIENT in writing of any services that lie outside the technical and professional expertise of CONSULTANT.

IV. SAMPLE DISPOSAL. Unless otherwise agreed to in writing, samples removed from Project site by CONSULTANT to a laboratory will, upon completion of testing, be disposed by CONSULTANT or the laboratory. CLIENT further agrees the cost for disposal of Hazardous Materials to include the characterization costs shall be borne by CLIENT.

V. CLIENT'S RESPONSIBILITIES. CLIENT or CLIENT's authorized representatives will provide CONSULTANT with all revised and updated plans, specifications, addenda, change orders, approved shop drawings and any other information for the proper performance of CONSULTANT pursuant to this Agreement. CLIENT shall not be responsible for any errors and/or omissions in the performance of CONSULTANT's work or services rendered resulting from CLIENT's failure to provide CONSULTANT with revised and updated plans, specifications, addenda, change orders, approved shop drawings and other information for the proper performance of CONSULTANT. CLIENT will arrange and provide access to each area in which it will be necessary for CONSULTANT to perform its work.

VI. INSURANCE. CONSULTANT shall secure and maintain throughout the full period of this Agreement sufficient insurance to protect it adequately from claims under applicable Workman's Compensation Acts and from claims for bodily injury, death or property damage as may arise from the performance of services under this Agreement. In addition, CONSULTANT shall secure and maintain throughout the full period of Agreement sufficient Professional Liability Insurance to protect it adequately from claims arising from errors or omissions resulting from Professional Services.

VII. EXEMPTIONS OF CONSULTANT'S RESPONSIBILITIES. CONSULTANT shall not be responsible for acts and/or omissions of any party or parties involved in the design of the Project or the failure of any Contractor or Subcontractor to construct any aspect of the Project in accordance with the contract documents, or in accordance with recommendations contained in any correspondence or written recommendations issued by CONSULTANT. CONSULTANT is not authorized to revoke, alter, relax, enlarge or release any requirement of the Project's specifications or other contract documents, nor to approve or accept any portion of the work, unless specifically authorized in writing by CLIENT or his authorized representative. CONSULTANT shall not have the right of rejection or the right to stop work, except for such periods as may be required to conduct sampling, testing, or inspection of operations covered by this Agreement. CONSULTANT shall not be liable for damages resulting from the actions or omissions of any governmental agencies, including but not limited to, permitting agencies.
VIII. CHANGES IN SCOPE OF WORK. CLIENT, without invalidating this Agreement may order changes in the scope or character of services and/or work performed by CONSULTANT, either decreasing or increasing the amount of CONSULTANT'S work or services. All such changes in the work and/or services performed by CONSULTANT shall be authorized by a written change order signed by CLIENT and shall be performed under the applicable terms and conditions of this Agreement. CONSULTANT shall not be obligated to perform any changes in the scope or character of the work and/or services until CONSULTANT is in receipt of a written change order signed by CLIENT and signed by CONSULTANT indicating its agreement therewith.

IX. LIMITATION OF LIABILITY. Should MITI or any of its professional employees be found to have been negligent in the performance of its work, or to have made and breached any express or implied warranty, representation or contract, CLIENT, all parties claiming through CLIENT and all parties claiming in any way relying upon MITI's work, agree that the maximum aggregate amount of the liability of MITI, its officers, employees and agents shall be limited to $5,000.00 or the total amount of the fees paid to MITI under this Agreement or the limit of any optional Client-purchased insurance, whichever amount is lesser.

X. COMPENSATION FOR SERVICES RENDERED. CLIENT recognizes that the estimate noted in Exhibit 'A' (if provided) was obtained through a diligent evaluation of the contract documents and scheduled discussions with the Owner, relevant subcontractors and the general contractor. CLIENT recognizes that the testing and inspection industry, and the services rendered herein under this contract, are schedule driven and are mandated by the scheduling and timing of the contractor(s). Should such items, for example, as the quantity of concrete placement, field or shop sized welding schedules or masonry placement days after from that quoted within our proposal, CONSULTANT shall be entitled to compensation for services rendered.

XI. OVERTIME AND BILLING MINIMUM. CLIENT recognizes the attached Exhibit 'A' which outlines billing minimums for any services rendered on site. In addition, CLIENT recognizes that, on occasion, due to the schedule of the contractor or relevant subcontractors, overtime work will be encountered. Due to the nature of the construction business, CONSULTANT will have no notice of this until the day the said overtime occurs. CLIENT agrees to compensate CONSULTANT for such overtime.

XII. LIMITATION OF SERVICES PROVIDED. The services provided pursuant to this agreement are intended solely for the use and benefit of the CLIENT as noted above. No other person or entity shall be entitled to rely on the services, opinions, recommendations, plans, or specifications provided pursuant to this agreement without the express written consent of CONSULTANT.

XIII. INDEMNITY. CLIENT agrees to defend, indemnify, and hold CONSULTANT, its officers, directors, employees, agents and independent contractors harmless from any and all claims, suits or liability for personal injury, death, illness, property damage, damage to natural resources, fine or penalty arising or alleged to have arisen out of performance of CONSULTANT'S work to the extent that such claims or damages were due to the negligence of the CLIENT, except to the extent due to gross negligence or intentionally wrongful conduct of CONSULTANT. CLIENT further agrees to compensate CONSULTANT for all costs, expenses and fees reasonably incurred in defending any such claim, including court costs and attorney's fees. In the event CLIENT shall bring any action against CONSULTANT, to the extent CONSULTANT prevails in such action, CLIENT shall provide the same compensation.

XIV. PROVISIONS SEVERABLE. The unenforceability or invalidity of any provision or provisions hereof shall not render any other provision or provisions unenforceable or invalid. Nothing in the Agreement shall relieve any party from its responsibilities under law or contract.

XV. LOCATION OF AGREEMENT AND DURATION OF PROPOSAL. This agreement is governed by the laws of the State of Idaho, and is entered into the County of Ada, City of Boise. The attached Proposal shall remain valid and in effect for 180 days from the date written in below.

This agreement contains the entire and integrated Agreement between CLIENT and CONSULTANT and supersedes all prior negotiations, representations or agreements, either written or oral. This agreement cannot be amended or modified except by a written Agreement, executed by each of the parties hereto. This Agreement is covered by the laws of the state of Idaho.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first above written, at Boise, Idaho.

---

Consultant:

Materiale Testing & Inspection, Inc.

Name & Title:  

Date:  2-15-07  

Client:

Company Name:  

Name & Title:  

Date:  

Analytical Laboratories, Inc.
1804 N. 33rd Street
Boise, Idaho 83703
Phone (208) 342-5515

Attn: JON KRUCK
MATERIALS TESTING & INSPECTION
2791 S VICTORY VIEW WAY
BOISE, ID 83709

Time of Collection: 16:55
Date of Collection: 2/14/2007
Date Received: 3/5/2007
Report Date: 3/7/2007

PWS: PWS

Laboratory Analysis Report
Sample Number: 0707409

EPA 8270C testing by Anatek Labs.(ATL)

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<th>MDL</th>
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MCL = Maximum Contamination Level
MDL = Method Detection Limit
Units MDL Method

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MCL = Maximum Contamination Level  
MDL = Method-Minimum Detection Limit  
UR = Unregulated
# Laboratory Analysis Report

Sample Number: 0707409

EPA 8270C testing by Anatek Labs (ATL)

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MCL = Maximum Contamination Level  
MDL = Method Minimum Detection Limit  
UR = Unreported
**Laboratory Analysis Report**

Sample Number: 0707409

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**MCL** = Maximum Contaminant Level

**MDL** = Method/Minimum Detection Limit

**UQL** = Unquantified
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<td>12,400</td>
<td>mg/kg</td>
<td>50</td>
<td>EPA 8015</td>
<td>3/6/2007</td>
<td>CY</td>
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</table>

MCL = Maximum Contamination Level  MDL = Method/Minimum Detection Limit  UR = Unregulated

Thank you for choosing Analytical Laboratories for your testing needs.

If you have any questions concerning this report, please contact: David Bennett
### ASTM C-1314 Compressive Strength of Masonry Prisms

#### Project: Meridian City Hall

**Contractor:** Petra  
**Supervisor:** ICCO  
**Mix ID:** 3136522  
**Location:** North stair tower, elevation 4' to 8'

**Date Made:** 7/16/07  
**Specified CMU f_c (psi):** 1500  
**Number of Yards:** 6.5  
**Ticket #:** 76809724  
**Report #:** 071sm

<table>
<thead>
<tr>
<th>CMU/Prism ID</th>
<th>Date Received</th>
<th>Test Age in Days</th>
<th>Date Tested</th>
<th>Prisms Grown?</th>
<th>Prism Width (inches)</th>
<th>Prism Length (inches)</th>
<th>Prism Height (inches)</th>
<th>Height lateral prism dimension</th>
<th>Corrected on Factor</th>
<th>Percent Net Area ASHMA CH-40</th>
<th>Net Area (in.²)</th>
<th>Failure Load (lb)</th>
<th>Corrected Compressive Strength (psi)</th>
<th>Fibre Modulus</th>
<th>Failure Mode</th>
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<td>5758</td>
<td>Jul 19, 07</td>
<td>7</td>
<td>Jul 24, 07</td>
<td>yes</td>
<td>7.65</td>
<td>7.60</td>
<td>15.00</td>
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<td></td>
<td>57.78</td>
<td>131,400</td>
<td>2,280</td>
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<td>Jul 19, 07</td>
<td>28</td>
<td>Aug 14, 07</td>
<td>yes</td>
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<td>7.60</td>
<td>15.00</td>
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<td>57.78</td>
<td>107,280</td>
<td>1,600</td>
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<td>5760</td>
<td>Jul 19, 07</td>
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<td>Aug 14, 07</td>
<td>yes</td>
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<td>7.60</td>
<td>15.00</td>
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<td></td>
<td>57.78</td>
<td>109,480</td>
<td>1,500</td>
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</tr>
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</table>

**Compressive Strength of Masonry (average for the set of 28 day prisms (psi)): 1,880**

![Fig. 4 Sketches of Types of Failure](image)

If you have any questions concerning this report (cmu5758), please contact us immediately.

Respectfully submitted,

MATERIALS TESTING & INSPECTION INC.

Reviewed by: George DuPont  
*Corporate Construction Services Manager*
Project: Meridian City Hall  
33 East Idaho Street  
Meridian, Idaho 83642

Owner: City of Meridian  
33 East Idaho Street  
Meridian, Idaho 83642

Architect: LCA Architects, PA.  
1221 Shoreline Lane  
Boise, Idaho 83702

General Contractor: Petra, Inc.  
1097 Rosario Street  
Meridian, Idaho 83642

The Closeout Package for Meridian City Hall, attached hereto has been received and found by the Owner to be complete in accordance with the Contract Documents.

Keith Watts (SIGNATURE)  
Purchasing Agent  
City of Meridian  
1/29/09

Eric Jensen (SIGNATURE)  
Building Maintenance  
City of Meridian  
1/29/09

Gene Bennett (SIGNATURE)  
Project Manager - Petra, Inc.  
1/29/09
PROJECT: Meridian City Hall

TO: City of Meridian
33 E Idaho Avenue
Meridian, ID 83642

DATE: 2/17/2009

REF: As Build documents for Signature

ATTN: Eric Jenson

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<tr>
<td>0012</td>
<td>2</td>
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<td>37 pages</td>
<td></td>
<td>As build Drawings from Tri-State - Plaza/Site Electrical</td>
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</tr>
</tbody>
</table>

Remarks:

Signed: Jack Vaughan

Exhibition: 535
TRANSMITTAL
No. 01004

ROCK SOLID
GENERAL CONTRACTORS
1097 N. ROSARIO STREET • MERIDIAN, ID 83642 • PHONE: (208) 323-4500 • FAX: (208) 323-4507

PROJECT: Meridian City Hall
TO: City of Meridian
   33 E Broadway Avenue
   Meridian, ID 83642
ATTN: Tom Johnson

DATE: 8/4/2009
REF: Punchlist Sign Off

PHONE: 208-379-9650
FAX: 208-379-9660
CELL: UNAVAILABLE

PROJECT: Meridian City Hall # 060675
PROJECT: Meridian City Hall # 060675

ITEM NO. | COPIES DATE | ITEM NUMBER | REV. NO. | DESCRIPTION | STATUS
--- | --- | --- | --- | --- | ---
1 | 1 | 8/4/2009 | | Punchlist Sign Off Sheet |

Remarks: Please see attached punchlist sign off sheet for your signature. Please return to Petra, Inc.

Thank you!

Barb

EXHIBIT
536

Signed: Barb Crawford

**Exhibit:** This Communication contains proprietary business information and may contain confidential information. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately destroy, discard, or erase this information.
The punchlist for Meridian City Hall attached hereto and dated 11/07/06, has been reviewed and found by the General Contractor, Architect and Owner to be complete in accordance with the Contract Documents.
<table>
<thead>
<tr>
<th>Item number</th>
<th>Responsible Contractor</th>
<th>Location</th>
<th>Item</th>
<th>Date Complete</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>ABM Cleaning</td>
<td>General Note</td>
<td>Clean all exterior glazing</td>
<td>11/3/06</td>
</tr>
<tr>
<td>2</td>
<td>ABM Cleaning</td>
<td>General Note</td>
<td>Clean all top story from building parapet</td>
<td>11/3/06</td>
</tr>
<tr>
<td>3</td>
<td>Axelson</td>
<td>General Note</td>
<td>Touchup concrete at coating below brick veneer continuously all the way around the building</td>
<td>11-3-06</td>
</tr>
<tr>
<td>4</td>
<td>ABM Cleaning</td>
<td>General Note</td>
<td>Wash entire building</td>
<td>11/3/06</td>
</tr>
<tr>
<td>5</td>
<td>Axelson</td>
<td>General Note</td>
<td>Clean up concrete rubbing line so it has nice uniform clean appearance throughout</td>
<td>11/3/06</td>
</tr>
<tr>
<td>6</td>
<td>TMC Masonry</td>
<td>Exterior General Note</td>
<td>Clean mortar from bottom of Armacraft stone</td>
<td>11/3/06</td>
</tr>
<tr>
<td>7</td>
<td>TMC Masonry</td>
<td>Exterior General Note</td>
<td>Clean mortar at top of building</td>
<td>11/3/06</td>
</tr>
<tr>
<td>8</td>
<td>Western Roofing</td>
<td>Exterior General Note</td>
<td>Schedule roof manufacturer to walk roof to ensure roof warranty</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Steel Mechanical</td>
<td>General Note</td>
<td>Increase height of overflow drain ring to four inches</td>
<td>11/2/06</td>
</tr>
<tr>
<td>10</td>
<td>Sealco</td>
<td>Exterior General Note</td>
<td>Provide sealant where all trim buckles steel plates meet brick veneer to provide weather tight construction</td>
<td>Extra Not PL comp 4/21</td>
</tr>
<tr>
<td>11</td>
<td>RB Welding</td>
<td>Site Work gen Note</td>
<td>All exposed fasteners shall be stainless steel and/or type to resist rusting</td>
<td>11/3/06</td>
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<tr>
<td>12</td>
<td>Sealco</td>
<td>Site Work gen Note</td>
<td>Remove zinc and stainless fasteners</td>
<td>12/2/06</td>
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<td>13</td>
<td>TMC Masonry</td>
<td>East Elevation</td>
<td>Re-point in mortar at sill cap at grade line J-1</td>
<td>11/3/06</td>
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<tr>
<td>14</td>
<td>TMC Masonry</td>
<td>East Elevation</td>
<td>Remove and replace split mortar at grade line</td>
<td>11/3/06</td>
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<tr>
<td>15</td>
<td>TMC Masonry</td>
<td>East Elevation</td>
<td>Remove two pieces of brick above sill window at top of grade line</td>
<td>11/3/06</td>
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<td>16</td>
<td>TMC Masonry</td>
<td>East Elevation</td>
<td>Re-point in mortar above Armacraft stone sill at second floor at grade line J-4</td>
<td>11/3/06</td>
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<td>17</td>
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<td>Re-point in mortar at brick veneer between two northern windows at second floor south of grade line J-4</td>
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<td>Re-point in mortar at top elevation of grade line H-4 below brick band at Armacraft stone</td>
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<td>19</td>
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<td>East Elevation</td>
<td>Reverse mortar joint at grade H-4 below brick band at Armacraft stone</td>
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<td>TMC Masonry</td>
<td>East Elevation</td>
<td>Re-point mortar surrounding brick corn at grade line H-4, right above first floor window</td>
<td>01/06</td>
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<td>21</td>
<td>TMC Masonry</td>
<td>East Elevation</td>
<td>Clean-up mortar bed where Armacraft stone meets foundation wall near grade line H-4,5</td>
<td>01/06</td>
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<td>East Elevation</td>
<td>Re-point mortar at brick veneer above Armacraft stone at grade line H-4,5</td>
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<td>Clean all aluminum flashing at grade line H-7</td>
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<td>Custom Glass</td>
<td>East Elevation</td>
<td>Install aluminum trim piece at head of entry doors to conceal exposed screws</td>
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<td>31</td>
<td>Tri-Stop</td>
<td>East Elevation</td>
<td>Install missing light fixture at grade line H-7</td>
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<tr>
<td>76</td>
<td>Rule Steel</td>
<td>South Elevation</td>
<td>Remove grout from middle sunshade steel fascia and repaint.</td>
<td>Y 9/1/09</td>
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<tr>
<td>77</td>
<td>Rule Steel</td>
<td>South Elevation</td>
<td>Replace bent turnbuckle and tie rod at east sun shade.</td>
<td>Y 9/1/09</td>
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<td>78</td>
<td>TMC Masonry</td>
<td>South Elevation</td>
<td>Repair plastic at gridline 1 between G and H underneath window sill</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>79</td>
<td>TMC Masonry</td>
<td>South Elevation</td>
<td>Repair mortar from decorative soldier course above window sill at gridline J-1</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>80</td>
<td>TMC Masonry</td>
<td>South Elevation</td>
<td>Re-point in mortar at gridline C at south second floor roof above center window at Amherst stone and brick</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>81</td>
<td>TMC Masonry</td>
<td>South Elevation</td>
<td>Trim back vinyl flashing at northeastmost window sill</td>
<td>Y 9/1/09</td>
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<tr>
<td>82</td>
<td>Bulk Mechanical</td>
<td>Roof 77</td>
<td>Provide escape ladder where roof drainpipe stops at window sill.</td>
<td>Y 9/1/09</td>
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<td>83</td>
<td>TMC Masonry</td>
<td>South Elevation</td>
<td>Clean mortar of roof drainpipe at south face of stair corn.</td>
<td>OK 9/1/09</td>
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<td>84</td>
<td>TMC Masonry</td>
<td>South Elevation</td>
<td>Clean mortar of roof drainpipe at south face of stair corn.</td>
<td>OK 9/1/09</td>
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<td>85</td>
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<td>Smooth mortar of roof drainpipe at south face of stair corn.</td>
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<td>86</td>
<td>TMC Masonry</td>
<td>South Elevation</td>
<td>Rework where second floor parapet intersects stair tower to provide clean waterproof detail.</td>
<td>Y 9/1/09</td>
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<tr>
<td>87</td>
<td>Ax Plus</td>
<td>West Elevation</td>
<td>Stucco exposed foundation wall adjacent to generator and pedestrian ramp.</td>
<td>No per Keith</td>
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<tr>
<td>88</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Re-tool mortar adjacent to southwest side door at grading F-2.</td>
<td>Y 9/1/09</td>
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<tr>
<td>89</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Re-tool mortar adjacent to southwest side door at grading F-2.</td>
<td>Y 9/1/09</td>
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<tr>
<td>90</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Re-tool and mortar at brick decorative soldier course above sill at gridline F-2.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>91</td>
<td>Rule Steel &amp; Roman</td>
<td>West Elevation</td>
<td>Look at the interior window sill to determine if needed; replace if required.</td>
<td>Y 9/1/09</td>
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<td>92</td>
<td>Rule Steel</td>
<td>West Elevation</td>
<td>Remove black stain from brick at center window before painting.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>93</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Remove black vinyl flashing above airbrake device at gridline F-2.</td>
<td>Y 9/1/09</td>
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<tr>
<td>94</td>
<td>Bulk Mechanical</td>
<td>West Elevation</td>
<td>Secure overflow drain properly with correct fasteners right at roof generator.</td>
<td>Y 9/1/09</td>
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<td>95</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Provide assistance for plumbing, gas line and electrical switches.</td>
<td>Y 9/1/09</td>
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<tr>
<td>96</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Permalon mortar under wall at column line to F-2.</td>
<td>Y 9/1/09</td>
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<tr>
<td>97</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Re-point mortar at gridline D-2 to north of second floor window.</td>
<td>Y 9/1/09</td>
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<tr>
<td>98</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Look at the center window to the south for paint and provide additional coats of paint on door frame.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>99</td>
<td>Commercial Painting</td>
<td>West Elevation</td>
<td>Paint to match exterior wall finishes.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>100</td>
<td>ABS Doors</td>
<td>West Elevation</td>
<td>Remove door and install 1-3/4&quot; thick steel door with 1-1/2&quot; thick glass panel and 3&quot; thick iron frame.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>101</td>
<td>Bulk Mechanical</td>
<td>West Elevation</td>
<td>Sandstone panic bar storage.</td>
<td>Y 9/1/09</td>
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<tr>
<td>102</td>
<td>Bulk Mechanical</td>
<td>West Elevation</td>
<td>Install survey trans at overflow downspout, generation adjacent to screen wall at southwest corner.</td>
<td>Y 9/1/09</td>
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<tr>
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<td>Commercial Painting</td>
<td>West Elevation</td>
<td>Paint to match exterior wall finishes.</td>
<td>Y 9/1/09</td>
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<td>104</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Clean exterior mortar from underneath sill block at second floor windows.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>105</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Re-point mortar underneath soldier course at window head at second floor window at south side of radius</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>106</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Complete electrical work at spot lights in west.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>107</td>
<td>Bulk Mechanical</td>
<td>West Elevation</td>
<td>Complete installation of all exposed concrete wall on entire east elevation.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>108</td>
<td>Bulk Mechanical</td>
<td>West Elevation</td>
<td>Install roof drain overflow trans at both eastern columns.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>109</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Remove black vinyl flashing along crown line A right at brick lintel above third story windows.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>110</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Complete installation of concrete wall when concrete wall meets bottom of brick veneer continuously all along west elevation.</td>
<td>OK 9/17</td>
</tr>
<tr>
<td>111</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Complete electrical box on the north side.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>112</td>
<td>Commercial Painting</td>
<td>West Elevation</td>
<td>Provide sustantial and mortar flashing below at the west elevation, first floor from along the west radius, second window from the north.</td>
<td>OK 9/17</td>
</tr>
<tr>
<td>113</td>
<td>Commercial Painting</td>
<td>West Elevation</td>
<td>Provide sustantial and mortar flashing below at the west elevation, first floor from along the west radius, second window from the north.</td>
<td>OK 9/17</td>
</tr>
<tr>
<td>114</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Re-point in mortar above main soldier course at gridline D-10.</td>
<td>Y 9/1/09</td>
</tr>
<tr>
<td>115</td>
<td>TMC Masonry</td>
<td>West Elevation</td>
<td>Complete installation of exterior wall finishes at window head at gridline F-11.</td>
<td>Y 9/1/09</td>
</tr>
</tbody>
</table>
February 24, 2009

Jerry S. Frank, CEO  
Gene Bennett, Project Manager  
Petra Incorporated  
1097 N. Rosario Street  
Meridian, ID 83642

RE: Change Order #2 Regarding Additional City Hall CM Fees

Dear Jerry and Gene:

Thank you for your patience during our research into your fee request. While we want Petra to be fairly compensated for its management of the Meridian City Hall project, our first priority is our obligation to the citizens of Meridian to assure good stewardship of their tax dollars.

Our analysis of your fee request must necessarily begin with a review of the Agreement for Construction Management Services. As you know, this Agreement was negotiated over a number of weeks with each party availing itself of legal representation so that the terms and conditions of the Agreement would be fully understood. Through the Agreement, the City endeavored to create a relationship with its Construction Manager whereby the Project would be managed in the City’s best interests.

Article 7 of the Agreement allows for an equitable adjustment in the Construction Manager’s Fee if significant change to the Project materially affects Construction Manager’s services. Petra is requesting additional fees as the result of increases in Project size, complexity, and budget. Petra and the City have been exchanging letters regarding this fee request since November 5 of 2007. The City has reviewed the additional substantiation provided by Petra on October 3, 2008 and we are still not convinced that the factors cited by Petra have materially affected the construction management services provided.

Article 4.2 of the Agreement required that Petra work with the Architect to “prepare and submit to the Owner a written report detailing its understanding of the Owner’s Criteria and identifying any design, construction, budgetary, operational or other problems or recommendations that result from Owner’s Criteria.” To our knowledge, this important contractual provision was never satisfied. This requirement was included in the Agreement because the City believed that it was critical to establishing control of the Project and that having a documented understanding would enable all team members to achieve the goals and be accountable for the outcome.

RSP No 1, Item #8
Jerry S. Frank, CEO
Gene Bennett, Project Manager
February 24, 2009
Page 2

Without having a documented understanding of the Owner’s Criteria as required by Article 4.2 of the Agreement, it is difficult for the City to evaluate Petra’s claim for additional construction management fees based on “increased complexity.” The “increased complexity” of some of the building components may have resulted in additional time required by the contractors hired to install them, but the City is not convinced that the final building design should have necessitated additional construction management time.

The Owner’s Objectives as stated in Article 3.1 of the Agreement were “to develop a new cost efficient city hall facility and public plaza on the Site.” Recital “B” stated the City’s desire to construct a “four story structure of with approximately 80,000 square feet of standard Class A office space.” As constructed, the Project does indeed contain the envisioned amount of office space on three floors; while the final design does not include a fourth floor, it does include a largely unfinished basement. The City contends that substituting an unfinished basement for a finished fourth story does not represent a material change in scope or complexity of the Project. Furthermore, the City contends that a structure built to “stand the test of time” should be considered standard construction for a City Hall building. Finally, the systems included in the final design may be considered “state of the art” by some, but they have become standard design for public buildings based on long-term cost efficiencies.

The Agreement set the Construction Manager’s fee as a flat fee, not a percentage of the project budget. The City continues to maintain its position that simply applying the fee to a budget increase is unacceptable. Furthermore, the additional substantiation provided by Petra fails to specifically justify how the increase in budget has materially affected the services delivered by the construction management team. Did Petra provide any additional services based solely on the increased budget, and if so, how did those additional services affect Petra’s home office overhead costs?

Further, Article 7 of the Agreement requires that any equitable adjustment be mutually agreed upon prior to the Construction Manager providing any additional services based on notice from the Construction Manager of the proposed change in service. The City had settled on the floor system and HVAC specifications by the end of February, 2007. The matter of the basement and the need to raise the entire structure four feet was settled at the City Council meeting of April 10, 2007. Despite the fact that the design of the building was settled early in the year 2007, the notice of intent to submit a change order was not submitted by Petra until November 5, 2007 and the actual change order request was not submitted until April 4, 2008. The City is not convinced that Petra has fulfilled the contractual responsibility of asking for and receiving approval to perform additional work, nor was any additional compensation authorized.
Jerry S. Frank, CEO
Gene Bennett, Project Manager
February 24, 2009
Page 3

Article 2.1.4 of the Agreement requires that the "Construction Manager shall prepare all documents and provide all services required under this Agreement in such a manner that increases in Project costs resulting from Construction Manager's errors or omissions do not exceed one percent (1%) of the total construction price of the Project." Based on the final budget of $20.4 million, this amount would be $204,000. The City has not yet had an opportunity to conduct a complete analysis of all change orders on the Project, so we are not yet convinced that this contractual requirement has been met. This provision of the Agreement is relevant to Petra's request for additional salary costs. Until the change orders have been analyzed, the City has no way of knowing whether any of the additional salary costs are related to errors or omissions in management of the Project.

The City is concerned that the numerous staff changes on the Project may have had an effect on the need for additional staff hours. Project Engineer Wes Bettis left the Project in November of 2007 and was replaced with Tom Coughlin. The Project Superintendent listed in the Agreement (Gene Landon) was replaced with Jon Anderson early on in the Project, and Anderson was replaced with Jack Vaughan in April of 2008. The City questions whether the turnover in critical construction management staff may have resulted in the need for additional hours on the job for which the City should not be held responsible.

Based on the foregoing, the City has determined that we must continue to deny Petra's request for additional compensation as outlined in Change Order #2.

If you would like an opportunity to address the City Council in executive session, let us know and we will place this matter on the next available agenda.

Sincerely,

Mayor Tammy de Weerd
Purchasing Manager Keith Watts

Council President Charlie Rountree
City Attorney Bill Nary
## INSPECTION REPORT / REPAIR FOR WARRANTY

### Applicator:
WESTERN ROOFING CO, INC  
2609 KEIM LN  
NAMPA, ID 83687  
Rep: DIVISION 7 SPECIALTIES, INC.

### System Material:  
796 MFMT-TPO  
.045 VW  
Sq Ft: 25,100

### Job #:  
1062949  
Completion Date: 10/1/08

### Date:  
09/23/2009  
FS Rep: SCOTT REES  
Inspection #:1  
Approved: No  
EB:N  
Attending Roofer: MIKE  
Reinspect: Y  
Rating: 7

**REPAIRS REQUIRED:** The entire roof should be checked to make sure it meets Versico Specifications and Details. Below are some of the repairs that must be made. To ensure proper splicing prior to making repairs all membranes and flashings must be cleaned with soap and water, rinsed and dried then follow proper splicing procedures.

### RFW Repair Items:

- **R1030** Holes/cuts/tears in membrane/flashings, damage by others. Repair: Apply surface splices with like material.
- **T004** Cold weld/Wrinkles in hot air weld field seam. Repair: Apply heat to hot air weld mating surfaces together or apply a surface splice extending 1 1/2" to 2" in all directions past cut area. Apply Cut-Edge Sealant to exposed scrim edges.
- **R1033** Non-reinforced surface splice in field of roof. Repair: Overlay with reinforced membrane (like material) extending 1-1/2 in. minimum in all directions past the edge of the existing surface splice.
- **R1039** Membrane unadhered. Repair: Cut open membrane, peel back and readhere with Versiweld Bonding Adhesive. Overlay all cuts with reinforced membrane extending 1-1/2 in. minimum in all directions past all cut or open area.
- **R1051** VWMA-2.1. Tented seam fasteners, fasteners still secure into deck. Repair: Cut hole in membrane at fasteners, tighten fasteners down, then overlay with 6 in. reinforced membrane or 6 in. QA Cover Strip.
- **T002** VW-9.; Missing termination at edge of membrane. Repair: Install appropriate termination per VW-9 details.
- **R1070** C-6.2; Hole in membrane cut too small. Repair: Cut opening in membrane larger than drain pipe below to allow proper drainage and not restrict water flow.
- **R1010** VW-8. Missing clamp and/or WCOM. Repair: Loosen clamp if necessary, apply WCOM between boot and pipe if necessary, then apply clamp as per detail VW-8.
- **R1032** Debris under membrane. Repair: Remove debris and overlay with reinforced membrane extending 1-1/2 in. minimum in all directions past all cut or open area.
- **T016** VW-8/B/C; Field fabricated pipe seal missing deck flange/vertical wrap of VersiWeld Flashing. Repair: Apply a deck flange of VersiWeld Flashing and/or a vertical wrap of VersiWeld Flashing achieving all minimum hot air weld requirements.
- **T022** VW-6; Non-reinforced flashing used in drain. Repair: Remove flashing and install field membrane (like material) in drain according to VW-6 specifications.
- **T007** VW-8.1/2, VW-16.1/2; Missing additional membrane securement maximum 12" away from the penetration. Repair: Install additional 2" Polymer Plates/ 2" Seam Fastening Plates maximum 12" away from the penetration and overlay per VersiWeld specifications.
- **T011** Membrane securement missing at roof perimeters/inside angle changes greater than 2:12 slope/curbs. Repair: Install 2" Polymer Plates/ 2" Seam Fastening Plates and overlay per VersiWeld specifications.

---

I hereby represent, with full intention that Versico justifiably rely hereupon in the issuance of its warranty, that the project described above now conforms in its entirety with all Versico specifications, details and installation instructions.

**REPAIRS COMPLETED ON:**  
**SIGNATURE:**

Versico and VersiWeld are trademarks of Carlisle Corporation
**Inspection Report between September 22, 2009 and September 25, 2009**

<table>
<thead>
<tr>
<th>Job Number</th>
<th>Drawing Number</th>
<th>Inspection Date</th>
<th>Job Name/City/State</th>
<th>Approved Reject Flag</th>
<th>Re-Inspect Number</th>
<th>Inspection Date</th>
<th>FSR Name</th>
<th>RFW Code</th>
<th>RFW Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1061116</td>
<td>AB#1061116</td>
<td>09/23/2009</td>
<td>FEDERAL WAY 4 &amp; 5, BOISE, ID</td>
<td>Rejected NO</td>
<td>1</td>
<td></td>
<td>SCOTT REES</td>
<td>R1055</td>
<td>Missing enhancement at overhead doors/large openings. Repair: Install HPVX Fasteners and 2 3/8 in. plates as per the specified criteria for this project and overlay with 6 in. reinforced membrane or 6 in. QA Cover Strip.</td>
</tr>
<tr>
<td>1062949</td>
<td>AB#1062949</td>
<td>09/23/2009</td>
<td>MERIDIAN CITY HALL, MERIDIAN, ID</td>
<td>Rejected YES</td>
<td>1</td>
<td></td>
<td>SCOTT REES</td>
<td>R1030</td>
<td>Holes/cuts/tears in membrane/flashings, damage by others. Repair: Apply surface splices with like material.</td>
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<td></td>
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<td>R1033</td>
<td>Non-reinforced surface splice in field of roof. Repair: Overlay with reinforced membrane (like material) extending 1-1/2 in. minimum in all directions past the edge of the existing surface splice.</td>
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<td>Membrane unadhered. Repair: Cut open membrane, peel back and re-adhere with VersiWeld Bonding Adhesive. Overlay all cuts with reinforced membrane extending 1-1/2 in. minimum in all directions past cut or open area.</td>
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<td>R1051</td>
<td>VW-9a; Missing termination at edge of membrane. Repair: Install appropriate termination per VW-9 details.</td>
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<td>R1070</td>
<td>C-6.2; Hole in membrane cut too small. Repair: Cut opening in membrane larger than drain pipe below to allow proper drainage and not restrict water flow.</td>
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<td>Debris under membrane. Repair: Remove debris and overlay with reinforced membrane extending 1-1/2 in. minimum in all directions past all cut or open area.</td>
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<td>T022</td>
<td>VW-6; Non-reinforced flashing used in drain. Repair: Remove flashing and install field membrane (like material) in drain according to VW-6 specifications.</td>
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<td>VW-8.1/2, VW-16.1/2; Missing additional membrane securement maximum 12” away from the penetration. Repair: Install additional 2” Polymer Plates/ 2” Seam Fastening Plates maximum 12” away from the penetration and overlay per VersiWeld specifications.</td>
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<tr>
<td>7/11/2006</td>
<td></td>
<td></td>
<td>City Entered into agreement with LCA to design a new City Hall.</td>
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<tr>
<td>8/1/2006</td>
<td></td>
<td></td>
<td>City entered into an agreement with Petra for Construction Management of an 80,000 square foot $12,200,000 building.</td>
<td>$12,200,000.00</td>
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<tr>
<td>8/24/2006</td>
<td>ASBESTOS TESTING</td>
<td>Watts, (Wes)</td>
<td>I met with Wes and MTI to let them into the creamery for asbestos testing. MTI stated that the results should be back in 1 1/2 weeks. I expect to go out for demo bid around 9-7-06.</td>
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<tr>
<td>9/18/2006</td>
<td>First Meeting</td>
<td>Mayor, Jerry Frank, Keith Bird, Wes Bettis, Steve Simmons, Russ, Ted, Will, Watts</td>
<td>Simmons stated that the site plan took longer than expected. He will have 2 ext elevations to propose on 9-27-06. I asked LCA when plans would be ready for bidding. Russ stated Jan. 07 at best.</td>
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<td>9/20/2006</td>
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<tr>
<td>9/20/2006</td>
<td>PROJECT KICK OFF MTG.</td>
<td>Ted, Wes, Simmons, Watts, Bird</td>
<td>I asked Wes to provide a Project Schedule and Project Budget. I provided Wes a procurement schedule that I had used on previous projects. Bird asked Wes to provide Petra's Safety manual that they will be using. Wes stated the Project Schedule will change weekly until the Pre-Construction Demo work is completed.</td>
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<tr>
<td>9/26/2006</td>
<td>DEMO &amp; ABATEMENT PRE-BID MEETING</td>
<td>Watts, Bird, Will, (Wes, Adam), (Christensen)</td>
<td>Wes &amp; myself conducted the Pre-Bid Meeting.</td>
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<tr>
<td>10/2/2006</td>
<td>INT. PROJECT MTG</td>
<td>Mayor, Ted, Brad Watson, Wes, Watts</td>
<td>Mayor asked me to provide Petra (Wes) a checklist of their responsibilities. Ted stated the City will use a modified AIA agreement. Brad stated that the Broadway Sewer Project will happen in Winter of 2006. Wes stated that the wells found on the site are a separate issue from the demo of the site.</td>
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<tr>
<td>10/4/2006</td>
<td>PROCUREMENT PROCESS MTG.</td>
<td>Ted, Will, Wes, Watts</td>
<td>We discussed the bid process. I asked Wes to get me a bidders list for Shell &amp; Core. I asked if the SWPP Plan had to be complete prior to demo of the creamery. Wes stated no.</td>
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</table>

**NOTES:**

- City Entered into agreement with LCA to design a new City Hall.
- City entered into an agreement with Petra for Construction Management of an 80,000 square foot $12,200,000 building.
- I met with Wes and MTI to let them into the creamery for asbestos testing. MTI stated that the results should be back in 1 1/2 weeks. I expect to go out for demo bid around 9-7-06.
- Simmons stated that the site plan took longer than expected. He will have 2 ext elevations to propose on 9-27-06. I asked LCA when plans would be ready for bidding. Russ stated Jan. 07 at best.
- I asked Wes to provide a Project Schedule and Project Budget. I provided Wes a procurement schedule that I had used on previous projects. Bird asked Wes to provide Petra's Safety manual that they will be using.
- Wes stated that the Project Schedule will change weekly until the Pre-Construction Demo work is completed.
- Wes & myself conducted the Pre-Bid Meeting.
- Mayor asked me to provide Petra (Wes) a checklist of their responsibilities. Ted stated the City will use a modified AIA agreement. Brad stated that the Broadway Sewer Project will happen in Winter of 2006. Wes stated that the wells found on the site are a separate issue from the demo of the site.
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</tr>
</thead>
<tbody>
<tr>
<td>10/5/2006</td>
<td>DEMO &amp; ABATEMENT BID OPENING</td>
<td>Mayor, Bird, Will, Brad, Ted, Watts, (Wes), (Rex &amp; Mark)</td>
<td>Structure design (shell &amp; core) is to be completed by mid February 2006.</td>
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</tr>
<tr>
<td>10/9/2006</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Brad, Will, Ted, Bird</td>
<td>Brad stated that the sewer plans were complete and into DEQ. Ted stated that the modified AIA agreement will be ready in December 06. I stated I would call the Demo Contractor to establish start and completion dates.</td>
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</tr>
<tr>
<td>10/10/2006</td>
<td>COUNCIL MTG.</td>
<td>Watts, Mayor, Bird, Brad, Will</td>
<td>Brad advised us of Ed Squires findings. Brad will contact Wes to discuss the abatement of the wells. The Mayor wants a discussion on the Demo schedule. I stated that I need to contact David of Ideal for his Demo schedule then forward to Ted for use I the agreement. Ted stated that he will work with the Mayor and UP to get the Sq. Ft. price down on the leased land to the south.</td>
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</tr>
<tr>
<td>10/16/2006</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Mayor, Bird, Brad, Will</td>
<td>Discussion on the Ground Breaking Ceremony. Wes stated that there should be only 2 bid packages. Elk Mountain is the Civil Engineer for the project. Bird asked that Wes have Elroy (Parks) look at the trees along the south end of the property to see if they could be removed for the IP trench. Ted stated that he is still working on the UPR Lease.</td>
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</tr>
<tr>
<td>10/23/2006</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Bird, Shelly, Ron Coulter, Sharon, Ted, (Wes), Simmons</td>
<td>Mayor stated that the Ground Breaking Ceremony will be 11/13 @11:00. The Mayor asked me to get pricing on improvements for the Parks Building for a possible trade with Andrews Upholstery for parking and present at the 11/16/06 Executive Session. Mayor asked Wes to get pricing on a sky bridge from City Hall across Meridian Rd. Will stated he thought we might need a large trash compactor.</td>
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</tr>
<tr>
<td>10/30/2006</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Mayor, Will, Brad, (Wes)</td>
<td>Wes stated that he attended LCA Design Team Meeting. Heat pumps are not feasible because of the water demand. A design presentation is scheduled for November 20th. The Geotech needs to drill 3 holes. Wes is look to MTI to quote the transite panels.</td>
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<td>11/6/2006</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Mayor, Ted, Bird, Brad, Will, Shelly, (Russ), (Wes)</td>
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<tr>
<th>DATE</th>
<th>MEETING TITLE</th>
<th>ATTENDEES</th>
<th>NOTES</th>
<th>BUDGET</th>
<th>COMPLETION DATE</th>
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<td>11/13/2006</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Bird, Brad, Will, Ted, (Wes), (Simmons)</td>
<td>Will stated that the Mayor took channel 6 around the site on Sunday. Don Nelson of Channel 6 will be the MC at the ceremony today. Brad stated that he found documentation for 4 wells on the site. The S.E. corner well is the newest and is 515' deep. I informed the group that I have Change Order #1 to ideal for Asbestos removal ready. Simmons stated that we will need 160 parking stalls, therefore we have significant parking issues. Will and myself once again stressed the need for parking. Wes stated that Dave Buich plans on being under construction on his property by March.</td>
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<td>11/20/2006</td>
<td>SHELL &amp; CORE MTG. @ POLICE</td>
<td>All</td>
<td>LCA presented colors and materials. The Mechanical Engineer present HVAC which is 2 rooftop units. There was discussion on if we want to make City Hall an EOC.</td>
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<td>11/27/2006</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Mayor, Ted, Brad, Will, (Wes)</td>
<td>Wes stated that they will break down the bids into several bid packages. Power is now stubbed on the site. He will be meeting with IP today to finalize design. Ted he is keeping pressure on Jim Larson (UP) for a new price. Mayor stated that LCA is to continue to push for LEED Certification. Certification will be done as an extra if we can afford it.</td>
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<td>11/27/2006</td>
<td>WELLS MTG.</td>
<td>Watts, Brad, (Wes), (Ed)</td>
<td>Ed stated he is working on specs &amp; a bidders list. He will have this by the end of the week (12/1/06). I stated that I could have bids out by the 4th if he gets me the specs by the 30th. We agreed on the following dates: Bids due 12/7, to Council 12/12, Bonds and Insurance 12/29 and NTP on 1/2/07. Ed stated that he thinks there are approx. 7 wells on the site.</td>
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<td>12/4/2006</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Ted, Will, Brad, Terry, mayor, (Wes)</td>
<td>Ted suggested that we sign UPR's lease in the amount of $1,400 and continue to negotiate a more reasonable fee. Wes stated that Shell &amp; Core drawings are anticipated to be ready 2/13/07. We will be able to bid footing foundations, windows-Doors. 30 days later we can bid Elect. Mechanical &amp; TI. Brad stated the sewer project should start the first of the year but he has some budget concerns. Wes reminded the group that if the sewer is delayed the Demo will be delayed as well and we will incur additional fees.</td>
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<td>12/5/2006</td>
<td>CITY COUNCIL MEETING</td>
<td>Watts, (Simmons &amp; Wes presented)</td>
<td>Steve stated that he has met with all departments. Floor plans are designed but not firm. Fountain has changed. Steve presented a more detailed elevation with beveled stone and brick accents and gave a brief presentation of the floor plans. Wes stated that the Demo was going well. The boiler room was abated. The creamery building will be down this Saturday 12/9. There will be a water truck on site tomorrow 12/6. <em>Shell &amp; Core Bid packages will be going out</em> if plans are completed by 2/13/07. The Mayor stated that they would like LEED Certification but not going to hold up design. The Mayor asked Ted to bring Certification to City Team Meeting (Int. Project Mtg.) on Monday Morning.</td>
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<td>12/11/2006</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Mayor, Bird, Ted, Will, Terry, (Wes), (Simmons)</td>
<td>Simmons brought 2 guys in from Henry to discuss LEED Certification and commissioning including training of City Staff (Maint. Person). I asked Simmons for an estimate for LEED Certification and he est. 0.80 Sq. Ft. Ted asked Wes what their LEED person would be and to see if there would be any duplication. Wes stated that there would be no duplication and that his person is essentially a second set of eyes. Simmons stated that he has seen Buich's proposed plans.</td>
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<td>12/18/2006</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Ted, Terry, Will, Shelly, Brad, (Wes)</td>
<td>Wes stated that the west foundation wall of the creamery is supporting Meridian Rd. and Ideal would like to leave it until start of construction. They will come back at no charge to remove at that time. Terracon was on site last week &amp; should have results this week. Wes asked Brad when the sewer project start. Brad stated it should start in January. He would like to have a Dept. Report on water rights at a future Council Meeting. The Mayor asked if we had heard fro LCA on the cost of LEED. Will stated that he would contact them. The Mayor asked how important the floor plans were (for bidding the Shell &amp; Core). Wes stated that they were not crucial to the Shell &amp; Core. The current schedule has them to be ready in Mid January which is ahead of the Mid Feb orig. estimate. The Mayor stated that she has concerns of the Bid Date of Mid March. She asked Wes if this was later than originally discussed. Wes stated that the lag in bid time was due to the Geotechnical and TOPO information which is yet to come in. Ted stated that we sit down with LCA to nail it down and get a realistic date and worst case scenario. Wes also stated another part of the lag was due to the additional 3 weeks the design team took in producing the site layout. I stated that the only open concern I have at the moment was the abandonment of the wells. Brad stated that he was meeting with Ed today.</td>
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<tr>
<td>12/19/2006</td>
<td>CISCO PHONE DEMO</td>
<td>Watts, Terry, David T., Karie, Sharon, Ron, Nancy</td>
<td>Mayor asked if the LEEDs agreement was wrapped up. I let her know I would call LCA and check. Bird stated that they would dive with the August 08 completion date. Brad stated that the sewer project was award and the contract is pending. Bird stated that he would like to look at the bricks when Ideal is off site, and possibly get parks to clean and stack. I asked if I was to continue to put all invoices on the consent agenda. Bird stated no. Bird asked how the well abandonment was moving along. Brad stated that he sent me a hard copy of the info. I stated that I do have an envelope from Ed. Mayor asked Sharon to have Will get with LCA to provide an electronic file of revised plans, elevations, Plaza &amp; floor plans. Mayor asked Brad if they have kept the Idaho Truss Co. informed of the sewer project. Brad stated the Kyle is on it.</td>
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<td>1/8/2007</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Bird, Brad, Ted, Will</td>
<td>I brought up Ideals request to release their bond and retention. Ted agreed to release 95% of bond, no retention. Ted asked if we had found any fuel tanks as he smelled fumes. Bird asked if we had found a Civil. Wes stated that he is still chasing them down. Ted stated that he is drafting the UPR agreement and he should have in 2 weeks. Wes stated that there is a firm wanting 10,000 bricks. Brad stated that Kyle has scheduled a Pre-Con for the septic line for the 17th. Wes stated that the design team is moving forward and his team will have a budget for stone and brick on concept drawings. Wes stated that they are having trouble getting 3 bids on the private side right now.</td>
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<td>1/10/2007</td>
<td>INT. BID MEETING</td>
<td>Watts, Mayor, Ted, Bill, Will</td>
<td>Ted reviewed the modified AIA agreement with us. Wes submitted 6 copies of their Construction Management Plan. Gene stated that his budget est. of $15,475,160 is over our $12,200,000. He believes a lot of it to be in the skin of the building (brick &amp; Stone), also the mechanical is $10.00 a square foot over their est. from the Blue Cross building. Simmons asked Gene if he could come to their Design Team Meeting tomorrow to present. Gene stated that no one in Idaho can do a Brick and Stone job of this size. Simmons stated that they will have the Mech. Engr. look at options. I asked if the options would be LEED acceptable. Simmons stated yes. Simmons suggested shrinking the basement by 1/2. Bird stated the cost did not surprise him and he would proceed as he thought we could find the extra $2,275,000. The Mayor asked for options to get the cost down to $14,000,000. Bird asked if the plans were 60% complete. Simmons stated that the Shell &amp; Core were 60% complete. Bird asked Wes how long he would leave bids out. Wes stated Gene extended the building bid time frame to a full month with Pre-Bid 5 days after issue. The Mayor asked Brad how the sewer was coming. Wes stated the project has been delayed until the 1st of April because the POT plant is down until April 1 &amp; ACHD will not allow cold patch. The Mayor asked Brad if we were set with the wells. Brad let her know when bids have been received. I let them know that we only received one bid and I would de-mail Brad and Ed today.</td>
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<td>1/29/2007</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Brad, Will, (Wes, Gene, Art)</td>
<td>Brad stated that ACHD is putting together a co-ordinating meeting. Wes will attend the Pre-Con. Brad asked me about the wells. I let Brad know that Ed is in the process of scheduling and that I will get the award on Council 2-6-07. Wes delivered 60% plans for shell &amp; core. They will start Pre-Advertising. LCA will turn in CZC next week. Petra to submit Shell &amp; Core permit on 2-19-07. Gene stated that he is having a meeting next Wed. 2-28-07 to compile a budget and list of value engineering. He will forward to committee prior to the next meeting on 3-12-07. Wes stated that the 100% Shell &amp; Core drawing are due 2/14/07. Brad has requested a meeting with Simmons but has not received a response. Will said he will follow up. Wes stated that Simmons needs Department Direction.</td>
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<td>2/12/2007</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Mayor, Bird, Ted, Will, (Jerry, Gene, Wes) (Simmons)</td>
<td>Simmons stated that the site package is due in a couple of days and the TI soon after. I gave a run down of contamination. Wes presented an updated schedule, Shell &amp; Core bids will be issued 2/23/07. The Mayor asked about Abandonment and Water Rights. Brad stated that Ed is good to go with abandonment. He did state that they have not started yet. Gene asked for a technical contact &amp; Bird asked Brad to be the point man. Brad agreed to be the point man. Gene passed out a new budget. Simmons stated the electrical had been designed for total build out. He asked if he could cut back. Bird gave him the ok. Gene stated that he value engineer to reduce $3 million deficit. The skin has been reduced but mechanical is still over. They will meet this week to VE. We will meet tomorrow at PW to review. The Mayor has heard bad things RE: the access flooring and HVAC system. Jerry is pushing for changing the HVAC Sys. Bird stated he is not willing to make drastic changes because one guy has said he does not like it. We need to get feedback from a building that has need in operation for at least a year. Jerry stated that Wes and Gene will be available for the time allowed per the contract. Gene stated the the budget has gone up $800,000 due primarily to MEP costs vs. the engineers estimates.</td>
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<td>2/26/2007</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Bird, Ted, Will, (Gene, Wes), (Simmons)</td>
<td>Bird asked if we have 3' of space above the false ceiling if we have a raised floor. Ted informed the Mayor that we can call references for the raised floor but advised not to base our decision on those references. We need to base our decision on advice of our CM and Architect. Simmons stated that theoretically, if floor is installed properly we should have no issues. Gene stated that we could save $812,000 through value engineering. Listed are other options for savings. Wes went through all options including removing the south wing and basement. The Mayor stated that the Council has expressed that they want a full building as designed. Bird stated that we need to stay with the footprint and need to decide if we stay with access flooring and asked when we will have plans. Simmons went through steps if we do not keep floor as is. Wes went through Ideal's excavation proposal of $82 - $83 a CU. YD. Bird instructed me to move forward with the c/o for Ideal and again asked when plans will be ready. Simmons stated plans will be ready Friday 3/2.</td>
<td>3/6/2007</td>
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<td>2/27/2007</td>
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<td><strong>CHANGE ORDER NO. 2 IS ISSUED TO IDEAL FOR CONTAMINATED SOIL FOUND ON SITE.</strong></td>
<td>3/12/2007</td>
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<td>3/6/2007</td>
<td>CONST. MTG.</td>
<td>Watts, Brad, (Wes, Adam, Gene) (Christensen)</td>
<td>Wes stated that the bid package is in production and should be ready to go out Wednesday 3-8-07</td>
<td>3/12/2007</td>
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<td>3/12/2007</td>
<td>PROJECT MTG.</td>
<td>Watts, Ted, Will, (Gene, Wes, Adam, Jon) (Simmons)</td>
<td>I gave a run down on the well situation. Wes stated that soil contamination needed direction. Ted stated that he needed to talk with ACHD and he will talk with Bill. Jon suggested MTI for contamination. <strong>Wes stated that the Shell &amp; Core is out to bid and the Pre-Bid is Wednesday 3/14/07.</strong> Gene stated that he will issue an Addendum to clarify de-watering, Waterproofing. He said that Dewatering is looking like a $100,000 deal. Simmons has a proposal for design of de-watering @15,000. Gene stated that he needs to get ACHD to buy into letting us use the storm drain. Simmons stated that they will be ready to present 2 color schemes next week. Will is scheduling the next Dept. Meeting on the 26th. Simmons would like to meet sooner with the Dept. Heads to review counter options. Will will schedule the 20th. Bid came in late and stated he does not want to give up the basement.</td>
<td>3/12/2007</td>
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<td>3/12/2007</td>
<td>CONST. MTG.</td>
<td>Watts, Brad, (Gene, Wes, Jon, Adam) (Simmons)</td>
<td>Gene stated that the Pre-Bid is Wed. @2:00 and Wes will conduct. Temp. De-watering engineering is figured out but he still needs to get Nampa Meridian Irr. Dist. Approval. We need to sleeve under Meridian Rd. Simmons stated that he would need 3-4 weeks for design time if we eliminate the basement at this point. Brad stated the real issue is whether we can get permits. Gene stated that we need to turn the de-water engineer loose to track down permits for de-watering. Jon stated that MTI will have a quote to us this afternoon for boring under the road and soil samples. Gene suggested limits should be set at $1 Million. I suggested a different amount for different packages up to $5 million. Brad stated that Ed Squires is to have the well abandonment completed by early April.</td>
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<td>3/13/2007</td>
<td>DE-WATER MTG.</td>
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<td>Gene gave report. 60' @ approx $40K for 1/4 mile. The $40K can be absorbed in the current budget as temp. const. costs. The 12&quot; line will run approx. $50K. Warren has Prelim. ok by Nampa Meridian Irr. He will talk with the Core this week and report on Monday. Est. @ $130K - $200K for perm. De-Water Sys.</td>
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<td>3/13/2007</td>
<td>EXEC. SESSION</td>
<td>Watts, Ted, Bird, Borton, Roundtree, Zaremba</td>
<td>Discussion of Oil Contamination. Council gave me the direction to proceed with a $90K change order with Ideal Demo. For further excavation and abatement. I created the CO on 3-14-07 and had Joe sign.</td>
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<td>3/19/2007</td>
<td>PROJECT MTG.</td>
<td>Watts, Bird, Mayor, Brad, Will, (Wes, Jon, Adam, Art)</td>
<td>Discussion on dewatering for the basement. Jon stated that 1,500 cubic yards of contaminated soil has been removed to date. Wes stated that the S&amp;C bid due date will be extended to April 3rd to allow more time for bid circulation. We have not had the interest Petra had hoped for. Steel suppliers are stating steel is in short supply once again.</td>
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<td>3/26/2007</td>
<td>INT. PROJECT MTG</td>
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<td>Ideal gave Ed Squires all the info on the discovery of the wooden well. They fished all the material out. The square is approx. 5 sq. MTI took a sample and Ed wants to pump it out and explore.</td>
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<td>3/26/2007</td>
<td>CONST. MTG.</td>
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<td>WOODEN WELL</td>
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<td>4/2/2007</td>
<td>INT. PROJECT MTG</td>
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<td>4/23/2007</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Bird, Brad, Wes, Ted (Christensen)</td>
<td>Jon stated that no soil was removed last week. We will hold off on Ideas CO #5 until we get the report on soil samples taken. Gene stated that we need a joint meeting with MTI, Hydro Logic, City &amp; Petra on these closures. Bird gave a NOT-TO-EXCEED approval of $11K for brick clean-up. Gene stated that the Pre-Con for Shell &amp; Core is May 2nd at the trailer. ACHD may impose impact fees of up to $500K. Simmons stated that they will try to soften. I stated that I need a cash flow projection from Petra. Gene stated that the next bid package should be out May 22. Simmons explained why he needs AV and Security by the end of this week. Gene asked Simmons to get with Foundation (concrete contractor) for changes and send contracts to Gene.</td>
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<td>4/23/2007</td>
<td>CONST. MTG.</td>
<td>Watts, Brad, Wes, Gene, Jon (Christensen)</td>
<td>Gene stated that they will start moving dirt (construction) on May 7th. Christensen stated that he had an ASI that will give new finished floor elevation. Jon stated the he needed to get const. power. We will provide power to everyone but welders. Pre-on is May 2nd @ 1:30. City will hire Labor Ready for brick clean-up.</td>
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<td>4/30/2007</td>
<td>INT. PROJECT MTG.</td>
<td>Watts, Mayor, Bird, Wes, Gene, Jon (Christensen)</td>
<td>Wes provided me a cash flow projection and signed contracts. Cash flow will double in Oct. Nov. &amp; Dec. Jon stated that we have a well closure procedure. Simmons stated that he has issued ASI #2. Bird wanted to confirm the we will be 4&quot; out of the water with the basement. He was assured by Simmons. Mayor asked how to landscape on Meridian Rd. LCA has some ideas. Jon stated the composition sewer project was paving this week. Mayor asked Brad if they could publish the Main/Meridian Rd. closure. Gene stated that there is no Penta or MEK which means contamination is coming from somewhere else not the site. We still need to put in monitoring wells. Simmons stated that ACHD has not provided an invoice yet.</td>
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<td>5/7/2007</td>
<td>SHELL &amp; CORE PRE-CONSTRUCTION MTG.</td>
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<td>5/8/2007</td>
<td>CONSTRUCTION BEGAN</td>
<td></td>
<td>I received a new schedule</td>
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CONSTRUCTION BEGAN: July 21, 2008
## CITY HALL PROJECT / CONSTRUCTION PROGRESSION

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<td>$19,896,103.00</td>
<td>August 9, 2007</td>
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<td>October 10, 2008</td>
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<td>3/11/2008</td>
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<td>$20,473,605.00</td>
<td>October 10, 2008</td>
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### Meridian City Hall Project

#### CHANGE ORDERS BY PHASE

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<td>Phase 1 - Demo &amp; Abatement</td>
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**APPROVED CHANGE ORDERS**

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**TOTAL APPROVED AMOUNT**

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#### OTHER BUDGET ITEMS

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**TOTAL MCH APPROVALS**

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#### COMPARISION - BUDGET TO APPROVED CONTRACTS & CHANGE ORDERS

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<th>Description</th>
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#### NOTES:

1. All contractor change orders were approved by the Meridian City Council on various dates.
2. The cost for the LEED Certification were approved by the city council.
I, THOMAS G. WALKER, being first duly sworn upon oath, depose and state:
1. I am one of the attorneys of record for the Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. I submit this affidavit in support of Petra's Opposition to Motion for Leave to File First Amended Complaint and Add Claim for Punitive Damages Pursuant to Idaho Code § 6-1604.

3. I am one of the custodians of records of Cosho Humphrey, LLP, which include memoranda, legal documents, reports, correspondence, emails, records, research and data compilations, in various forms that are kept in the course of Cosho Humphrey, LLP’s regularly conducted business activity, and which are made and maintained as the regular practice of Cosho Humphrey, LLP.

4. Attached hereto as Exhibit “A” is a true and correct copy of relevant excerpts from the transcript of the deposition of Steven J. Amento taken on August 17, 2010.

5. Attached hereto as Exhibit “B” is a true and correct copy of relevant excerpts from the transcript of the deposition of Todd Weltner taken on August 18, 2010.

6. Attached hereto as Exhibit “C” is a true and correct copy of relevant excerpts from the transcript of the deposition of Laura Knuth taken on August 11, 2010.

THOMAS G. WALKER

THOMAS G. WALKER
SUBSCRIBED AND SWORN to before me this 13th day of September, 2010.

Notary Public for Idaho
Residing at Eagle, Idaho
My commission expires: March 31, 2016.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 13th day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☒ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

) Case No. CV OC 0907257

v.

PETRA INCORPORATED, an Idaho corporation,

)

Defendant/Counterclaimant:

AUDIO-VISUAL DEPOSITION OF STEVEN J. AMENTO
August 17, 2010
Boise, Idaho

Janet French, CSR #946, RPR

For the Plaintiff: TROUT JONES GLEDHILL FUHRMAN, P.A.
For the Defendant: COSHO HUMPHREY, LLP

APPEARANCES:

For the Plaintiff: TROUT JONES GLEDHILL FUHRMAN, P.A.
Counterdefendant: By: Kim J. Trout, Esq.
225 North 9th Street, Suite 820
Post Office Box 1907
Boise, Idaho 83701
Telephone: (208) 331-1170
Facsimile: (208) 331-1529
ktrout@idalaw.com

For the Defendant: COSHO HUMPHREY, LLP
Counterclaimant: By: Thomas G. Walker, Esq.
800 Park Blvd., Suite 790
Post Office Box 9518
Boise, Idaho 83707-9518
Telephone: (208) 344-7811
Facsimile: (208) 338-3290
twalker@cosholaw.com

Also Present: Tom Coughlin
Richard Kluckhohn

BE IT REMEMBERED that the deposition of
STEVEN J. AMENTO was taken by the Defendant/
Counterclaimant at the offices of Cosho Humphrey, LLP,
located at 800 Park Boulevard, Suite 790, Boise,
Idaho, before Associated Reporting, Inc., by Janet
French, a Court Reporter and Notary Public in and for
the City of Ada, State of Idaho, on Tuesday, the
17th day of August, 2010, commencing at the hour of
9:05 a.m. in the above-mentioned matter.

PROCEEDINGS

09:05:52 1
09:05:52 2
09:05:57 3
09:06:00 4
09:06:03 5
09:06:06 6
09:06:09 7
09:06:13 8
09:06:16 9
09:06:20 10
09:06:23 11
09:06:24 12
09:06:26 13
09:06:32 14
09:06:36 15
09:06:40 16
09:06:46 17
09:06:53 18
09:06:53 19
09:06:56 20
09:07:00 21
09:07:02 22
09:07:06 23
09:07:06 24
09:07:07 25

MR. WALKER: We are on the record. I'm going to
do a little recitation here in conformance with Idaho
Rule of Civil Procedure 30(b)(4), which is required
for audio-video depositions.

This is the deposition of Steven J. Amento,
which is being taken on behalf of defendant, Petra
Incorporated in Case No. CV OC 09-7257 filed by the
City of Meridian in the District Court of the Fourth
Judicial District for the State of Idaho in and for
Ada County.

This deposition is being taken on August
17th, 2010, commencing at 9:06 a.m. And the
deposition is being taken before Janet French,
the operator of the audio-visual equipment.

This deposition is being taken in accordance
with the Idaho Rules of Civil Procedure, and there are

EXHIBITS

NO. PAGE

262. Notice of Taking Audio-Video Deposition 29
Duces Tectum of Steven J. Amento (5 pages)

263. Affidavit of Steven Amento in Opposition to 30
Defendant's Motion for Summary Judgment
(463 pages)

268. Steve Amento's file produced in 77
response to the duces tecum (1838 pages)

264. Request for Statement of Qualifications 159
(6 pages)
Q. You were an expert consultant?  
A. Schedule delay, cost overrun, nonpayment.

Q. And what was the size of that project in dollars?  
A. I think around 15 or 20 million dollars.

Q. Square footage would be irrelevant in those projects?  
A. Yes. Well, compared to a building square footage, yes. It's not comparable.

Q. Who did you represent?  
A. About five years ago.

Q. What about the Prosser City Hospital footage?  
A. Yes. Well, compared to a building square footage, yes. It's not comparable.

Q. Washington street DOT project?  
A. Yes. Well, compared to a building square footage, yes. It's not comparable.

Q. As an expert in that case -- or in that matter or the construction manager?  
A. That would be -- that would be an expert.

Q. That project?  
A. Yes.

Q. Represented the contractor?  
A. Yes.

Q. Represented the contractor.  
A. Yes.

Q. As an expert?  
A. About five years ago.

Q. And in what capacity did your partner or the firm serve in that matter?  
A. Represented the contractor.

Q. As an expert?  
A. Yes.

Q. Any other public works projects that you can recall?  
A. About five years ago.

Q. As an expert?  
A. Yes.

Q. Have you served as a construction manager on behalf of a public entity?  
A. Yes. There's a remediation project for the Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation.

Q. Do you recall the total cost of the project?  
A. I think that's the entire hospital project. I think it was around 25,000 square feet hospital in Prosser.

Q. As an expert?  
A. Yes. Well, compared to a building square footage, yes. It's not comparable.

Q. Do you recall the total value -- the total that's good.  
A. Yeah. There's a remediation project for the Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation.

Q. As an expert?  
A. Yeah. There's a remediation project for the Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation.

Q. Do you recall the total value -- the total that's good.  
A. Yeah. There's a remediation project for the Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation.

Q. As an expert?  
A. Yeah. There's a remediation project for the Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation.

Q. Do you recall the total value -- the total that's good.  
A. Yeah. There's a remediation project for the Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation.

Q. As an expert?  
A. Yeah. There's a remediation project for the Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation.

Q. Do you recall the total value -- the total that's good.  
A. Yeah. There's a remediation project for the Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation.

Q. As an expert?  
A. Yeah. There's a remediation project for the Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation, Washington State Department of Transportation.
Q. Do you recall how long ago that project was constructed?
A. You mean, originally?
Q. Yes.
A. It's between 10 and 15 years old.
Q. What's the estimated cost of the remediation there?
A. It's replacement of the cladding as well as the deck membrane.
Q. What about Bell Arts, what's the remediation there?
A. It's replacement of the cladding as well as the deck membrane.  
Q. With regard to the Mooring -- the Moorings Condo, that's a remediation project; correct?
A. The Moorings Project, yes.
Q. And what is -- what's the remediation there?
A. It's replacement of the cladding as well as the deck membrane.
Q. The 60-01 Condo, what's the remediation there? 10:48:40
A. You mean, originally? 10:48:09
Q. Yes. You know, I'd have to look at my list.
A. Yes. There are some, but I'm drawing a blank right now.
Q. That's fine. With regard to the 15 completed projects, how many of those 15 were new construction?
A. Some replacement of doors at the exterior also decks.
Q. And you don't recall the cost of that, of the remediation?
A. The remediation, I think it is around the $400,000.
Q. And the Moorings remediation, do you recall the cost of that?
A. It's in excess of 5 million.
Q. Can you identify those for me, please.
A.  I understand. So we performed work for that course -- excuse me, for the golf club.
Q. And were any structures involved, by that, I mean buildings?
A. No. It was primarily the driving range and equipment associated with the driving range.
Q. Okay. What was the approximate cost of that new construction?
A. It's in excess of 5 million.
Q. And the Moorings, the Broadmoor Clubhouse -- Broadmoor Golf Course as a clubhouse.
A. That's correct.
Q. My question was whether or not of the 15 completed projects you acted as the construction manager on -- for new construction.
A. There's a -- well, I don't know if we are really construction managers. There is a new retaining wall that's completed over in -- or under the mean buildings?
Q. Has anyone or any structures involved, by that, I mean buildings?
A. No. It was primarily the driving range and that -- and equipment associated with the driving range.
Q. Okay. Any other new construction among those 15 completed projects in which you acted as construction manager?
MR. WALKER: Back on the record.
During our break, we had a discussion regarding the documents that Mr. Amento brought in response to duces tecum in his notice, and we have those now in a box, a banker's box, and we've numbered the entire box as Exhibit No. 268.
The court reporter will take those exhibits and have them copied for my office as well as the documents in paper form in the box, and we've agreed we will number them commencing with our Bates numbered documents provided to us.

Q. And that was awarded by Iowa State University in 1978.
A. Yes. Lisa Moe is a registered architect in the State of Washington.
Q. And he serves in an actual function as a construction manager on behalf of the firm?
A. No. I think that generally covers it.
Q. Okay. Does the -- does any -- do any of the other principals or employees of the firm hold any professional licenses related to the construction industry?
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A. Yes. Lisa Moe is a registered architect in the State of Washington.
Q. And he serves in an actual function as a construction manager on behalf of the firm?
Have you told me about all of the projects that you've worked on that you consider to be of similar size, scope, and complexity as the Meridian City Hall project? Have you told me about all of the projects at Hensel Phelps. The Denver City Performing Arts Center; the 11:24:15 A. I did not. The contractors on the project? Did you interview any of the vendors on the project that provided materials or supplies? I've discussed it in house with members of others that he didn't print out, so I can't answer that question.

Q. Okay. Tell me about those projects. A. Not that I can recall. A. That's correct. A. Lisa Moe. That's M-O-E. A. That would be Laura Knothe. A. Not that I reviewed personally, no. Q. Thank you. And you go on in paragraph 6, in 11:23:47 25 Q. You indicated that you have a registered architect as an employee of your firm, is that correct? A. No, not as a construction manager, per se. 11:24:19 9 Q. Did you interview any of the vendors on the project? A. Not that I can recall. A. That's correct. A. That would be Laura Knothe. 11:24:46 19 Q. And you also indicate that you talked with a professional architect familiar with the project, and you named Bill Selvage? 11:24:41 17 A. That's correct. A. Not that I reviewed personally, no. Q. Any other construction management professionals that you've discussed this project with? A. Not that I can recall. Q. That's correct -- licensed as construction managers? A. Yes. A. Not that I can recall. 11:24:19 9 Q. Did you interview any of the vendors on the project that provided materials or supplies? A. Not that I can recall. Q. Any other architects that you discussed this project with? A. Not that I can recall. A. That's correct. Q. What photographs did you review? A. Not that I can recall. A. Not that I can recall. A. That's correct. Q. That's correct -- licensed as construction managers? Q. None of those folks, though, are licensed; are they? A. In the state of Idaho, that's correct. Q. In any state? A. That's correct. Q. Did you review -- did you interview any of the contractors on the project? A. Not that I can recall. Q. Did you interview any of the vendors on the project that provided materials or supplies? Q. Any other construction management professionals that you've discussed this project with? A. Not that I can recall. A. Not that I reviewed personally, no. Q. Any other architects that you discussed this project with? A. Not that I can recall. A. That's correct. Q. What photographs did you review? A. Not that I can recall. A. Not that I can recall. A. Not that I can recall.

Associated Reporting Inc.
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006191
The City of Meridian v. Petra, Inc., et al.

Steven J. Amento
August 17, 2010

13:25:25 1 "The City had a right to rely on Petra's
13:25:29 2 representations as to the CM fee before accepting any
13:25:33 3 Phase II bids, Phase III bids, and becoming committed
13:25:35 4 to the project."
13:25:40 5 Review 16, and did I read that correctly?
13:25:44 6 A. Yes, you did.
13:25:47 7 Q. What facts do you have of your own personal
13:25:51 8 knowledge that the City would have abandoned the
13:25:52 9 project if it had been informed that the CM fee would
10 increase?
13:25:53 10 MR. TROUT: Object to the form of the question.
13:25:56 11 THE WITNESS: I have no evidence that the City
13:25:59 12 would have abandoned the project. But certainly Petra
13:26:05 13 had an obligation to provide timely and accurate
13:26:09 14 information to the City at the time when they knew or
13:26:12 15 should have known.
13:26:12 16 MR. WALKER: Okay.
13:26:14 17 Q. (BY MR. WALKER) In paragraph 17, you
13:26:19 18 indicate that, "Petra's claim having failed to provide
13:26:24 19 a written notice of active interference is a breach of
13:26:28 20 the standard of care and a breach of the CMA."
13:26:30 21 First of all, how do you know that Petra
13:26:34 22 failed to provide written notice regarding active
13:26:35 24 interference?
13:26:36 25 A. I have not seen a project record from Petra.

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Page 123

13:26:43 1 where they claim that the City engaged in active
13:26:43 2 interference.
13:26:48 3 Q. In paragraph 18, you recite, "Petra had a
13:26:51 4 duty to protect the City from construction that did
13:26:55 5 not meet the plans and specifications under section
13:26:58 6 4.7.9 of the CMA."
13:26:59 7 Did I read that correctly?
13:26:59 8 A. Yes.
13:27:03 9 Q. What construction are you referring to that
13:27:07 10 did not meet the plans and specifications?
13:27:11 11 A. Well, I go on to recite some examples. It's
13:27:16 12 not a comprehensive list, but some examples are in
13:27:21 13 section 19. The leaks at the water features at the
13:27:25 14 front of the property, leaks and related problems at
13:27:32 15 the roof, the problems with the HVAC system, the
13:27:38 16 missing and inaccessible clean outs in the Weltner
13:27:40 17 affidavit, the tests and operational parts in the
13:27:47 18 Weltner affidavit. There's the masonry issues in the
13:27:50 19 Weltner affidavit, and there is probably some other
13:27:54 20 issues in the Knothe deposition. I haven't had a
13:27:58 21 chance to read that transcript yet. So those are
13:28:00 23 Q. And which transcript are you referring to?
13:28:02 24 A. Laura Knothe.
13:28:06 25 Q. Okay. Let's take 19(a), leaking water

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13:29:39 1 leaking roof first manifest itself?
13:29:39 2 A. I don't know.
13:29:42 3 Q. Okay. Let me back up to leaking water
13:29:42 4 feature.
13:29:47 5 Did you review the punch list that related
13:29:49 6 to the leaking water feature?
13:29:49 7 MR. TROUT: Object to the form.
13:29:53 8 THE WITNESS: I have looked at punch lists, not
13:29:56 9 specifically related to the water feature, so I don't
13:29:58 10 know. There may have been some water feature issues
13:30:01 11 on the punch lists, but I don't recall.
13:30:03 12 Q. (BY MR. WALKER) What are the consequences
13:30:10 13 of an acceptance by the owner of an item on the punch
13:30:12 14 list vis-a-vis the construction manager's
13:30:13 15 responsibility?
13:30:15 16 MR. TROUT: Object to the form to the extent that
13:30:19 17 it may call for a legal conclusion or assume facts not
13:30:19 18 in evidence.
13:30:23 19 THE WITNESS: It generally has no bearing on the
13:30:29 20 construction manager's responsibility, because the
13:30:34 21 construction manager's responsibility is stated in
13:30:40 22 the -- in the CMA agreement, and as we find -- and
13:30:46 23 also there is statutes in regards to building defects
13:30:50 24 and the right of an owner to make claim for those
13:30:52 25 building defects regardless of whether there was,
Q. (BY MR. WALKER) And which statutes are you referring to?

A. Uh, there would be statutes of repose and also statutes of limitation related to building defects, breach of contract. There is certainly in the State of Washington, I assume there are also those same laws in the State of Idaho.

Q. Have you done an independent search of the Idaho Statutes to determine whether those statutes exist in Idaho?

A. I have not.

Q. I apologize, if I've already asked you this, but when did the leaking roof identified in 19(b) first manifest itself?

A. You asked me that, and I said I did not perform or not performed.

Q. With respect to 19(a), (b), and (c), are those items in the Knothe affidavit or possibly in her testimony found?

A. No. I believe they have not been addressed.

Q. To your knowledge, has the City incurred any financial liability for the items curing those items.

A. Consulting costs, legal costs to research and then implement those remedies.

Q. What about the -- in pursuing the remedies, how did the City go about pursuing the remedies?

A. They first attempted to do their own self diagnosis, and then they brought in professionals to help them do that.

Q. And did the City contact the prime contractors as it relates to these three items on page 32 of your affidavit?

A. In regards to the roof, I know that when I was there in October, the roofing contractor was there actually performing some work, so I assume that the City or somebody on the City's behalf contacted them.

Q. Okay. With -- specifically, with regard to the leaking water feature at the City plaza, are you aware of whether or not the City requested warranty work by the construction or by the contractor that built the water feature?

A. Consulting costs, legal costs to research and then implement those remedies.

Q. Okay. With -- specifically, with regard to the leaking water feature at the City plaza, are you aware of whether or not the City requested warranty work by the construction or by the contractor that built the water feature?

A. In regards to the roof, I know that when I was there in October, the roofing contractor was there actually performing some work, so I assume that the City or somebody on the City's behalf contacted them.

Q. Okay. With -- specifically, with regard to the leaking water feature at the City plaza, are you aware of whether or not the City requested warranty work by the construction or by the contractor that built the water feature?

A. Yes.

Q. And what do you know about that?

A. Consulting costs, legal costs to research and then implement those remedies.

Q. Okay. With -- specifically, with regard to the leaking water feature at the City plaza, are you aware of whether or not the City requested warranty work by the construction or by the contractor that built the water feature?
THE CITY OF MERIDIAN, an Idaho Corporation, 

vs. 

PETRA INCORPORATED, an Idaho Corporation, 

vs. 

Janet French, CSR #946, RPR 

TODD WELTNER was taken by the Defendant! 

Counterclaimant at the offices of Cosho Humphrey, LLP, located at 800 Park Boulevard, Suite 790, Boise, Idaho, before Associated Reporting, Inc., by Janet French, a Court Reporter and Notary Public in and for the County of Ada, State of Idaho, on Wednesday, the 18th day of August, 2010, commencing at the hour of 8:33 a.m. in the above-entitled matter.

APPEARANCES:

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Also Present: Tom Coughlin Richard Kluckhohn

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EXHIBITS

NO. PAGE
265. Notice of Taking Audio-Video Deposition Duces Tecum of Todd Weltner (5 pages)

266. Affidavit of Todd Weltner dated May 24, 2010 Filed in Support of Opposition to Motion for Summary Judgment (87 pages)

267. Second Affidavit of Todd Weltner Dated July 6, 2010 Filed in Support of Opposition To Motion for Summary Judgment (44 pages)

268. Five DVD's: City Hall Photos; Volume: Todd Files-multi-page PDFs; ASIIRFIICM Volumes; Files for Bill; Meridian City Hall video files

270. Schedules and lists of ASI's and RFI's (124 pages)

271. Series of schematics and floor plans (13 pages)

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EXHIBITS

NO. PAGE
272. Meridian City Hall, Vol I, Technical Specifications (9 pages)

273. Todd Weltner's Meridian City Hall file containing various loose documents (101 pages)

274. Floor Plans CM110852-862 (12 pages)

275. Photographs - CM030690, CM031097, CM030883, CM031009, CM030962 (6 pages)

276. An installation diagram for underwater J boxes; an underwater junction box installation detail for base or yolk mounted fixtures (3 pages)

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Q. What specific problems did Mr. Wetherholt provide information on?
A. Again, we -- you know, we looked at -- we had a tomography report, and so we were looking at those areas that were identified in that report, and that's probably 15 or 20 specific areas that we got on our hands and knees and looked around for leaks or -- and even pulled up the membrane to see if there was any moisture beneath the insulation or layer or any damage to the structure, which there wasn't.

Q. Who prepared the tomography report?
A. Idaho Airships, I believe.

Q. And what were the results of your crawling around on your hands and knees and pulling up the membrane?
A. Well, we did find a couple leaks. I wouldn't say a lot, but we found several -- several areas of concern including a slashed area of a membrane, which we couldn't figure out how it happened. But we did find, you know, a dozen areas that they repaired that day.

Q. Okay. You mentioned the parapet that you were baffled -- everyone, apparently, was baffled by the -- whatever you observed regarding the parapet.
A. Yeah. Right around the bottom of the parapet, there was a slice in the membrane, literally just a slice down, and then there was a patch over that slice. And the bottom of that patch was actually glued to the existing membrane -- the original membrane, but the top in some places was not. So if that top membrane came out underneath -- beyond the cap of the parapet, that would catch water, and that's what was -- we assumed was happening.

Q. And was any determination made of when the cut was -- when the cut occurred?
A. No.

Q. How long was the cut?
A. Well, we found it in half a dozen spots, and it varied from 10 feet to 40 or 50 feet, so quite extensive.

Q. And was it apparent that it was a cut, or was the material short?
A. No. We determined it was a cut. The membrane actually went up and over the top of the parapet wall, which it was supposed to for the detail, so it had been cut at somebody's direction or somebody's -- we don't know what.

Q. I noted -- and we'll get to your affidavit and the exhibits attached, but I believe there was a photograph of where this --
A. Yes.

Q. And that's representative of what you've been talking about?
A. Yes. We were talking about you.
the third floor felt it under their feet, and the people down below heard it up in the ceiling.

Q. You consider this to be a life safety issue?

A. I don't, actually.

Q. Why not?

A. I don't think that one weld breaking is probably a life safety issue.

Q. And what other causes did you consider in the process of eliminating causes for the popping noise?

A. I mean, we kind of talked about maybe a mechanical noise pinging or something like that. That didn't seem to be consistent with what they were describing. It felt like a violent -- a violent occurrence.

Q. How violent?

A. I mean, just -- again, they could feel it in their feet on the third floor, so enough that you could feel it in the building structure.

Q. When did this popping noise first manifest itself?

A. Again, can you re-read the list that we had?

Q. A week or two before that date?

A. A week or two. 10:41:22

Q. And whose responsibility would it be for the installation of the drains and the over flow?

A. We were informed a week or two before, but I don't know the exact date, but the site had been occurring all spring during the rainy season.

Q. And what other causes did you consider in the process of eliminating causes for the popping noise?

A. We actually stuck a hose in the drain to see what it drained out. Eric Jensen did. And as he put the hose in the over flow drain, it came out -- or excuse me -- in the main drain, it came out at that location that is intended only for over flow, which would be a minimal amount of water if ever.

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A. We actually stuck a hose in the drain to see what it drained out. Eric Jensen did. And as he put the hose in the over flow drain, it came out -- or excuse me -- in the main drain, it came out at that location that is intended only for over flow, which would be a minimal amount of water if ever.

Q. And when did that problem first manifest itself?

A. I don't know the exact date.

Q. How much prior to June 4th were you informed that the over flow issue manifested itself?

A. We were informed a week or two before, but it had been occurring all spring during the rainy season.

Q. And whose responsibility would it be for the installation of the drains and the over flow?

A. MR. TROUT: Object to the form.

THE WITNESS: I mean, I don't know on this specific project.

Q. (BY MR. WALKER) Would it be Buss Mechanical?

MR. TROUT: Same objection.

THE WITNESS: I don't know for sure if that's in their scope or not.

Q. (BY MR. WALKER) And in your experience as a general contractor, does the City plumbing inspector inspect drains?

MR. TROUT: Object to the form.

THE WITNESS: They look at the drains. I don't know that they would do a water test.

Q. (BY MR. WALKER) Do you know whether or not the City inspector ever red tagged the drains?

MR. TROUT: Object to the form.

THE WITNESS: No, I do not.

Q. (BY MR. WALKER) The next item on your list was June 28, the roof membrane. We've talked about the cut and not sealed?

A. Right.

Q. And I think your testimony was that it appeared, at least based on your investigation, that the roof membrane was installed in accordance with the plans and specifications.

THE WITNESS: I mean, I don't know on this specific project.
Q. Yes. Thank you.

Q. Okay.

A. Okay?

Q. Okay.

Q. Okay. Thank you. Are those photographs that you are removing them from are our official exhibit book or from your book?

A. This is our book.

Q. Okay. And what's the number on it?

Q. Okay. And that's the number on it?

Q. Okay. Thank you. Are those photographs that you are removing them from that are our official exhibit book or from your book?

Q. Okay. And that's the number on it?

Q. Okay. And what's the number on it?

A. CM111464.

A. Okay. And actually, that's incorrect, right. And I came across a picture looking below this parapet cap (indicating).

I think that might be helpful. Right. And I came across a picture looking below this parapet cap. And if you can see, this is actually a patch that something was amiss in that location.

Q. Why did you use the words 'latent defect' when describing this?

A. I don't recall. I don't recall. And if you can see, this is actually a patch below this parapet cap (indicating).

MR. TROUT: Object to the form.

Q. Why would you refer to it as a latent defect?

A. Again, maybe "latent" was wrong, but I don't recall. And if you can see, this is actually a patch below this parapet cap (indicating).

A. Absolutely.

Q. And is that possible?

Q. Okay. Thank you. Are those photographs that you are removing them from that are our official exhibit book or from your book?

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MR. TROUT: Object to the form.
<table>
<thead>
<tr>
<th>Time (11:46:42)</th>
<th>Testimony</th>
</tr>
</thead>
<tbody>
<tr>
<td>11:46:46</td>
<td>Because on our subsequent visit to the job site on the 23rd of July, we did find that it appeared to be too low.</td>
</tr>
</tbody>
</table>
| 11:46:50       | Q. Okay. Thank you. In paragraph 12, you testify, "I have studied the project specifications and the punch list."
| 11:46:52       | A. Correct. |
| 11:46:54       | Q. Did you note whether or not this defect that you've identified in paragraph 12 appeared on any punch list? |
| 11:46:58       | A. No. |
| 11:47:00       | Q. When did you conduct your review of the specifications, which is to be consistently 3/8th of an inch. |
| 11:47:02       | A. Correct. Yes. |
| 11:47:04       | Q. Did you know whether or not this defect that you've identified in paragraph 12 appeared on any punch list? |
| 11:47:06       | A. No. |
| 11:47:08       | Q. Why didn't you ask Mr. McGourty? |
| 11:47:10       | A. It wasn't appropriate. |
| 11:47:12       | Q. And why do you say that? |
| 11:47:14       | A. I just -- the legal proceedings, I didn't think we should be talking about this. |
| 11:47:16       | Q. Did anyone tell you not to talk to Mr. McGourty? |
| 11:47:18       | A. No. It's pretty common sense. |
| 11:47:20       | Q. Okay. Now, once again, you've characterized this, I believe, as a "latent defect." |
| 11:47:22       | A. Yeah, and that -- again, it's a defect. It obviously does not follow specifications. The joints are larger than they are supposed. The difference between the stones is larger than it is supposed to be. And we have some really good photos, again, that show that. |
| 11:47:24       | Q. Are you aware of the industry standards for masonry construction? |
| 11:47:26       | A. TMC Masonry. |
| 11:47:28       | Q. (BY MR. WALKER) Do you know when this alleged defect was first discovered? |
| 11:47:30       | A. Yes. |
| 11:47:32       | Q. That's July 13th, 2010; correct? |
| 11:47:34       | A. Correct. Yes. |
| 11:47:36       | Q. Do you know whether or not the contractor laid up the stones has been notified about this problem? |
| 11:47:38       | A. My understanding is that Laura has been in contact with the contractor that installed that. |
| 11:47:40       | Q. Do you know who the contractor is? |
| 11:47:42       | A. TMC Masonry. |
| 11:47:44       | Q. And you mentioned that you talked to Tim McGourty, but you didn't have any specific discussions about this issue? |
| 11:47:46       | A. TMC Masonry. |
| 11:47:48       | Q. Okay. Was it -- on the 23rd, you were basically on the roof. |
| 11:47:50       | A. That's the roof, right, so probably -- |
| 11:47:52       | Q. So it would be the 13th? Would that be reasonable? |
| 11:47:54       | A. Yes. |
| 11:47:56       | Q. Thank you. That's July 13th, 2010; correct? |
| 11:47:58       | A. Right. |
| 11:48:00       | Q. Do you know whether or not the contractor who laid up the stone has been notified about this problem? |
| 11:48:02       | A. My understanding is that Laura has been in contact with the contractor that installed that. |
| 11:48:04       | Q. Do you know who the contractor is? |
| 11:48:06       | A. TMC Masonry. |
| 11:48:08       | Q. And you mentioned that you talked to Tim McGourty, but you didn't have any specific discussions about this issue? |
| 11:48:10       | A. TMC Masonry. |
| 11:48:12       | Q. Okay. Was it -- on the 23rd, you were basically on the roof. |
| 11:48:14       | A. That's the roof, right, so probably -- |
| 11:48:16       | Q. So it would be the 13th? Would that be reasonable? |
| 11:48:18       | A. Yes. |
| 11:48:20       | Q. Thank you. That's July 13th, 2010; correct? |
| 11:48:24       | Q. Do you know whether or not the contractor who laid up the stone has been notified about this problem? |
| 11:48:26       | A. My understanding is that Laura has been in contact with the contractor that installed that. |
| 11:48:28       | Q. Do you know who the contractor is? |
| 11:48:30       | A. TMC Masonry. |
| 11:48:32       | Q. And you mentioned that you talked to Tim McGourty, but you didn't have any specific discussions about this issue? |
| 11:48:34       | A. TMC Masonry. |
| 11:48:36       | Q. Okay. Was it -- on the 23rd, you were basically on the roof. |
| 11:48:38       | A. That's the roof, right, so probably -- |
| 11:48:40       | Q. So it would be the 13th? Would that be reasonable? |
| 11:48:42       | A. Yes. |
| 11:48:44       | Q. Thank you. That's July 13th, 2010; correct? |
| 11:48:46       | A. Right. |
| 11:48:48       | Q. Do you know whether or not the contractor who laid up the stone has been notified about this problem? |
| 11:48:50       | A. My understanding is that Laura has been in contact with the contractor that installed that. |
| 11:48:52       | Q. Do you know who the contractor is? |
| 11:48:54       | A. TMC Masonry. |
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Laura Knothe August 11, 2010 The City of Meridian v. Petra, Inc., et al.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Plaintiff/Counterdefendant,

Case No. CV OC 09-7257

THE CITY OF MERIDIAN, an Idaho Municipal Corporation, vs. PETRA INCORPORATED, an Idaho corporation, Defendant/Counterclaimant.

Laura Knothe August 11, 2010

AUDIO-VIDEO DEPOSITION OF LAURA KNOTHE
Boise, Idaho

Janet French, CSR #946, RPR

AUDIO-VIDEO DEPOSITION OF LAURA KNOTHE

BE IT REMEMBERED that the deposition of LAURA KNOTHE was taken by the Defendant/Counterclaimant at the offices of Cosho Humphrey, LLP, located at 800 Park Boulevard, Suite 790, Boise, Idaho, before Associated Reporting, Inc., by Janet French, a Court Reporter and Notary Public in and for the County of Ada, State of Idaho, on Wednesday, the 11th day of August, 2010, commencing at the hour of 9:01 a.m. in the above-entitled matter.

APPEARANCES:

For the Plaintiff/Counterdefendant: By: Kim J. Trout, Esq.
225 North 9th Street, Suite 820
Post Office Box 1097
Boise, Idaho 83701
Telephone: (208) 331-1170
Facsimile: (208) 331-1529
ktrout@idalaw.com

For the Defendant/Counterclaimant: By: Thomas G. Walker, Esq.
800 Park Blvd., Suite 790
Post Office Box 9518
Boise, Idaho 83707-9518
Telephone: (208) 344-7811
Facsimile: (208) 358-3290
twalker@cosholaw.com

Also present: Tom Coughlin

MR. WALKER: On the record. I need to do a few things here to comply with the Idaho Rule of Civil Procedure 30(b)(4), and so I'll just recite this little script.

This is the deposition of Laura Knothe which is being taken on behalf of the defendant, Petra Incorporated, in Case No. CV OC 09-7257 filed by the City of Meridian in the District Court of the Fourth Judicial District for the State of Idaho in and for Ada County.

This deposition is being taken on August 11, 2010, commencing at 9:00 a.m. Mountain Time before Janet French a court reporter with Associated Reporting Inc.

I'm Thomas G. Walker of the Cosho Humphrey firm, and I'm here representing Petra Incorporated, the defendant, in this lawsuit, and I'm also the operator of the audio-visual equipment.

This deposition is being taken in accordance with the Idaho Rules of Civil Procedure, and there are

INDEX

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LAURA KNOTHE PAGE

By: Mr. Walker 5

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259. Laura Knothe's working file and 7 discs 57
   (306 pages)
13:20:25 1 A. The -- the unit was labeled.
13:20:30 2 Q. And who hooked the pipes up backwards, which
13:20:31 3 entity?
13:20:32 4 A. Buss Mechanical.
13:20:36 5 Q. So how does that involve Hobson?
13:20:47 6 A. I believe Buss -- well, it was Hobson's air
13:20:50 7 handling unit, and it was labeled incorrectly.
13:20:52 8 Q. By the manufacturer?
13:20:58 10 Q. How would Petra as the construction manager
13:21:02 11 determine that the pipes were mislabeled?
13:21:05 12 A. They may determine that the air handling
13:21:10 13 unit wasn't functioning properly and that there was no
13:21:11 14 heating across the coils.
13:21:13 15 Q. Do you know whether or not there was heating
13:21:15 16 across the coils at the time the building was
13:21:17 17 occupied?
13:21:18 18 A. There couldn't have been.
13:21:20 19 Q. How do you know that?
13:21:22 20 A. The water wasn't going across the coils
13:21:24 21 because the piping was backwards.
13:21:27 22 Q. And has that problem been resolved?
13:21:28 23 A. It has.
13:21:31 25 Q. (BY MR. WALKER) It has; correct?

13:22:12 2 Q. And when was it resolved?
13:22:21 4 Q. And when was the problem first discovered?
13:22:29 6 Q. So the problem never arose until more than a
13:22:34 7 year after the date of occupancy; is that your
13:22:38 8 testimony?
13:23:02 10 Q. (BY MR. WALKER) With regard to Buss
13:23:03 11 Mechanical, which -- specifically, what items were not
13:23:06 12 properly completed by Buss Mechanical?
13:23:09 13 A. The glycol loop chemicals that we talked
13:23:29 16 A. The piping of the air handling, which we
13:23:31 17 just -- the air handlers, which we just talked about,
13:23:35 18 which was really more Hobson's responsibility.
13:23:40 1 A. Hobson.
13:23:43 2 Q. And when you say the problem has been
13:23:46 3 mitigated, what do you mean by that?
13:23:59 5 Q. (BY MR. WALKER) Do you know whether that
13:24:15 6 resolution is satisfactory?
13:24:18 7 MR. TROUT: Same objection.
13:24:27 8 A. Yes.
13:24:40 9 Q. Hobson.
13:24:43 10 Q. (BY MR. WALKER) Do you know that the
13:24:46 11 water feature has never functioned properly
13:24:48 12 in that it has always leaked.
13:24:54 14 A. Yes.
13:25:03 16 A. December of '10 -- I mean '09.
13:25:05 17 Q. And what was M.R. Miller's involvement in
13:25:08 18 the water feature?
13:25:10 19 MR. TROUT: Same objection.
13:25:11 20 Q. And was M.R. Miller's involvement in
13:25:14 21 the water feature?
13:25:20 23 Q. (BY MR. WALKER) Do you know what M.R.
13:25:22 24 Miller's responsibilities were with respect to the
13:25:25 25 water feature?
13:25:35 18 Q. (BY MR. WALKER) To install the -- the question --
13:25:38 19 the question that we are working with them on is the
13:25:40 20 installation of the piping and the basins for the
13:25:48 22 Q. (BY MR. WALKER) And what had been -- what
13:25:51 23 has been the result of your working with M.R. Miller
13:25:55 24 with respect to those issues?
13:26:00 25 A. The leak has been slowed. I mean, the
13:25:53 1 quantity of the leak has decreased considerably. 13:28:46 1 have -- I haven't gotten into that.
13:25:56 2 There is still an existing leak -- 13:28:50 2 Q. Okay. As you sit here today, what is the
13:25:58 3 Q. And when -- 13:28:56 3 status of any work that was not properly completed by
13:25:59 4 A. -- re several. 13:28:57 4 Western Roofing?
13:26:03 5 Q. And when did the leaks, plural, first 13:29:00 5 A. I haven't worked on the roof --
13:26:06 6 manifest themselves? 13:29:03 6 Q. So you don't know --
13:26:13 7 A. My understanding is summer of -- I guess I 13:29:09 7 A. -- per se, for the last -- I don't know the
13:26:14 8 don't know for sure. 13:29:12 8 status. I believe they haven't had a leak in some
13:26:22 10 there is continuing effort -- there is a continuing 13:29:15 10 Q. Approximately how long has it been since the
13:26:25 11 effort with M.R. Miller to resolve the continuing 13:29:17 11 roof last leaked, do you know?
13:26:26 12 leaks? 13:29:20 12 A. I don't know. There are hundreds of patches
13:26:32 14 Q. Do you know what the volume of water is 13:29:25 14 Q. What's the status of the warranty -- are you
13:26:33 15 leaking? 13:29:28 15 aware of what the status of the warranty is on the
13:26:36 16 A. It's -- at this point in time, I believe it 13:29:30 16 roof as we sit here today?
13:26:42 17 is about 2,000 gallons a day. 13:29:31 17 MR. TROUT: Object to the form.
13:26:46 18 Q. And how was that determination made? 13:29:41 18 THE WITNESS: I am not. In December or January
13:26:48 19 A. Through a test by the City. 13:29:46 19 when I was working on the roof, I believe they --
13:26:51 20 Q. And who conducted those tests? 13:29:55 20 Western had repaired -- basically, addressed the items
13:26:52 21 A. Elroy Huff. 13:30:04 21 that were on the Versico warranty list, but there were
13:26:56 22 Q. And how did he conduct the tests? 13:30:08 22 subsequent leaks, so I'm not sure at this point.
13:27:01 23 A. By just running one run of piping at a time 13:30:12 23 Q. (BY MR. WALKER) Are you aware of whether or
13:27:05 24 and -- and then the water feature is on its own meter,
13:27:09 25 so in running one water feature at a time and 13:30:17 24 not Western Roofing and/or Versico extended the
13:27:14 1 determining the usage of water that's leaving the 13:30:19 25 warranty to the City to the lease -- and by extended,
13:27:17 2 system. 13:30:22 1 I mean, increase the warranty period?
13:27:22 4 A. We are not exactly sure. 13:30:28 3 THE WITNESS: I'm not aware. It's a two-year
13:27:28 5 Q. Do you have -- based on your conversations 13:30:28 4 warranty.
13:27:29 6 with Elroy Huff or anyone else, do you have any idea 13:30:31 5 MR. TROUT: Counsel, I'm going to ask that we go
13:27:31 7 of where the water is going? 13:30:34 6 off the record for a period of time. I need to
13:27:36 8 A. I believe the most significant source of the 13:30:38 7 prepare, as I told you earlier, for a 2:00 o'clock
13:27:41 9 leak is actually the basins themselves. 13:30:42 8 conference call with the Court in conjunction with the
13:27:45 10 Q. And where is the water going that's leaking 13:30:44 9 one that was taken this morning.
13:27:50 12 A. Into the sub grade of the plaza. 13:30:46 11 (Off the record.)
13:28:14 14 specific items of work were not properly completed by 13:31:53 13 I had a discussion with Mr. Trout, the
13:28:16 15 Western Roofing? 13:31:56 14 City's counsel, regarding some other obligations that
13:28:17 16 A. There was several leaks in the roofing 13:31:59 15 he has this afternoon, and as a consequence of the
13:28:18 17 system. 13:32:02 16 the fact that we are going to have to continue this
13:28:21 18 Q. And was that the fault -- have you 13:32:05 17 deposition at a later time in order to cover the
13:28:23 19 determined whether or not that was the fault of 13:32:07 18 documents that Ms. Knothe has provided us, we have
13:28:25 20 Western Roofing? 13:32:12 19 agreed to continue the deposition to some later date
13:28:26 21 A. I believe some were. 13:32:15 20 that's convenient to Counsel and the parties.
13:28:29 22 Q. And what about the others? 13:32:17 21 Is that correct, Mr. Trout?
13:28:31 23 A. It's possible that the roof could have been 13:32:17 22 MR. TROUT: Yes, sir.
13:28:37 24 damaged by other contractors. They have a 13:32:20 23 MR. WALKER: Thank you. We'll go off the record.
13:28:41 25 responsibility to protect their installation, but I 13:34:57 24 (The deposition adjourned at 1:32 p.m.)
13:28:46 11 I mean, increase the warranty period?

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

STATE OF IDAHO )
) :ss
County of ADA )

KIM J. TROUT, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

2. I am a member of the law firm of TROUT ▪ JONES ▪ GLEDHILL ▪ FUHRMAN ▪ GOURLEY, P.A., representing the Plaintiff in this matter, and I make the following statements based upon my own personal knowledge.
3. Attached hereto as Exhibit “A” is a true and correct copy of the Deposition Transcript of Jack K. Lemley taken on June 16, 2010. The relevant portions are as follows:

a. Page 7:19-8:7;

b. Page 14:3-16;

c. Page 18:21 – 25;

d. Page 77:11-21;

e. Page 84:15-21; and

f. 163:4-8;

4. Attached hereto as Exhibit “B” is a true and correct copy of the Deposition Transcript of Jack K. Lemley taken on July 22, 2010. The relevant portions are as follows:


b. Page 197:7-198:22;

c. Page 199:12-200:21;

d. Page 206:21-208:17;

e. Page 213:17-216:1;

f. Page 233:11-22;

g. Page 244:23-245:8;

h. Page 248:13-249:3;

i. Page 252:20-254:5;

j. Page 258:23-259:14;

k. Page 267:22-268:12;

l. Page 270:18-25;

m. Page 272:4-19;
FURTHER YOUR AFFIANT SAYETH NAUGHT.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦
GOURLEY, PA

By: Kim J. Trout

Subscribed and sworn to before me this 13th day of September, 2010.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Email

Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

Case No. CV OC 09-7257

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho
Corporation,

Defendant.

DEPOSITION OF JACK K. LEMLEY
June 16, 2010
Boise, Idaho

Janet French, CSR #046, RPR

BE IT REMEMBERED that the deposition of JACK K. LEMLEY was taken by the Plaintiff at the offices of Trout Jones Gledhill Fuhrman, P.A., located at 225 North 9th Street, Suite 820, Boise, Idaho, before Associated Reporting, Inc., by Janet French, a Court Reporter and Notary Public in and for the County of Ada, State of Idaho, on Wednesday, the 16th day of June, 2010, commencing at the hour of 9:00 a.m. in the above-entitled matter.

APPEARANCES:
For the Plaintiff: TROUT JONES GLEDHILL FUHRMAN, P.A.
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Telephone: (208) 331-1170
Facsimile: (208) 331-1529
ktrout@idalaw.com

For the Defendant: COSHO HUMPHREY, LLP
By: Thomas G. Walker, Esq.
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Post Office Box 9518
Boise, Idaho 83707-9518
Telephone: (208) 344-7811
Facsimile: (208) 338-3290
twalker@cosholaw.com

Also Present: Richard Kluckhohn

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EXAMINATION

JACK K. LEMLEY

By: Mr. Trout

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<table>
<thead>
<tr>
<th>Time</th>
<th>Speaker</th>
<th>Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td>09:04:41</td>
<td>By Mr. Trout</td>
<td>(Deposition Exhibit Nos. 86-88 marked.)</td>
</tr>
<tr>
<td>09:04:43</td>
<td>A.</td>
<td>Do you see that, sir?</td>
</tr>
<tr>
<td>09:04:46</td>
<td>Q.</td>
<td>What have you brought with you in compliance with that request?</td>
</tr>
<tr>
<td>09:04:50</td>
<td>A.</td>
<td>I do.</td>
</tr>
<tr>
<td>09:04:57</td>
<td>By Mr. Trout</td>
<td>Sir, I'm going to hand you No. 86, and ask if that is one of the three binders that was provided to you?</td>
</tr>
<tr>
<td>09:05:03</td>
<td>A.</td>
<td>Yes. As it's identified on the cover, it's Volume I.</td>
</tr>
<tr>
<td>09:05:08</td>
<td>Q.</td>
<td>All right. Now, sir, I'm going to turn Exhibit No. 86 on it's side, and I'm going to point out for you, for purposes of our record there are a number of sticky notes in this document.</td>
</tr>
<tr>
<td>09:05:11</td>
<td>Q.</td>
<td>Mr. Bauer as set out in this yellow tab.</td>
</tr>
<tr>
<td>09:05:14</td>
<td>A.</td>
<td>The two pink ones.</td>
</tr>
<tr>
<td>09:05:16</td>
<td>A.</td>
<td>Nothing other than the fact I am a little hard of hearing, so I may have to ask things to be repeated from time to time.</td>
</tr>
<tr>
<td>09:05:21</td>
<td>Q.</td>
<td>That's fine. I appreciate that, and I'll do my best to make myself loud enough and clear enough for you to understand.</td>
</tr>
<tr>
<td>09:05:33</td>
<td>A.</td>
<td>Yes.</td>
</tr>
<tr>
<td>09:05:40</td>
<td>A.</td>
<td>I circled a matter up here, which is my habit, and then there was a response to me from Mr. Bauer as set out in this yellow tab.</td>
</tr>
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<td>09:05:43</td>
<td>A.</td>
<td>The bulk of them are his. I didn't say none of them are mine. I think that a couple of them are markers that I put in the volume so that I could have more study done on the issue.</td>
</tr>
<tr>
<td>09:05:46</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
</tr>
<tr>
<td>09:05:49</td>
<td>A.</td>
<td>Yes.</td>
</tr>
<tr>
<td>09:05:53</td>
<td>Q.</td>
<td>And can you tell me what you wrote on that tab that is your marker?</td>
</tr>
<tr>
<td>09:05:55</td>
<td>A.</td>
<td>I believe -- if I might look at this a little closer, sir?</td>
</tr>
<tr>
<td>09:05:57</td>
<td>Q.</td>
<td>Sure. Please do.</td>
</tr>
<tr>
<td>09:05:59</td>
<td>A.</td>
<td>I circled a matter up here, which is my habit, and then there was a response to me from Mr. Bauer as set out in this yellow tab.</td>
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<td>09:06:04</td>
<td>Q.</td>
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<td>A.</td>
<td>The two pink ones.</td>
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<td>09:06:17</td>
<td>Q.</td>
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</tr>
<tr>
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<td>A.</td>
<td>Yes.</td>
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<tr>
<td>09:06:22</td>
<td>Q.</td>
<td>And can you tell me what you wrote on that tab that is your marker?</td>
</tr>
<tr>
<td>09:06:25</td>
<td>A.</td>
<td>I believe -- if I might look at this a little closer, sir?</td>
</tr>
<tr>
<td>09:06:30</td>
<td>Q.</td>
<td>All right. So none of these sticky notes contain your handwriting; is that correct?</td>
</tr>
<tr>
<td>09:06:35</td>
<td>A.</td>
<td>The bulk of them are his. I didn't say none of them are mine. I think that a couple of them are markers that I put in the volume so that I could have more study done on the issue.</td>
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<td>Q.</td>
<td>And can you tell me what you wrote on that tab that is your marker?</td>
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<td>09:06:48</td>
<td>A.</td>
<td>I believe -- if I might look at this a little closer, sir?</td>
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</tr>
<tr>
<td>09:07:07</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
</tr>
<tr>
<td>09:07:10</td>
<td>A.</td>
<td>Yes.</td>
</tr>
<tr>
<td>09:07:13</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>09:07:17</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>09:07:19</td>
<td>A.</td>
<td>Yes.</td>
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<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>A.</td>
<td>Yes.</td>
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<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>A.</td>
<td>Yes.</td>
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<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>A.</td>
<td>Yes.</td>
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<td>09:07:36</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>09:07:38</td>
<td>A.</td>
<td>Yes.</td>
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<td>09:07:40</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>09:07:42</td>
<td>A.</td>
<td>Yes.</td>
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<td>09:07:44</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>09:07:46</td>
<td>A.</td>
<td>Yes.</td>
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<td>09:07:48</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>09:07:50</td>
<td>A.</td>
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<td>Q.</td>
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<td>Q.</td>
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<td>09:07:58</td>
<td>A.</td>
<td>Yes.</td>
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<td>09:08:01</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>09:08:03</td>
<td>A.</td>
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<td>09:08:05</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>09:08:07</td>
<td>A.</td>
<td>Yes.</td>
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<td>09:08:09</td>
<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>09:08:11</td>
<td>A.</td>
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<td>Q.</td>
<td>All right. So with respect to Exhibit No. 86, can you identify for me which of the markers are yours?</td>
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<td>09:08:15</td>
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<td>Q.</td>
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June 16, 2010

The City of Meridian v. Petra, Inc., et al.

Q. Okay. Now, tell me why you circled Ted.

A. I circled the word Ted, and I said, Ted, that was more -- more confirmatory than the yellow tab, again, describes -- gives me the answer that I had asked for.

Q. Okay. Could you please read your handwritten note that is written in conjunction with what is circled in pencil on Exhibit D of Deposition.

A. Yes. It's several names. Ted is one.

Q. Okay. Can you specifically read for the record what your handwritten note is in relationship to what you circled.

A. I circled the word Ted, and I said, Ted, with equal marks, and then Ted Baird City Attorney was put in there after I turned this book over to Mr. Bauer.

Q. So "Ted Baird City Attorney" is Mr. Bauer's handwriting and not yours?

A. No. It's several names. Ted is one for the purposes of our record, there appears to be a number of sticky notes tabbed in this document.

Q. Okay. And whose writing is the pink tab?

A. Well, it confinned to me that the mayor had personally made in Exhibit 2 -- or excuse me -- in Exhibit No. 86; is that correct?

Q. All right. Other than Mr. Bauer, is there anyone of them.

A. Well, let me examine the document. The most important aspect of that document to me was to try to get the numerous players straight and determine what organization they represented so that as I went forward I would be able to know who was speaking and on what grounds they had to speak from.

Q. Okay. And what, if any, conclusions did you draw from Exhibit M about any person from the City of Meridian?

A. Well, it confirmed to me that the mayor had a conference on the process of the building of the new City Hall as it does say -- it does identify the subject as the Mayor's Building Committee.

Q. Okay. I'm going to hand you what has been marked as Exhibit No. 87, and ask you to identify that document, please.

A. Yes. It's several names. Ted is one of Eugene Bennett, dated April 7th, 2010.

Q. All right. Testimony, this second pink note is the only other personal note you would have made within Exhibit No. 86, is that correct?

A. Yes. It's several names. Ted is one

Q. Okay. I'm going to hand you what has been marked as Exhibit No. 87, and ask you to identify that document, please.

A. Yes. It's several names. Ted is one of Eugene Bennett, dated April 7th, 2010.

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Ies

anyone else who was a member of your immediate staff?

A. Yes, sir.

Q. Who?

A. Mr. Roy McGlothin.

Q. How spell his last name?

A. Mc-G-l-o-t-h-i-n.

Q. And...

A. He is a graduate structural engineer from

the University of Idaho, very close to receiving his

professional engineer's stamp, but waiting for the

next test.

Q. So he's currently not a licensed engineer in

the State of Idaho?

A. No.

Q. All right. Now, was there anyone else who

was a member of your immediate staff who worked with

you on the Meridian City Hall project?

A. There was no other individual on our staff

that worked on any of the technical aspects of the

Meridian City Hall. We have a chief financial

officer, Mr. Randal Hartman, who takes care of the

billings and whatnot for our firm with our clients.

Q. Did Mr. Hartman conduct any analysis of any

matter, and it contains documents that relate to the

City of Meridian, the plaintiff and counterdefendant

versus Petra and the defendant's counterclaimant.

Q. Okay. So I'm going to turn Exhibit No. 88

sideways, and for our record, I'll represent there are

a number of yellow sticky notes that have been

attached to this exhibit.

Q. Any of those your handwriting, sir?

A. If you give me a minute, I'll look.

Q. Thank you. Please do.

A. None of them appear to be notes that I might

have written.

Q. Okay. Given -- well, first of all, did you

read all of the contents of Exhibit No. 88?

A. Yes. I believe I read most of the contents

of all of those three volumes.

Q. All right. And did you keep track of your

time on an hourly basis?

A. I did.

Q. And is there a written record of that time

in your billing files or billing system?

A. There is.

Q. How much time did you spend in reading

Exhibit No. 88?

A. I can't answer that as we sit here, but the

billing file should have a record of that.

Q. All right. And how much time did you spend

reading Exhibit No. 88?

A. It would be the same answer as for Exhibit

No. 88. I kept track of the time, but I worked many

days on this, and I can't precisely tell you how much

of that time is related to one volume as opposed to

the other here today.

Q. All right. How do you keep track of your

time? How do you record it?

A. I have a daytimer that I record the number

of hours that I work on an individual commission and a

description of what I did during those hours, and then

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THE WITNESS: I have no reason to doubt that it wouldn't represent a standard, because I do work on a number of projects where there are other consultants working, and our reporting and billing is consistent with theirs. Now, I don't know what the standard—how you define the "standard" in the industry. As long as you get an accurate compilation of the time.

Q. (BY MR. TROUT) All right. I'm sorry. I didn't write it down. But what was the name of your graduate student again?

A. Roy McGlothin.

Q. And how do we correctly spell his name for the record?

A. M-e-G-l-o-t-h-i-n.

Q. And is Mr. McGlothin a licensed construction manager in the State of Idaho?

A. No, he's not.

Q. Okay. Is Mr. Bauer a licensed construction manager in the State of Idaho?

A. Yes, he is.

Q. Are you a licensed construction manager in the State of Idaho?

A. Not individually, no, but the firm is.

Q. Relying on Mr. Bauer's license; correct?

A. Primarily, yes.

Q. All right. Other than Mr. Bauer, did you have any other licensed construction manager in the State of Idaho review this matter?

A. No.

Q. All right. Are you a licensed construction manager in any other state?

A. No.

Q. Are you a licensed civil engineer in the State of Idaho?

A. No.

Q. Have you ever held a civil engineering license in the State of Idaho?

A. No.

Q. Have you ever held a civil engineering license in any state in the United States?

A. Yes.

Q. And what treaties would you consider to be authoritative on construction management in the State of Idaho?

A. Documents produced by the Construction Industry Institute, CII.

Q. All right.

A. I might add to your previous questions, I'm a registered engineer in England and in Europe.

Q. With respect to the CII treaties, can you identify any individual treatise that you would consider authoritative on the issue of construction management in the state of Idaho?

A. Well, I have a number of those treaties, and they are applicable to construction management any place in the United States, I believe.

Q. All right. Can you tell me specifically which treaties you are referring to?

A. Well, I can't give the titles or the numbers off of them right now. I do have them in my office, and they could be produced.

Q. All right. Would you --

A. I have been an executive with CII for a number of years, and worked on the development of a lot of those.

Q. Okay. Would you ask Mr. Bauer to provide us with the names and volume numbers, if any, of any of the treaties that you consider to be authoritative on the issue of construction management as it would relate to this project?

A. I can, indeed, and it may be tomorrow morning before you get those, depending on how long this deposition runs.
Q. That's fine. I appreciate your courtesy in doing that.

MR. WALKER: Counsel, could you identify the company again — or the institute?


MR. TROUT: Thank you.

Q. (BY MR. TROUT) Other than treatises produced by the Construction Industry Institute, are there any other authoritative treatises on construction management that you would consider appropriate to rely on?

A. Well, there are textbooks that construction management is taught from. A list of those could be produced by Boise State. They have a very strong management program there that I have lectured at a number of times every year.

Q. All right. Is there any single or particular textbook that you can identify for me?

A. No.

Q. Right. I noted from your curriculum vitae that you received a degree in architecture from the University of Idaho; is that correct?

A. That's correct.

Q. Did you ever become a licensed architect in the State of Idaho?

A. No.

Q. Did you ever become a licensed architect in any state?

A. No.

Q. Have you personally written any article, memorandum, textbook, treatise of any kind on the topic of construction management?

A. I have.

Q. Can you —

A. I've been published in the Program Management Institute's publications.

Q. Okay. What is the Program Management Institute?

A. It is an institute that has focused on the whole idea of managing projects, whether they be building airplanes or new city halls or capitol buildings in the State of Idaho.

Q. Okay. And what specific topic did you write on?

A. I wrote on the Channel Tunnel when I was just finishing that, and I gave this speech and paper in Vancouver, British Columbia in about 1994.

Q. Do you have a copy of it?

A. I may have some place. I would have to investigate that.
establish quantities, whether it be of concrete or steel or other building material as we are referring to building constructions. And for concrete, it's length times width times height divided by 27.

Q. All right. Have you ever heard the term, takeoff, with respect to labor?

A. I have.

Q. And how is the phrase, takeoff, used with respect to labor?

A. It depends on how a project is solicited for in the design. Now, there is a number of levels of inspection that can be called for that go from a superficial visual inspection to a very detailed chemical or physical measurement.

Q. And how is the phrase, takeoff, used with any particular project?

A. I have.

Q. All right. What does the term "construction manager" mean?

A. It's certainly possible for a construction manager to estimate the number of hours and the types of service a construction manager will provide for a project, isn't it, sir?

Q. (BY MR. TROUT) Let me be more specific. It's certainly possible for a construction manager to estimate the number of laborers, isn't it, sir?

A. If he's given the ground rules against which that's going to be measured, yes. It is possible.

Q. All right. What does the term "inspection" mean?

A. Inspection can mean a number of things, but primarily the definition of the term is to make sure that the work conforms to the specifications called for in the design. Now, there is a number of levels of inspection that can be called for that go from a superficial visual inspection to a very detailed chemical or physical measurement.

Q. All right. What does the term "construction observation" mean?

A. That would be an observation of the manner in which the construction was being done. In some ways that could easily be interpreted to be an inspection of sorts.

Q. Are the terms synonymous?

A. No, they are not synonymous.

Q. What, if anything, is the difference between an inspection and an observation in construction?

A. Well, an observation can be an observation from the standpoint -- it depends on what you are observing. If you are observing progress alone, you are observing conformance to schedule. If you're observing with a concern toward whether or not the contractor is meeting the intent of the specifications that he bid against, that's another level of observation.
whether or not the contractor is meeting the specifications he bid against, is that a form of quality control?

A. It's a form of quality control, yes.

Q. All right. What's an estimate?

A. It's a form of quality control, yes.

Q. All right. What's an estimate?

A. It's a form of quality control, yes.

Q. All right. Is there any treatise that you would consider to be authoritative with respect to a project like the Meridian City Hall, is that a discreet set of people?

A. I think there will be a response to that in the provision of its construction management services?

Q. All right. What is job cost accounting?

A. I think there will be a response to that in the provision of its construction management services?

Q. Okay. What is job cost accounting?

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Q. Okay. What is job cost accounting?

A. I think there will be a response to that in the provision of its construction management services?
A. Yes, me.

Q. All right. And did you track that time?

A. Yes. That’s the way we prefer to draft our contracts. It’s done in the organizations that we do business with. Indeed, the same way that I described to you.

Q. All right. Do you allocate your home office expenses on a project-by-project basis? Is that correct?

A. Yes.

Q. And that would be something akin to job costs accounting for construction management services; correct?

A. Yes. And we do that in Lemley International.

Q. Okay. Were you the construction -- was organization.

Q. Okay. And how big was that project?

A. 120 million.

Q. All right. And it's certainly possible, is it not, to track office supplies, cell phone costs, photocopiers, all of those kinds of costs on a project-by-project basis; correct?

A. Yes. And we do that in Lemley International.

Q. Okay. And would you say that is a common practice in the construction management services industry?

A. If it's understood to the contract that way. It is not allocated that way. Indeed, the same way that I described to you.

Q. Okay. As to an allocation of her time from project to project?

A. It is not allocated that way.

THE WITNESS: It's done in the organizations that we do business with. Indeed, the same way that I described to you.

Q. Okay. As to an allocation of her time from project to project? That's the way we prefer to draft our contracts. It's done in the organizations that we do business with.
Q. -- which do you believe accurately reflects the contractual organization for the Meridian City Hall project?

A. I believe that Exhibit No. 90 more accurately reflects the Meridian City Hall.

Q. Okay. Tell me why.

A. Because the owner is holding the contracts directly. They are not being held through a construction manager.

Q. All right. And, of course, you would assume, would you not, sir, that Petra in the performance of its duties would understand that Exhibit No. 90 would more accurately reflect the contractual organization for the project?

A. Yes.

Q. (BY MR. TROUT) All right. Would it be your opinion that a construction manager exercising ordinary care in the state of Idaho would correctly understand Exhibit No. 90 to be the correct representation of the contractual organization relationship for the Meridian City Hall project?

A. No. I believe that Exhibit No. 90 more accurately reflects the Meridian City Hall.

Q. (BY MR. TROUT) Well, my specific question was: Can you specifically point to anything here in Exhibit No. 90 that indicates there is a fiduciary relationship between the owner and the contractor? Are there any circumstances and not hiding information from a client?

A. Yes, I think so. There are several things that suggest a fiduciary relationship. One is the fact that Petra is acting as a construction manager for the project. This would reflect a construction manager who had absolute as to whether or not that the subcontractors were held by the construction manager at risk or by the trade contractors.

MR. WALKER: Objection. Calls for speculation.

MR. TROUT: Objection. Lack of foundation.

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MR. TROUT: Objection. Lack of foundation.
Page 42
In broad terms, in 1985, Bechtel had proposed to do this job and had told the State of Massachusetts that it would cost two-and-a-half billion dollars. When we did the audit, Bechtel/Parsons Brinckerhoff had charged the owner for their fee, two-and-a-half billion dollars, while achieving very little of the physical work, and we estimated the physical work was then going to cost $15 billion. So they misrepresented the project, and then they charged as though it was going just as it should have gone, and it wasn't going well at all. So if I were to break down a bit what you just said, the weakness of the owner's team was a factor which you considered in your review? A. Yes, it was. And our report was that issued, the weakness of the owner's team was a factor which you considered in your review? A. Yes, it was. And our report was that issued, the weakness of the owner's team was a factor which you considered in your review? A. Yes, it was. And our report was that issued, the weakness of the owner's team was a factor which you considered in your review? A. Yes, it was. And our report was that issued.
A. But we have a storage room full of about 600 boxes of that kind of stuff.

Q. Okay. What was it about the weakness of the owner's team that you considered to be of concern or that had an impact in your analysis?

A. In the first instance, they had a lawyer as an administrative assistant was a retired general from the Tank Corp. He had never built anything either.

They had no financial officer, and their chief engineer was an architect who had only worked on one low cost housing project, never a transportation project. So we recommended that they change all of those people, get rid of all of them, and we cautioned them in one place that they didn't listen to us. We said, for God's sake, don't let your program manager corrupt your organization. The owner needs to have an organization regardless of how this contract is written.

Q. Okay.

A. I did.

Q. Okay. And with respect to overcharge; is that correct?

A. Well, overcharges and just not making any progress with the critical items of work.

Q. Okay.

A. Their people were there, but they weren't getting done the job as the critical path called for. And, of course, I would be correct in understanding that it was the Bechtel team that was responsible for managing and coordinating the work on the critical path?

Q. Okay. Now, turning our attention to construction management. In your work as a construction manager representing an owner as an agent during construction, are you familiar with the change order process?

A. Yes.

Q. Okay. Just conceptually, can you tell me how the change order process should, in your opinion, work?
But the judge got interested in it and wrote change; is that correct?

A. That is correct. In the instance of the

Meridian City Hall, I don't believe the contractors

were required to escrow their bids, so comparing what

the contractor was asking for with regard to the

change, assuming that there was a change, the quantum

would be something that would have to be negotiated.

Q. And when you talk about quantum, are you
talking about time or money?

10:44:24

10:44:24

10:44:24

10:44:24

A. Both.

Q. All right. So would I be correct in

understanding that to appropriately process a change

order a comparison between what was anticipated to be
done versus what was requested to be done would have
to be made?

10:44:47

10:44:47

10:44:47

10:44:47

A. Yes. And in the season of the year it

was planned to be done.

10:45:25

10:45:25

10:45:25

10:45:25

Q. All right. And in analyzing a requested

change, you would have to then quantify how much

extra excavation work in a rainy season. It's better to do

a weather condition that is favorable for it.

Q. And when you talk about quantum, are you

talking about time or money?

4:1:13

4:1:13

4:1:13

4:1:13

A. Yes, and that would -- would also have to be

done in a dry season. And in the case of outside work

that has to be done, it's more expensive and takes

longer in an adverse weather condition than it does in a

weather condition that is favorable for it.

Q. Okay. And with respect to cost, would it be

reasonable to require that the contractor provide an

evaluation of the increased cost in hours and dollars so

that the construction manager could analyze that to

determine whether it was equitable?

10:45:17

10:45:17

10:45:17

10:45:17

A. Yes. And in the season of the year it

was planned to be done.

10:45:25

10:45:25

10:45:25

10:45:25

Q. All right. And in analyzing a requested

change, you would have to then quantify how much

extra excavation work in a rainy season. It's better to do

a weather condition that is favorable for it.

Q. And when you talk about quantum, are you

talking about time or money?

4:1:13

4:1:13

4:1:13

4:1:13

A. Yes, and that would -- would also have to be

done in a dry season. And in the case of outside work

that has to be done, it's more expensive and takes

longer in an adverse weather condition than it does in a

weather condition that is favorable for it.

Q. Okay. And with respect to cost, would it be

reasonable to require that the contractor provide an

evaluation of the increased cost in hours and dollars so

that the construction manager could analyze that to

determine whether it was equitable?
known to the contractor, would it be your expectation that the contractor ought to be able to estimate the number of hours and the costs for the performance of each of those elements? A. As long as they knew what time of year the work was going to be done in, if an excavation contractor could give you a very accurate estimate about the number of truck loads of material they had to haul away and what that would encompass in the summer as opposed to the winter. Q. Okay. I understand your answer. Are there any other factors other than time of year that would impact the ability of the contractor to estimate the number of hours and the cost if they knew the scope of work to be performed? A. And when it was to be performed. Q. Understood. I understand the when, but taking when out -- A. The only other issue that I can think of would be whether there was a general labor shortage in the area which would affect contractors ability to attract labor, and if that happened after the contract was bid, the contractor would have to shoulder the cost of retaining the labor that he required to do the work. That's a contractor's risk.

Q. Sure. Exclusive of a labor shortage and exclusive of the when or weather impact, would you as a construction manager reasonably expect any contractor who had a defined or known scope of work to be able to estimate the labor and the costs of that labor for that work? A. I would, unless it was a feature of work that had not been used in the area and the contractor had little or no experience with performing it. Q. Okay. Fair enough. In analyzing a change order with a known scope of work, would you as a construction manager agent representing an owner consider it appropriate to pay for any hours of work that were not directly related to the change? A. It would be highly unlikely.

Q. Tell me why. A. Because it would be assumed that the contractor was competent to do the work, and he would have a hold on the costs that it would require. Q. Okay. To give you an example, you wouldn't be as a construction manager agent representing an owner compensating the contractor for sending his employees out to buy groceries? A. No. Q. Okay. Not reasonably related to the work.
<table>
<thead>
<tr>
<th>Time</th>
<th>Line</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>10:55:35</td>
<td>Q. (BY MR. TROUT)</td>
<td>Well, you know what the term</td>
</tr>
<tr>
<td>10:55:38</td>
<td></td>
<td>authorized means, don't you, sir?</td>
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<tr>
<td>10:55:41</td>
<td>MR. WALKER:</td>
<td>Also object on the basis of lack of</td>
</tr>
<tr>
<td>10:55:48</td>
<td>MR. TROUT:</td>
<td>That's right. So I'm going to have</td>
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<tr>
<td>10:56:14</td>
<td></td>
<td>the court reporter read back my question, please.</td>
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<td>10:56:11</td>
<td></td>
<td>(The question was read back.)</td>
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<tr>
<td>10:56:17</td>
<td>MR. WALKER:</td>
<td>Objection. Vague and lack of</td>
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<tr>
<td>10:56:27</td>
<td>THE WITNESS:</td>
<td>If the contractor's work not having</td>
</tr>
<tr>
<td>10:56:34</td>
<td>been started jeopardizes the overall schedule, it may</td>
<td></td>
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<td>10:56:40</td>
<td></td>
<td>be less expensive to authorize some payment to get him</td>
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<tr>
<td>10:56:47</td>
<td></td>
<td>started than it would be to let the project be further</td>
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<td>10:56:49</td>
<td></td>
<td>delayed.</td>
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<tr>
<td>10:56:50</td>
<td>Q. (BY MR. TROUT)</td>
<td>And how is that --</td>
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<tr>
<td>10:56:53</td>
<td>A.</td>
<td>Schedule is everything in a construction</td>
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<tr>
<td>10:56:53</td>
<td>project.</td>
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<tr>
<td>10:57:12</td>
<td>Q.</td>
<td>I understand. So as a construction manager,</td>
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<tr>
<td>10:57:18</td>
<td></td>
<td>how much are you going to authorize for payment where</td>
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<td>10:57:21</td>
<td></td>
<td>no work is being performed?</td>
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<tr>
<td>10:57:22</td>
<td>A.</td>
<td>I can't answer that, because I don't know</td>
</tr>
<tr>
<td>10:57:27</td>
<td></td>
<td>how critical it might be to push the contractor to</td>
</tr>
<tr>
<td>10:57:28</td>
<td>start.</td>
<td></td>
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<tr>
<td>10:57:31</td>
<td>Q.</td>
<td>What if you're paying him and he doesn't</td>
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<tr>
<td>10:57:32</td>
<td>start at all?</td>
<td></td>
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<tr>
<td>10:57:35</td>
<td>A.</td>
<td>Well, you -- in the worst case, you can</td>
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<td>10:57:43</td>
<td></td>
<td>breach his contract and go out and hire another one.</td>
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<tr>
<td>10:57:43</td>
<td>Q.</td>
<td>Well --</td>
</tr>
<tr>
<td>10:57:46</td>
<td>A.</td>
<td>There is a lot of what ifs.</td>
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<tr>
<td>10:58:03</td>
<td>As a construction manager, if you have the</td>
<td></td>
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<tr>
<td>10:58:07</td>
<td>responsibility for certifying that a portion of the</td>
<td></td>
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<tr>
<td>10:58:12</td>
<td>work has been done prior to authorizing payment, what</td>
<td></td>
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<tr>
<td>10:58:16</td>
<td>steps do you undertake to do so?</td>
<td></td>
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<tr>
<td>10:58:21</td>
<td>A.</td>
<td>Well, I would go to the client and explain</td>
</tr>
<tr>
<td>10:58:30</td>
<td>to the client why I was proposing to pay somebody for</td>
<td></td>
</tr>
<tr>
<td>10:58:35</td>
<td>work that hadn't been physically performed and my</td>
<td></td>
</tr>
<tr>
<td>10:58:36</td>
<td>reasons for wanting to do it.</td>
<td></td>
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<tr>
<td>10:58:39</td>
<td>Q.</td>
<td>Would you document that in any fashion?</td>
</tr>
<tr>
<td>10:58:39</td>
<td>A.</td>
<td>Certainly I would.</td>
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<tr>
<td>10:58:41</td>
<td>Q.</td>
<td>How would you document it?</td>
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<tr>
<td>10:58:44</td>
<td>A.</td>
<td>Well, I would go have a meeting with them, and</td>
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<td>10:58:47</td>
<td></td>
<td>then I'd write the minutes of the meeting. And if</td>
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<tr>
<td>10:58:51</td>
<td></td>
<td>I had a client that I didn't trust, I'd have them sign</td>
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<tr>
<td>10:58:54</td>
<td></td>
<td>the minutes along with my signature.</td>
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<tr>
<td>10:59:07</td>
<td>Q.</td>
<td>Okay. Is it your opinion that a</td>
</tr>
<tr>
<td>10:59:14</td>
<td></td>
<td>construction manager exercising ordinary care in the</td>
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<tr>
<td>10:59:17</td>
<td></td>
<td>state of Idaho at the time of the Meridian City Hall</td>
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<tr>
<td>10:59:32</td>
<td>project would document any significant decision made</td>
<td></td>
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<tr>
<td>10:59:33</td>
<td>by a client.</td>
<td></td>
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<tr>
<td>10:59:35</td>
<td>MR. WALKER:</td>
<td>Object to the use of the term</td>
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<tr>
<td>10:59:36</td>
<td>&quot;significant&quot; as being vague.</td>
<td></td>
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<tr>
<td>10:59:39</td>
<td>THE WITNESS:</td>
<td>I would think that the client would</td>
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<tr>
<td>10:59:45</td>
<td>want a documentation as well as the contractor.</td>
<td></td>
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<tr>
<td>10:59:45</td>
<td>MR. TROUT:</td>
<td>Okay.</td>
</tr>
<tr>
<td>10:59:48</td>
<td>Q. (BY MR. TROUT)</td>
<td>So let me ask the question</td>
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<tr>
<td>10:59:53</td>
<td></td>
<td>one more time so that we can get a very clear answer</td>
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<tr>
<td>10:59:55</td>
<td></td>
<td>to the specific question if we can, sir.</td>
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<tr>
<td>11:00:01</td>
<td>In your opinion as a construction manager</td>
<td></td>
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<tr>
<td>11:00:10</td>
<td>for the period of time of the Meridian City Hall</td>
<td></td>
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<tr>
<td>11:00:14</td>
<td>project, would a construction manager in the exercise</td>
<td></td>
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<tr>
<td>11:00:21</td>
<td>of ordinary care document any significant decision</td>
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<tr>
<td>11:00:23</td>
<td>made by a client?</td>
<td></td>
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<tr>
<td>11:00:26</td>
<td>MR. WALKER:</td>
<td>Object to the word &quot;significant&quot; as</td>
</tr>
<tr>
<td>11:00:27</td>
<td>being vague.</td>
<td></td>
</tr>
<tr>
<td>11:00:33</td>
<td>THE WITNESS:</td>
<td>Well, I think I need a more defined</td>
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<tr>
<td>11:00:38</td>
<td>definition of what significant is.</td>
<td></td>
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<tr>
<td>11:00:43</td>
<td>MR. TROUT:</td>
<td>Okay.</td>
</tr>
<tr>
<td>11:00:47</td>
<td>Q. (BY MR. TROUT)</td>
<td>So you can't answer without</td>
</tr>
<tr>
<td>11:00:50</td>
<td></td>
<td>that definition?</td>
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<tr>
<td>11:01:00</td>
<td>A.</td>
<td>I can't feel as comfortable answering as if</td>
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<tr>
<td>11:01:06</td>
<td></td>
<td>I had a definition. As an example, in a very tiny job</td>
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<tr>
<td>11:01:13</td>
<td></td>
<td>with a very tiny issue, I might just go ahead and do</td>
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<tr>
<td>11:01:16</td>
<td></td>
<td>something, on a very big job with a tiny issue, it all</td>
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<tr>
<td>11:01:18</td>
<td></td>
<td>depends on the context in which it is in.</td>
</tr>
<tr>
<td>11:01:21</td>
<td>Q.</td>
<td>All right. So in the context of a project</td>
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<tr>
<td>11:01:22</td>
<td>like the Meridian City Hall project, if the decision</td>
<td></td>
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<tr>
<td>11:01:27</td>
<td>involved a value of more than $500, should that be</td>
<td></td>
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<tr>
<td>11:01:28</td>
<td>documented?</td>
<td></td>
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<tr>
<td>11:01:29</td>
<td>A.</td>
<td>I would think so.</td>
</tr>
<tr>
<td>11:01:33</td>
<td>Q.</td>
<td>All right. And would your answer be the</td>
</tr>
<tr>
<td>11:01:36</td>
<td></td>
<td>same if the decision involved a value of more than</td>
</tr>
<tr>
<td>11:01:38</td>
<td>$5,000?</td>
<td></td>
</tr>
<tr>
<td>11:01:38</td>
<td>A.</td>
<td>Yes.</td>
</tr>
<tr>
<td>11:02:16</td>
<td>Q.</td>
<td>Okay. You have issued a written report in</td>
</tr>
<tr>
<td>11:02:17</td>
<td>this case; is that correct?</td>
<td></td>
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<tr>
<td>11:02:17</td>
<td>A.</td>
<td>That's correct.</td>
</tr>
<tr>
<td>11:02:17</td>
<td>(Deposition Exhibit No. 91 marked.)</td>
<td></td>
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<tr>
<td>11:02:31</td>
<td>Q. (BY MR. TROUT)</td>
<td>Sir, the court reporter has</td>
</tr>
<tr>
<td>11:02:47</td>
<td>handed you a copy of Exhibit No. 91, which I</td>
<td></td>
</tr>
<tr>
<td>11:02:59</td>
<td>understand to be your report; is that correct?</td>
<td></td>
</tr>
<tr>
<td>11:02:59</td>
<td>A.</td>
<td>That's correct.</td>
</tr>
<tr>
<td>11:03:09</td>
<td>Q.</td>
<td>Now, is this document the opinions of Lemley</td>
</tr>
<tr>
<td>11:03:10</td>
<td>International?</td>
<td></td>
</tr>
<tr>
<td>11:03:11</td>
<td>A.</td>
<td>Yes.</td>
</tr>
<tr>
<td>11:03:19</td>
<td>Q.</td>
<td>All right. And let me make sure I</td>
</tr>
<tr>
<td>11:03:23</td>
<td>understand, Lemley International is a corporation?</td>
<td></td>
</tr>
<tr>
<td>11:03:23</td>
<td>A.</td>
<td>Yes.</td>
</tr>
</tbody>
</table>
Q. Okay. Organized under the laws of what state?
A. The State of Idaho.

Q. Okay. When did Lemley International come into existence?

Q. All right. And who are the shareholders?
A. My wife and I.

Q. Based upon your -- are there any other shareholders?

Q. Based upon the -- and I may not ask this correctly, so please correct me if I'm wrong.
A. I'll try.

Q. Would you consider yourself to be the principal of Lemley International?
A. No.

Q. All right. On financial matters, would I be correct in understanding from your prior testimony that your wife is the principal?

Q. And your wife's name, sir?
A. Pamela K. Lemley.

Q. All right. Would I be correct in understanding that this report is not intended to provide any legal opinions of any kind?
A. That is correct.

Q. Based upon your testimony, it doesn't have to be.
A. Yes.

Q. And your wife's name, sir?
A. Pamela.

Q. What's an efficiency ratio?

Q. In your report you talk about efficiency ratios; correct?
A. Yes.

Q. Okay. Organized under the laws of what state?
A. The State of Idaho.

Q. Okay. In your report you state that this report is not intended to be applicable?
A. I think it would be very much higher than the 85 or 90 percent level.

Q. What's an efficiency ratio?
A. It would be probably efficient to the 85 or 90 percent level.

Q. Does the building have to be?
A. Well, the building would have to be whatever size a building you had planned to plant on top of the foundation.

Q. Well, let's get specific. If I want 20,000 square feet of useable office space, how large does the structure have to be?
A. I think it would be very much higher than that if you are just building a box that is 20,000 square feet with nothing to the box, all you have is a door, and the door has to have an area to swing in, either in or out.

Q. Okay. So your concept of Class A office space for 2006 is simply a box with a door; is that correct?
A. Well, I thought that's what you indicated.

Q. Okay. What would you consider to be applicable for a Class A office building to be constructed in the year 2006/2007 in Meridian, Idaho?

Q. Okay. If I want 20,000 square feet of useable office space, how large does the structure have to be?
A. Well, of the amount of space contained within the shell of the building, it's how much of the building itself can be used for its intended purpose.

Q. Okay. If I want 20,000 square feet of useable office space, what kind of efficiency ratio would you consider to be applicable for a Class A office building to be constructed in the year 2006/2007 in Meridian, Idaho?

Q. Okay. In Idaho, Class A to be constructed commencing in May of any given year, if I seek 20,000 square feet of useable office space, how large does the structure have to be?
Q. (BY MR. TROUT) What is it?
A. I believe -- I'll give you an example of a building that I think is representative of that and that would be the Banner Bank building.
Q. Okay. And what kind of -- first of all, how many square feet of useable office space exists in the Banner Bank building?
A. I don't know.
Q. Do you know what the efficiency ratio is for the Banner Bank building?
A. No, I don't.
Q. Okay. Does it typically take more than one square foot of Class A useable office space?
A. I don't know.
THE WITNESS: Well, if you're asking, do you have one square foot of useable office space knew or should have known that it would require more square footage than just the 80,000,000 square foot of building construction to accommodate the building was going to be used for. Correct?
Q. All right, sir. And based upon your opinion that any construction manager looking at the construction of 80,000 square feet of useable office space knew or should have known that it would require more square footage than just the 80,000 square feet of standard Class A office space, "and related improvements with surface parking for the project."
A. A. I believe -- I'll give you an example of a building that I think is representative of that and that would be the Banner Bank building.
Q. Okay. Does it typically take more than one square foot of Class A useable office space?
A. I don't know.
Q. Do you know what the efficiency ratio is for the Banner Bank building?
A. No, I don't.
Q. Okay. Does it typically take more than one square foot of Class A useable office space?
A. I don't know.
Q. What is a more reasonable efficiency ratio for a project like the Meridian City Hall in the year 2006/2007 than the 84 percent you have stated?

A. It's a lower percentage as I understand it, although, architects are generally tasked with calculating useable floor space as they design a building. That relates more to an architectural expert than to a construction manager.

Q. Okay. So are you telling me that you don't have the expertise to express the opinion that is contained in the second full paragraph on page 4 of Exhibit No. 2?

A. I'm telling you that we did not do an extensive calculation to calculate these numbers. Instead, we used the information that came from the people that we worked with, and I would say that our experience on the capitol is that the efficiency there can't be any greater than about 85 to 90 percent as opposed to the two wings, which we believe are significantly more efficient.

Q. Well, that wasn't really my question, so we'll go back.

A. Well, I understand that. I thought I answered it with two or three paragraphs. I'm sorry, sir.

Q. That's all right. You don't need to apologize. I just want to get a specific answer to my specific question. My specific question is: Would I be correct in understanding from your testimony that you don't have the professional competence to express an opinion about what's ambitious or not ambitious in terms of building efficiency ratios that is contained in paragraph -- second full paragraph, page 4 of exhibit Exhibit No. 91, your report?

A. What I think I testified to was the fact that we do have the professional experience and competence to do those calculations, but in this particular case, we did not calculate that as we felt that information more readily gained from the architect.

Q. All right. And if Lombard-Conrad testified that an efficiency ratio of 75 percent was appropriate for the construction of the City Hall in Meridian, in the years 2006/2007, would you have any professional reason to disagree with that?

A. We would be cautious about it. There have been numbers floating around in the 73 to the 75 percent range, but we would definitely calculate it if...
Q. Okay. Which part did you type?

A. Bauer did a lot of it. Randal Hartman did some of it.

Q. And who is Mr. Hartman?

A. I explained, he was a financial fellow in our firm who is in charge of billing and general office administration.

Q. Okay. Do you have the various drafts or iterations of this that were in existence prior to the final report?

A. No. They just corrected the data that was on the computer and lost the previous information.

Q. Okay. So if I ask you to provide me with the original electronic file for the creation of this report, would you do so?

A. I would with the advice of Counsel. And I

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Page 79
1:14:51:10 coupon should be clipped out of whatever it is being dates and things in here that I've tried to keep in
1:14:51:44 measurement of a specific structural element, and that
1:14:51:51 Q. So in the performance of a quality audit,
1:14:52:06 A. No. I'll get that, and we will send it to
1:14:52:10 2. Yes, unless it requires a physical
1:14:52:29 3. That work has been done, but you actually have the paper that is
1:14:52:37 4. I can't tell you. I'll have to review the
1:14:53:06 7. A. Originally, yes, and then I believe it was
transferred to the Department of Public Works.
1:14:53:10 8. Okay. How many square feet of usable
office space is there in the Water Center?
1:14:53:14 9. A. I can't tell you. I'll have to review the records.
1:14:53:22 11. A. I told him that to do anymore, we would
9. No. I'll get that, and we will send it to
1:14:53:30 10. 'Okay, about how things might have been done, but you actually have the paper from
1:14:53:38 11. There. And you start to exercise judgment on the value of that paper and oftentimes it will give you
1:14:53:46 12. For what entity?
1:14:53:54 13. A. No. I think I said I was an agent
1:14:54:00 14. construction manager.
1:14:54:09 15. A. I don't remember, but I visited with
1:14:54:17 16. No. I'll get that, and we will send it to
1:14:54:20 17. A. I don't remember, but I visited with
1:14:54:23 18. A. I don't remember, but I visited with
1:14:54:25 19. A. If I were you, I'd go to hang you.
1:14:54:32 21. A. I don't remember, but I visited with
1:14:54:35 22. A. I don't remember, but I visited with
1:14:54:40 23. A. I don't remember, but I visited with
1:14:54:44 24. A. I don't remember, but I visited with
1:14:54:47 25. A. I don't remember, but I visited with

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<table>
<thead>
<tr>
<th>Time</th>
<th>Page 85</th>
<th>Page 86</th>
<th>Page 87</th>
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<tbody>
<tr>
<td>11:52:04</td>
<td>a Bates numbered page PETRA96939.</td>
<td></td>
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</tr>
<tr>
<td>11:52:06</td>
<td>2. A. 96939?</td>
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<tr>
<td>11:52:10</td>
<td>3. Q. Yes, sir. It's the second page of Exhibit</td>
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<tr>
<td>11:52:24</td>
<td>5. A. I see. Excuse me. I guess that's why we have Bates numbers. I'm there, sir.</td>
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<td>11:52:55</td>
<td>7. Q. All right. So you indicate in this document</td>
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<td>11:53:04</td>
<td>8. that you met with Jerry Frank, Gene Bennett, and Tom Coughlin; is that correct?</td>
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</tr>
<tr>
<td>11:53:05</td>
<td>9. Coughlin; is that correct?</td>
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</tr>
<tr>
<td>11:53:09</td>
<td>11. Q. When did you meet with Mr. Frank?</td>
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<tr>
<td>11:53:12</td>
<td>12. A. I met with him the first time out at the site, and the second time here about a month ago in my office.</td>
<td></td>
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</tr>
<tr>
<td>11:53:24</td>
<td>15. Q. Okay. Who was present during the first meeting with Mr. Frank at the site?</td>
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<td>11:53:26</td>
<td>16. meeting with Mr. Frank at the site?</td>
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<tr>
<td>11:53:31</td>
<td>18. Q. Okay. Was anyone else present?</td>
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<tr>
<td>11:53:34</td>
<td>20. Q. Was anyone else present?</td>
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<td>11:53:39</td>
<td>22. Q. All right. Did you keep any notes of that meeting?</td>
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<tr>
<td>11:53:43</td>
<td>25. Q. Did Mr. Bauer keep any notes of that meeting?</td>
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</tr>
<tr>
<td>11:53:43</td>
<td>1. meeting?</td>
<td></td>
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<tr>
<td>11:53:45</td>
<td>2. A. He may have. I don't know.</td>
<td></td>
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<tr>
<td>11:53:49</td>
<td>3. Q. All right. Did you keep any recordings of that meeting?</td>
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<td>11:53:55</td>
<td>6. Q. Okay. I'm going to focus on conversations with the specific individuals if I can. When did that meeting occur, what date?</td>
<td></td>
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<tr>
<td>11:54:00</td>
<td>7. with the specific individuals if I can. When did that meeting occur, what date?</td>
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<tr>
<td>11:54:04</td>
<td>8. meeting occur, what date?</td>
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<tr>
<td>11:54:09</td>
<td>9. A. That was probably April of this year.</td>
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<tr>
<td>11:54:14</td>
<td>10. Q. All right, sir. And can you tell me specifically what was said by Mr. Frank and what was said by you during that meeting?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11:54:20</td>
<td>11. specifically what was said by Mr. Frank and what was said by you during that meeting?</td>
<td></td>
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</tr>
<tr>
<td>11:54:24</td>
<td>13. A. Well, I said that I thought the building was a nice looking building, and that I was told that there was a raised floor for ventilation in the building, and I said I understand how difficult a raised floor can be to get the ventilation and whatnot balanced, because we had a raised floor in the water center, and they are not commonly used in the Treasure Valley, so the experience to balance the systems doesn't really exist here as it should, and we had to bring people in from Seattle to finally achieve a proper balance in the Water Center.</td>
<td></td>
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<tr>
<td>11:54:33</td>
<td>14. a nice looking building, and that I was told that there was a raised floor for ventilation in the building, and I said I understand how difficult a raised floor can be to get the ventilation and whatnot balanced, because we had a raised floor in the water center, and they are not commonly used in the Treasure Valley, so the experience to balance the systems doesn't really exist here as it should, and we had to bring people in from Seattle to finally achieve a proper balance in the Water Center.</td>
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<tr>
<td>11:54:41</td>
<td>15. Q. All right. And what, if anything, was said to you by Mr. Frank to that response of that</td>
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<tr>
<td>11:54:46</td>
<td>16. Q. All right. And what, if anything, was said to you by Mr. Frank to that response of that</td>
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<tr>
<td>11:54:57</td>
<td>17. balanced, because we had a raised floor in the water center, and they are not commonly used in the Treasure Valley, so the experience to balance the systems doesn't really exist here as it should, and we had to bring people in from Seattle to finally achieve a proper balance in the Water Center.</td>
<td></td>
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</tr>
<tr>
<td>11:55:05</td>
<td>18. balanced, because we had a raised floor in the water center, and they are not commonly used in the Treasure Valley, so the experience to balance the systems doesn't really exist here as it should, and we had to bring people in from Seattle to finally achieve a proper balance in the Water Center.</td>
<td></td>
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<tr>
<td>11:55:11</td>
<td>19. Valley, so the experience to balance the systems doesn't really exist here as it should, and we had to bring people in from Seattle to finally achieve a proper balance in the Water Center.</td>
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</tr>
<tr>
<td>11:55:18</td>
<td>22. Valley, so the experience to balance the systems doesn't really exist here as it should, and we had to bring people in from Seattle to finally achieve a proper balance in the Water Center.</td>
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</tr>
<tr>
<td>11:55:20</td>
<td>23. Valley, so the experience to balance the systems doesn't really exist here as it should, and we had to bring people in from Seattle to finally achieve a proper balance in the Water Center.</td>
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<tr>
<td>11:55:22</td>
<td>24. Valley, so the experience to balance the systems doesn't really exist here as it should, and we had to bring people in from Seattle to finally achieve a proper balance in the Water Center.</td>
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<tr>
<td>11:55:28</td>
<td>25. Valley, so the experience to balance the systems doesn't really exist here as it should, and we had to bring people in from Seattle to finally achieve a proper balance in the Water Center.</td>
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</tbody>
</table>
Q. Well, I looked at the fit and finish of the interior that was obvious, and the fit and finish on the floor to the specific language in Petra --
A. Yes. I'm reading it right now, sir. I'll address this as soon as I find it.

Q. Okay. A. Okay.

Q. Okay, I'm going to ask you to turn to Exhibit No. 2, which is the Petra contract.
A. Yes, sir.

Q. Okay. And I'd like to identify for me where I can find the contingency agreement in this contract.

Q. So is it your testimony that the Petra contract with the City of Meridian had a contingency in it?
A. Yes.

Q. What would you tell me, sir, what that is?
A. That's my understanding.

Q. When the contractor has basically performed all of the work in the schedule of values and the work completed, the contractor is generally given the notice of completion.
A. Yes.

Q. Is it a notice of completion or a notice of substantial completion?
A. Notice of substantial completion. There is always a warranty period connected with a project and total completion would be when the warranty period is exhausted.

Q. So is it your testimony that the Petra contract with the City of Meridian had a contingency in it?
A. Yes.

Q. All contracts such as this have a contingency built into them so that --
A. All contracts such as this have a contingency built into them so that --

Q. Well, what I'm asking you, sir, is to point to the specific language in Petra --
A. I'm reading it right now, sir. I'll address this as soon as I find it.

Q. Okay. A. Okay.

Q. Okay. We'll come back to that. What you are referring to any commentary. Mr. Lemley is your expert. He should be able to tell us with his expertise what document --
A. MR. WALKER: When do you want to take our lunch break?

Q. All contracts such as this have a contingency built into them so that --
A. All contracts such as this have a contingency built into them so that --

Q. Well, the prime contractors for the Meridian project were Mr. Bennett and Mr. Coughlin. Do you recall anything about contingencies, and that would be a typical use of a contingency. Agent construction managers don't have financial risk in a project like that and nobody is perfect. It's all human beings make mistakes.

Q. Well, we'll come back to that. What you are referring to any commentary. Mr. Lemley is your expert. He should be able to tell us with his expertise what document --
A. MR. WALKER: When do you want to take our lunch break?
<table>
<thead>
<tr>
<th>Time</th>
<th>Transcript</th>
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<tbody>
<tr>
<td>12:26:10</td>
<td>Q. And what, if any, observation did you make with respect to the parking lot?</td>
</tr>
<tr>
<td>12:26:12</td>
<td>2</td>
</tr>
<tr>
<td>12:26:18</td>
<td>A. Well, it was a good sized parking lot, and presumably would accommodate the traffic normally seen at the City Hall.</td>
</tr>
<tr>
<td>12:26:25</td>
<td>Q. All right. Did you make any other observations with respect to the parking lot?</td>
</tr>
<tr>
<td>12:26:33</td>
<td>8</td>
</tr>
<tr>
<td>12:26:36</td>
<td>Q. Did you make any observations with respect to the water features?</td>
</tr>
<tr>
<td>12:26:44</td>
<td>11</td>
</tr>
<tr>
<td>12:26:48</td>
<td>A. There was -- it was pointed out to me that there was some difficulty in the water feature, and that there was a leak issue that was being worked on, but that wasn't being done under warranty.</td>
</tr>
<tr>
<td>12:26:53</td>
<td>Q. All right. And who pointed that out to you?</td>
</tr>
<tr>
<td>12:27:01</td>
<td>15</td>
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<tr>
<td>12:27:04</td>
<td>Q. All right. And what specifically do you recall Mr. Bennett saying to you about the water features?</td>
</tr>
<tr>
<td>12:27:10</td>
<td>18</td>
</tr>
<tr>
<td>12:27:15</td>
<td>A. I think we just walked by it and in general observation I said that it was attractive and that I thought it went with the building very well, so the visual standpoint looked pretty good, but I advised them to measure the masonry installation to be sure that it was done exactly according to specifications and plans.</td>
</tr>
<tr>
<td>12:27:20</td>
<td>Q. All right. In your visit, did you make any other observations with respect to the water features?</td>
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<td>12:27:27</td>
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<td>12:27:32</td>
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<td>12:27:38</td>
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<td>12:27:39</td>
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<table>
<thead>
<tr>
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<tbody>
<tr>
<td>12:27:49</td>
<td>Q. All right. In your visit, did you make any other observations with respect to the water features?</td>
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<td>12:27:57</td>
<td>4</td>
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<tr>
<td>12:27:57</td>
<td>A. No, I didn't.</td>
</tr>
<tr>
<td>12:28:04</td>
<td>Q. All right. What, if anything, else was said to you during that visit by Mr. Frank?</td>
</tr>
<tr>
<td>12:28:10</td>
<td>6</td>
</tr>
<tr>
<td>12:28:16</td>
<td>A. I don't recall any other subject being addressed between us.</td>
</tr>
<tr>
<td>12:28:18</td>
<td>8</td>
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<tr>
<td>12:28:25</td>
<td>Q. What was Mr. Frank's role in the Meridian City Hall project?</td>
</tr>
<tr>
<td>12:28:27</td>
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<tr>
<td>12:28:32</td>
<td>A. He was the executive of Petra, so he would have had a general oversight responsibility for the entire work being done by Petra.</td>
</tr>
<tr>
<td>12:28:39</td>
<td>Q. All right. Would you consider Mr. Frank to be the principal in Petra?</td>
</tr>
<tr>
<td>12:28:43</td>
<td>15</td>
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<tr>
<td>12:28:51</td>
<td>Q. Who was the project manager for the project?</td>
</tr>
<tr>
<td>12:28:52</td>
<td>17</td>
</tr>
<tr>
<td>12:28:56</td>
<td>A. Mr. Bennett.</td>
</tr>
<tr>
<td>12:28:59</td>
<td>Q. All right. What was Mr. Coughlin's role?</td>
</tr>
<tr>
<td>12:29:03</td>
<td>20</td>
</tr>
<tr>
<td>12:29:04</td>
<td>A. Well, Mr. Coughlin was the project manager. Mr. Bennett was a home office oversight to Mr. Coughlin.</td>
</tr>
<tr>
<td>12:29:07</td>
<td>21</td>
</tr>
<tr>
<td>12:29:13</td>
<td>Q. Okay. What, if anything, else do you recall being said by Mr. Coughlin during that visit?</td>
</tr>
<tr>
<td>12:29:24</td>
<td>24</td>
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<tr>
<td>12:29:29</td>
<td>A. I think he explained to me that when they were getting started, they had encountered hazardous and unsuitable material when they were excavating for the garage, and that the site investigation that they had -- that they did suggested that they raise the building four feet so that it wouldn't puncture the impervious layer and allow anything to migrate into the ground water system.</td>
</tr>
<tr>
<td>12:29:36</td>
<td>Q. My conclusion was that the City got value for the money that they had spent on the building.</td>
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<tr>
<td>12:29:42</td>
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<td>12:30:05</td>
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<td>12:30:11</td>
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<td>12:30:24</td>
<td>8</td>
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<tr>
<td>12:30:26</td>
<td>Q. Okay. Can you tell me what a building story is?</td>
</tr>
<tr>
<td>12:30:33</td>
<td>9</td>
</tr>
<tr>
<td>12:30:48</td>
<td>Q. All right. Was anything else said by Mr. Bauer during your site visit in April?</td>
</tr>
<tr>
<td>12:30:54</td>
<td>13</td>
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<tr>
<td>12:30:58</td>
<td>A. There might have been some discussion of the masonry work on the greater building being later than they had hoped to have it done, but I don't remember the specifics of the conversation.</td>
</tr>
<tr>
<td>12:31:09</td>
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<tr>
<td>12:31:17</td>
<td>Q. Did you make any personal observations of the masonry work?</td>
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<td>12:31:36</td>
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<tr>
<td>12:31:41</td>
<td>Q. All right. Was anything else said by Mr. Bennett?</td>
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<td>12:31:47</td>
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<td>12:31:50</td>
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<table>
<thead>
<tr>
<th>Time</th>
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<tbody>
<tr>
<td>12:31:59</td>
<td>Q. Do you know if that measurement has taken place?</td>
</tr>
<tr>
<td>12:32:00</td>
<td>1</td>
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<td>12:32:04</td>
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<td>12:32:11</td>
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<tr>
<td>12:32:12</td>
<td>A. I do not.</td>
</tr>
<tr>
<td>12:32:15</td>
<td>Q. All right. Do you recall anything else said by Mr. Frank, Mr. Bennett, or Mr. Coughlin during that visit?</td>
</tr>
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<td>12:32:19</td>
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<td>12:32:23</td>
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<tr>
<td>12:32:27</td>
<td>A. Not that I can recall.</td>
</tr>
<tr>
<td>12:32:33</td>
<td>Q. All right. Tell me what, if anything, was said by Mr. Bauer during that visit?</td>
</tr>
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<td>12:32:46</td>
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<tr>
<td>12:32:47</td>
<td>A. I think he probably mentioned the raised floor as we were walking through the lobby, and that opened that discussion, but I don't remember it very well.</td>
</tr>
<tr>
<td>12:32:50</td>
<td>Q. What, if any, conversation did you have with Mr. Bauer regarding the site visit as you were traveling away from the site?</td>
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<td>12:32:58</td>
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<tr>
<td>12:33:07</td>
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<tr>
<td>12:33:10</td>
<td>Q. Did you travel away from the site with Mr. Bauer?</td>
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<td>12:33:18</td>
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<td>12:33:35</td>
<td>17</td>
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<tr>
<td>12:33:41</td>
<td>A. I did.</td>
</tr>
<tr>
<td>12:33:47</td>
<td>Q. What, if any, conversation did you have with Mr. Bauer regarding the site visit as you were traveling away from the site?</td>
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<tr>
<td>12:33:58</td>
<td>19</td>
</tr>
<tr>
<td>12:34:00</td>
<td>A. I said that I thought the building looked good for a new facility in the range of $20 million.</td>
</tr>
<tr>
<td>12:34:10</td>
<td>20</td>
</tr>
<tr>
<td>12:34:18</td>
<td>My conclusion was that the City got value for the money that they had spent on the building.</td>
</tr>
<tr>
<td>12:34:24</td>
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24 (Pages 93 to 96)
Q. All right. During the construction of the Water Center, was the plenum floor in the Water Center air tested?

A. Oh, yes. It was.

Q. All right. Are you familiar either from your work at the Water Center -- actually, I'll ask it in a slightly different way. Prior to your work on the Water Center, had you been involved in any project utilizing any installation of a plenum floor?

A. No.

Q. As a result of your work with the Water Center and the installation of the plenum floor in that facility, did you become familiar with air testing for plenum floors?

Q. Okay. Tell me what level of familiarity you have with air testing of plenum floors?

A. Well, they are sensitive to the population of the building because of the body heat that you are introducing both in terms of heating and cooling, and of course, the distribution of the air, it's -- it is

Q. At the Water Center?

A. The Water Center?

Q. Yes.

A. All right. Now, how much destructive testing occurred when the air testing for the plenum floors was done on the Water Center?

Q. Was any of the floor damaged in that process?

A. No.

Q. All right. Would it be your experience as a construction manager having worked on the plenum floor system at the Water Center that it would not be appropriate to damage the plenum floor components in the testing process?

A. It's never a good practice to damage any of the permanent work during a testing phase. That's a complete waste to damage permanent work, unless you need to take a piece of it for deeper inspection.

Q. Some kind of destructive testing?

A. Yes. If you needed to take a piece of it for destructive testing, that would be acceptable, but it would be surprising to me to have much of a raised floor have to be subjected to destructive testing if you had received certifications from the manufacturer and the vendor who had installed it.

Q. All right. In the form of shop drawings or submittals, would that be the certification you are talking about?

A. That's one component.

Q. Okay. What would be another component?

A. A certification that they were manufactured in accordance with their patent.

Q. All right. I want to go back to Exhibit No. 2 for a moment. You had approximately 20 minutes to examine Exhibit No. 2 in your search for some language related to contingency; correct?

MR. TROUT: Back on the record in the deposition, you can answer.

A. Yes. They made a lot of mistakes.

Q. Okay. What would be another component?

A. Yes.

Q. All right. During the construction phase, did you see any evidence of damage to the plenum floor components?

A. If you needed to take a piece of it for deeper inspection, that would be acceptable, but it would be surprising to me to have much of a raised floor have to be subjected to destructive testing if you had received certifications from the manufacturer and the vendor who had installed it.

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MR. TROUT: Back on the record in the deposition, you can answer.

A. Yes. They made a lot of mistakes.

Q. Okay. What would be another component?

A. Yes.

Q. All right. During the construction phase, did you see any evidence of damage to the plenum floor components?
Q. And part of your purpose in conducting the
audit was to seek to recover for the Authority money
that had been improperly charged by Bechtel; is that
right?
A. The first audit, that wasn't the case.
Q. Would I be fair in understanding that the
purpose of your second audit was to provide the
factual foundation for the recovery of money as
against Bechtel and Parsons Brinckerhoff?
A. Yes. And there were two things about it.
Q. Okay. And in your review for preparation
of what Massachusetts should have gotten back was the
last thing I heard about that was that Massachusetts
had transferred that whole project to the
Massachusetts Department of Transportation. I did
identify areas where there was bad work, and I
suggested that Bechtel Parsons Brinckerhoff owed the
state at least $600 million. When my assignment was
done, I read that they had settled for $484 million.
Q. Okay. So I would be correct in
understanding that you did not have any conversations
with Mr. Walker regarding this matter prior to June
10th, 2010; is that correct?
A. Not because -- let me clarify that. Because
when he hired us, yes. And Mr. Bauer had
consider to be authoritative on the use of the owner's
contingency and construction project?
Q. Okay. And will you conduct that review and
then provide us whatever you can find that you
call the Office of the Attorney General? I don't know whether they ever
consider to be authoritative on the use of the owner's
contingency and construction project?
Q. All right. Thank you.
In order to determine the standard of care
for Petra's conduct on the Meridian City Hall project,
is it in your professional opinion appropriate to
utilize Petra's Construction Management Agreement with
the City of Meridian to lay that foundation?
Q. Sir, let me narrow the question a little
further. The City of Meridian -- Boston Bay Cleanup Authority. I
don't know whether they ever
consider to be authoritative on the use of the owner's
contingency and construction project?
Q. Okay. And will you conduct that review and
then provide us whatever you can find that you
call the Office of the Attorney General? I don't know whether they ever
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Q. All right. Thank you.
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13:51:12
13:50:44
13:50:36
13:51:07
13:51:03
13:50:42
13:50:36
13:51:16
13:51:40 25 Q. Based on your review, can you tell me what 13:56:05
13:51:36
13:51:33
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13:51:33 21 Q. And Mr. -- is it Mc Glothin? 13:55:51
13:51:22
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13:51:36 24 A. $100. 13:56:00
13:51:40 25 Q. Do you know what the total amount that you

Q. So I assume they would have accounted for management of the mechanical system.  
A. That's correct.

Q. All right. So based upon your experience as a construction manager, can you tell me how much time Petra should have estimated spending in managing the building described in Exhibit No.2, as of August 1st, 2006?  
A. When I read through it a little bit ago, I was trying to clarify your question.  
Q. A. When I read through it a little bit ago, I presume they would have accounted for management of the mechanical system.  
A. Thats correct.

Q. All right. So based upon your experience as a construction manager, can you tell me how much time Petra should have estimated spending in managing the building described in Exhibit No.2, as of August 1st, 2006?  
A. No, I can't.

Q. Well, let me ask this question. Based on the description you just gave me, how much time would you have anticipated spending on managing the construction of the exterior as of August 1st, 2006?  
A. That in accordance with the building that was described to them at the time they took the contract that is outlined in their contract?  
Q. Well, let me ask it as simply as I can. As a construction management professional, can you tell me how much time Petra should have anticipated spending on the management of the exterior building construction as of August 1st, 2006?  
A. I believe that there was a difference between the exterior that they may have been thinking about and the exterior that was actually completed.

Q. Okay. Can you tell me, based upon your professional experience, how much time Petra should have anticipated spending on the management of the building exterior as of August 1st, 2006?  
A. I believe that there was a difference between the exterior that they may have been thinking about and the exterior that was actually completed.  
Q. Well, let me ask you two questions as a follow up to that. Can you point out in Exhibit No.2, the Construction Management Agreement, where the description of the building exterior can be found?  
A. No, because I don't believe there is one.
me how much time Petra estimated it would spend on
managing the construction of the building exterior as
of August 1st, 2006?
A. I have not been privy to Petra's estimate.
Q. Okay. And if Petra didn't create an
estimate of how much time it would spend managing the
building exterior -- or the construction of the
building exterior as of August 1st, 2006, we would
have nothing to measure their time against as they
have reported today, isn't that correct?
MR. WALKER: Objection. Lack of foundation. And
also there is more than one question in that question.
THE WITNESS: Unless we had their estimate, we
don't know what they thought they were going to do
as opposed to what they did do. The only thing that
can be done at this point is to speculate on what
we'd need to look at the specific time records that
recorded that activity, wouldn't we, sir?
MR. TROUT: Right.
Q. All right. And if Petra didn't create an
estimate of how much time Petra had spent in managing the
portion of the work specifically.
A. That's what I suggested to you, sir. I
think I answered that question.
Q. All right. And Petra didn't do any of the
actual physical construction; correct?
A. No, they didn't.
Q. Okay. And wouldn't I be correct in
suggesting that that is the case. I don't know
that specifically.
Q. (BY MR. TROUT) All right. And what does
the cost of the city council chamber clear span have
to do with the specific amount of time that Petra
spent in managing that portion of the work?
A. It's a hell of a lot easier to put in a
series of columns with a beam across the top of them
than it is to put in a large clear span truss, and it
takes much more time to do the second.
Q. All right. And that time, of course, would
have been expended by the steel fabricator and steel
erector?
A. That's what I suggested to you, sir. I
think I answered that question.
Q. All right. And Petra didn't do any of the
actual construction; correct?
A. No, they didn't.
Q. All right.
Q. (BY MR. TROUT) All right. And would I be correct in
suggesting that, for example, the steel fabrication
and erection for this project would have been in the
Phase II core and shell bids; is that correct?
A. We'll have to look at the specific time records to
determine that.
Q. You have access to those records and can determine
that specifically.
A. We'll have to look at the specific time records to
determine that.
Q. (BY MR. TROUT) Okay. And you haven't done
anything to investigate whether that was done, isn't
that correct?
MR. WALKER: Objection. Lack of foundation.
A. I was not asked to do that.
Q. And would I be correct if I assumed
logically that all of the required exterior stone and
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006233
Mr. Walker: Objection. Lack of foundation.

Q. (By Mr. Trout) Okay. And would your answer be the same with respect to the mechanical system that was placed out for bid?

Mr. Walker: Objection. Lack of foundation.

Q. Would you have any reason to disagree with him?

A. No.

Q. If Mr. Bennett testified under oath that he was aware of the required exterior stone and brick, would you have any reason to disagree with him?

A. No.

Q. If Mr. Bennett testified that he was aware of the Petra presentation to the City?

A. Yes, I understood they did.

Q. (By Mr. Trout) Did Mr. Bennett tell you that as part of their response to the request for proposals from the City of Meridian before Meridian hired a construction manager that they made a presentation to the City?

A. Yes, I understood they did.

Q. Okay. Did Mr. Bennett tell you in that presentation that they made a presentation with...
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<td>Jack K. Lemley</td>
<td>The question. I</td>
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<td>A. I understood that they did, yes.</td>
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<td>14:17:47</td>
<td>Jack K. Lemley</td>
<td>Q. All right. So certainly even before the contract was signed, if Petra made a presentation with respect to LEED certification they were aware that the City was seeking that for this project, wouldn't you agree?</td>
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<td>14:18:00</td>
<td>Jack K. Lemley</td>
<td>A. Yes.</td>
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<td>14:18:39</td>
<td>Jack K. Lemley</td>
<td>Q. All right. As of August 1st, 2006, in your professional opinion is there enough time Petra should have expected to spend in the management of ASIs or architectural supplemental information?</td>
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<td>Jack K. Lemley</td>
<td>MR. TROUT: I'll clarify the question. I apologize, Mr. Lemley. Let me ask it this way.</td>
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<td>Jack K. Lemley</td>
<td>Q. (BY MR. TROUT) For the Meridian City Hall project as described in Exhibit No. 2, the Construction Management Agreement, as of August 1st, 2006, in your professional opinion as a construction manager how much time should Petra have anticipated spending in the management of architectural supplemental instructions or ASIs?</td>
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<td>Jack K. Lemley</td>
<td>THE WITNESS: Until they got familiar with the architect and how well the architect has done his work, it would be very hard to estimate that number.</td>
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<td>Jack K. Lemley</td>
<td>MR. TROUT: All right.</td>
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<td>Jack K. Lemley</td>
<td>Q. (BY MR. TROUT) Can you estimate that number as we sit here today?</td>
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<td>to estimate how much time it was going to spend managing ASIs for the Meridian City Hall project?</td>
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<td>Jack K. Lemley</td>
<td>A. Well, they were -- the parking was certainly called for in the original contract. The plaza area was definitely an added feature.</td>
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31 (Pages 121 to 124)
Q. (BY MR. TROUT) If I've asked you that, I of Meridian v. Petra, Inc., et al.

MR. WALKER: Objection. Asked and answered. Q. (BY MR. TROUT) If I've asked you that, I

MR. WALKER: Objection. The document speaks for itself. Q. (BY MR. TROUT) If I've asked you that, I

Q. Okay. In preparing your opinion, did you review any of the prime contracts for this project? Q. Okay. In preparing your opinion, did you review any of the prime contracts for this project?

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I, as the construction management professional for Petra, should have signed the LEED change order when it was submitted to me by the City in the amount of $205,000.

MR. WALKER: Objection. Lack of foundation.

THE WITNESS: Well, I don't know whether they should have or not. They should have responded to the change order regardless of whether they signed it or not.

Q. Have you seen this document before?

A. Yes, sir.

Q. Have you seen this document before?

A. I have seen similar documents, yes.

Q. Well, my question is: Have you specifically seen this document before?

A. Yes, I believe I have.

Q. All right. And did you utilize this document in any fashion in formulating your company's conclusion as to what the cost of their new facility was doing.

THE WITNESS: There is a summary that we just contained or required by section 4.5.9 of Exhibit No. 2, the Construction Management Agreement?

Q. (BY MR. TROUT) Now, could you please turn to Exhibit No. 10 in the book in front of you.

Q. Okay. And directing your attention to page 10 in a different way. A cost estimate is an estimate of the bidders data in and consolidate it into a final cost estimate over a -- on various dates as the project looked at that showed the growth of the final cost estimate over a -- on various dates as the project.

THE WITNESS: There is a summary that we just

Q. (BY MR. TROUT) Well, turning your attention to Exhibit No. 10 in the notebook in front of you.

A. Yes, sir. I'm there.

THE WITNESS: That's correct.

Q. Okay. And so by definition a final cost estimate would have to be prepared before any bids were received, isn't that correct?

A. Well, it could be prepared before bids were received, but it would be more accurate to get certain

Q. (BY MR. TROUT) Well, how could you prepare a final cost estimate -- well, let me ask the question

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Gil' of Meridian v. Petra, Inc., et al.

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The City of Meridian v. Petra, Inc., et al.

14:55:04 1 building than -- or the facility than any that I had
14:55:19 2 seen prior to that.
14:55:21 3 Q. (BY MR. TROUT) All right. So if Petra
14:55:25 4 represented to the City of Meridian that the figures
14:55:40 5 contained in the column dated 7/12/2007 were the
14:55:54 6 highest cost estimate or the highest costs that the
14:55:58 7 City would be looking at for this project, would you
14:56:02 8 have any reason to disagree with Petra's representation as
14:56:04 9 of that date?
14:56:05 10 MR. WALKER: Objection. Calls for speculation
14:56:10 11 and lacks foundation. It is also compound.
14:56:13 12 MR. TROUT: Yeah. I'll ask it in a couple of
14:56:46 13 different ways. That's for sure.
14:56:46 14 Q. (BY MR. TROUT) Mr. Lemley, let me ask it
14:57:08 15 this way: With respect to the column identified as
14:57:16 16 July 12th, 2007, on Exhibit No. 10, in your opinion as
14:57:22 17 the construction management professional that reviewed
14:57:31 18 this document on behalf of Petra, did the City have a
14:57:38 19 right to rely on Petra's representations as to cost as
14:57:41 20 of July 12th, 2007?
14:57:45 21 MR. WALKER: Objection. Calls for a legal
14:57:48 22 conclusion. I would want to have a -- the column that
14:57:49 23 THE WITNESS: When you say, relies on, for what
14:57:52 24 purpose?
14:57:52 25 Q. (BY MR. TROUT) To believe whether it was

15:00:01 3 Q. (BY MR. TROUT) All right. So if Petra
15:00:04 4 represented to the City of Meridian that the figures
15:00:07 5 they would have been well disposed to take the
15:00:18 6 million to it. I hope that the Meridian City
15:00:26 7 government understands these numbers better than I do.
15:00:31 8 MR. TROUT: Okay.
15:00:44 9 Q. (BY MR. TROUT) Well, let me ask you this:
15:01:01 10 With respect to the items exclusively in the 7/12/2007
15:01:11 11 column -- all right, sir?
15:01:53 12 A. Yes, I heard you.
15:02:06 13 MR. WALKER: All right.
15:02:21 14 Q. (BY MR. TROUT) Standing in front of the City Council and you handed
15:02:33 15 session at a meeting of the City Council that this set
15:02:48 16 of numbers, "Is the highest budget that we could think
15:02:52 17 of inclusive of all of the items," did the City have a
15:03:05 18 right to rely on that statement?
15:03:14 19 Q. (BY MR. TROUT) Well, let me ask you the
15:03:18 20 question in a slightly different way. If you were
15:03:22 21 standing in front of the City Council and you handed
15:03:26 22 them the column of numbers in Exhibit No. 10 that is
15:03:36 23 represented by the July 12th, 2007, column, and you
15:03:56 24 Q. (BY MR. TROUT) Well, let me ask you the
15:04:12 25 THE WITNESS: I said that if I were the City
15:04:16 26 fathers, I would want to have a -- the column that
15:04:52 27 said, variance to budget, clear before I settled on a
15:05:05 28 number of 20 million.
15:05:12 29 Q. (BY MR. TROUT) Well, let me ask you the
15:05:26 30 conclusion, and asked and answered.
15:05:41 31 A. With the exception of clearing that column
15:05:48 32 Q. (BY MR. TROUT) Well, let me ask you the
15:05:52 33 THE WITNESS: I said that if I were the City
15:05:56 34 Q. (BY MR. TROUT) Well, let me ask you the
15:06:04 35 MR. TROUT: All right.

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006238
15:04:04 1 THE WITNESS: I said I would qualify it until I
15:04:07 2 had it completely clear that all of these variances
15:04:12 3 were cleared out of the budget, whether they were
15:04:17 4 additive or subtractive to the numbers in the July
15:04:29 5 12th, 2007, budget. And it looks to me like there
15:05:03 6 might be an addition of 2 million plus.
15:04:35 7 Q. (BY MR. TROUT) Okay. So let me direct your
15:04:41 8 attention to Exhibit No. 10, and let's look at the
15:04:43 9 variance to budget column that you are speaking of.
15:04:44 10 All right?
15:04:44 11 A. Yes, sir.
15:04:51 12 Q. Okay. In the construction management and
15:04:58 13 site development costs, the third item is reimbursable
15:04:59 14 construction; correct?
15:05:00 15 A. The third item?
15:05:02 16 Q. Yes.
15:05:03 17 A. Yes.
15:05:08 18 Q. And in the variance column, it says, zero?
15:05:09 19 A. Right.
15:05:12 20 Q. So we wouldn't worry about that, would we?
15:05:12 21 A. No.
15:05:14 22 Q. And the fourth item in the construction
15:05:19 23 management and site development costs is construction
15:05:19 24 management fee.
15:05:20 25 Do you see that, sir?

15:04:07 1 all the core and shell; correct?
15:04:12 2 A. Yes.
15:04:58 3 Q. And as of July 12th, 2007, the Phase III
15:07:02 4 bids were in, isn't that correct?
15:07:03 5 A. That is correct.
15:07:27 6 (Deposition Exhibit No. 92 marked.)
15:07:31 7 Q. (BY MR. TROUT) Sir, I'm going to hand you
15:07:45 8 what's been marked as Exhibit No. 92 for
15:07:45 9 identification.
15:07:46 10 A. Yes, sir.
15:07:49 11 Q. Do you recognize that document?
15:07:49 12 A. I don't, no.
15:07:52 13 Q. Okay. I'll represent to you that this is
15:08:00 14 Petra's takeoff of the Phase III tenant improvements
15:08:04 15 and mechanical and electrical plumbing bids comprised
15:08:10 16 in Phase III all dated for the bid opening July 12th,
15:08:12 18 A. Yes.
15:08:14 19 Q. Does that look consistent with the document
15:08:16 20 you are seeing, sir?
15:08:16 21 A. Yes.
15:08:29 22 Q. All right. So as of July 12th, 2007, Petra
15:08:34 23 knew what the bids were for Phase II core and shell;
15:08:37 24 correct?

15:04:17 4 way from Exhibit No. 10, doesn't it, sir?
15:04:17 5 A. Yes.
15:04:12 6 Q. So as of, frankly, the date of the bid
15:04:12 7 opening, April 3rd, 2007, Petra certainly knew all of
15:04:12 8 the costs that were going to be included in core and
15:04:12 9 shell according to the bid opening?
15:04:12 10 A. Yes.
15:04:17 11 Q. All right. And that would include
15:04:17 12 structural steel, wouldn't it?
15:04:17 13 A. Yes.
15:04:17 14 Q. And that would include the exterior cladding
15:04:17 15 of stone and brick, wouldn't it?
15:04:17 16 A. I'm looking for it.
15:04:17 17 Q. Okay.
15:04:17 19 Q. All right. And, of course, in order to know
15:04:17 20 the core and shell numbers, you would have to know the
15:04:17 21 physical size of the project that was placed out for
15:04:17 22 bid as of April, 3rd, 2007; correct?
15:04:17 23 A. Yes.
15:04:17 24 Q. All right. And by way of the description in
15:04:17 25 Exhibit No. 92, Petra would have known of all of the

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15:10:55 1 tenant improvements or scope of work within the
15:10:59 2 building as of July 12th, 2007, correct?
15:11:01 3 A. I would think so, yes.
15:11:06 4 Q. All right. And Petra had estimated in
15:11:12 5 Exhibit No. 10 the plaza and site work, which was bid
15:11:20 6 Phase IV as contained in the July 12th, 2007, column
15:11:23 7 on Exhibit No. 10, isn't that correct?
15:11:31 8 A. It sure appears that way, yes.
15:11:39 9 Q. All right. And so as of the Phase II bids,
15:11:45 10 April 3rd, 2007, Petra certainly would have been aware
15:11:51 11 of the steel required for the City Council chambers as
15:11:54 12 identified in the core and shell documents; correct?
15:11:59 13 A. It certainly is logical, yes.
15:12:02 14 Q. All right. And as of that same date, April
15:12:07 15 3rd, 2007, Petra a would be aware of the stone
15:12:11 16 and brick used in the exterior cladding for the
15:12:13 17 building as part of the Phase II core and shell
15:12:15 18 documents; correct?
15:12:15 19 A. Yes.
15:12:20 20 Q. And as of July 12th, 2007, Petra would have
15:12:25 21 been fully aware of the mechanical system as contained
15:12:30 22 in the Phase III bids; correct?
15:12:32 23 A. I believe that's correct, yes.
15:12:37 24 Q. And as of July 12th, 2007, Petra would have
15:12:41 25 been fully aware of the electrical system contained in

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15:12:47 1 the Phase III MEP bids, isn't that correct?
15:12:51 2 A. I believe so. I have no specific knowledge
15:12:54 3 of that other than what is represented here.
15:12:58 4 Q. All right, sir. But, again, turning your
direction -- or attention to Exhibit No. 92, it says,
15:13:04 5 Meridian City Hall project Phase III TI -- TI means
15:13:10 6 tenant improvements?
15:13:12 7 tenant improvements?
15:13:13 8 A. Yes, I understand that.
15:13:17 9 Q. And MEP means mechanical electrical and
15:13:19 10 plumbing, isn't that correct?
15:13:24 12 Q. All right. And as of July 12th, 2007, if we
15:13:36 13 look in the column marked 7/12/2007, and we go down to
15:13:39 14 the construction costs, we have a LEED certification
15:13:47 15 cost shown in that column of $205,000; correct?
15:13:59 16 A. Yes, it is.
15:14:02 17 Q. All right. And in that same column, we have
15:14:07 18 two line items, one is for Phase II, general
15:14:14 19 conditions budget, 181,029; correct?
15:14:30 20 A. This is in the variance column?
15:14:39 22 column.
15:14:33 24 Q. Construction costs, item 1(a), Phase II
15:14:40 25 general conditions budget, 181,029.

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15:14:40 1 A. Yes. That's correct.
15:14:43 2 Q. And there is zero variance shown in the
15:14:45 3 variance column; correct?
15:14:45 4 A. That's correct.
15:14:48 5 Q. And if we go down a little further, we have
15:14:54 6 the Phase III general conditions budget, same number,
15:14:57 7 181,029; correct?
15:14:57 8 A. That's correct.
15:15:02 9 Q. And in the variance column, we have a zero,
15:15:03 10 isn't that correct?
15:15:03 11 A. Yes.
15:15:26 12 Q. Okay. So if I look at the Exhibit No. 92 in
15:15:34 13 conjunction with Exhibit No. 10, as a construction
15:15:44 14 management professional, wouldn't I be correct that as
15:15:51 15 of July 12th, 2007, Petra knew all of the
15:15:59 16 components that we've just spoken about and placed
15:16:05 17 them into the final cost estimate for that date, July
15:16:08 18 12th, 2007?
15:16:08 19 A. Yes.
15:16:24 20 MR. TROUT: All right. Let's go off the record
15:16:25 21 for just a moment.
15:16:27 22 (Off the record.)
15:17:49 24 Q. (BY MR. TROUT) Mr. Lemley, in your work as
15:17:58 25 a construction management professional, if I am a

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15:18:06 1 contractor and I make a request to you for a change
15:18:20 2 order, does all of my original scope of work have to
15:18:26 3 be completed before I am entitled to have you process
15:18:27 4 my change order?
15:18:28 5 A. No.
15:18:31 6 Q. Why not?
15:18:34 7 A. If your original scope of work doesn't
15:18:38 8 relate to the change order, there would be no reason
15:19:44 9 to process the change order ahead of finishing your
15:18:47 10 original scope of work.
15:18:52 11 Q. What if the change order relates to my
15:18:52 12 original scope of work, am I entitled to have that
15:19:01 13 processed before my original scope of work is fully
15:19:05 14 complete?
15:19:06 15 A. If it is tied totally to your original scope
15:19:15 16 of work, you would have every right to expect the
15:19:19 17 change order to be processed, but not necessarily
15:19:25 18 finalized and paid until your original scope of work
15:19:37 19 was done. Or if you were a long way behind schedule
15:19:40 20 with your scope of work, they may not process it at
15:19:41 21 all and might terminate you.
15:19:43 22 Q. Sure. If I wasn't performing, you would
15:19:46 23 have every right to terminate me, isn't that correct?
15:19:52 24 A. Yes. For breach of contract.
15:20:06 25 Q. In your experience, sir, is termination a
15:20:12 severe remedy?
15:20:15 A. Yes. It is a severe remedy, and there are
15:20:21 several variations of termination, termination for
15:20:24 cause or termination for convenience, both of which
15:20:27 carry a completely different connotation.
15:20:31 Q. What's termination for cause in your
15:20:34 experience as a construction manager?
15:20:40 A. If a contractor demonstrates that he is not
15:20:46 able to complete the work that he contracted to do, or
15:20:55 if he walks off the project and he has been paid in
15:21:01 accordance with the contract, then he would be
15:21:16 susceptible to be terminated for cause.
15:21:25 Q. What's force account work?
15:21:29 A. It's doing work on a project on the basis of
15:21:33 time and materials where the contractor is paid for
15:21:48 all of his cost, plus a profit on his cost, normally.
15:21:55 That's force account work. In the first instance,
15:22:00 it's always best to try to get a price from the
15:22:07 contractor for the given work, but if that can't be
15:22:12 achieved, it might be better to put him on a time and
15:22:13 material basis. 
15:22:17 Q. When is it appropriate in your experience to
15:22:23 use a force account basis for having a contractor
15:22:26 perform work?
15:22:29 A. When you have unexpected work that develops
15:22:32 that requires immediate attention.
15:22:46 from a contractor who is doing work under a force
15:22:47 account?
15:22:51 A. He should have a specific cost code that he
15:22:58 charges all of his costs to and have it as an open
15:23:01 record of what he has spent to accomplish the work.
15:23:06 Q. What kind of documentation do you consider
15:23:10 necessary and appropriate with respect to force
15:23:17 account work involving labor?
15:23:23 A. Timecards and a certified payroll, and if
15:23:30 there is subcontractor involvement, a certified
15:23:33 payment to the subcontractor but with the same
15:23:34 documentation.
15:23:39 Q. What kind of particularity would you require
15:23:43 the timecards to have as it relates to the scope of
15:23:46 the force account work?
15:23:51 A. I would expect the timecard to have on it
15:23:55 the proper coding, and have it signed by, first, the
15:24:00 employee, and second, by the supervisor.
15:24:03 Q. What level of detail would you expect in
15:24:05 that timecard?
15:24:08 A. I would require -- I would expect a good
15:24:09 level of detail.
15:24:15 Q. What's a good level of detail, sir?

15:24:22 1 A. Well, it would depend on the work. If you
15:24:22 were going to put a roof on a building, you would need
15:24:32 the detail as to how the roofing material got to the
15:24:39 place where it had to be installed, and then the
15:24:45 cleaning of the area that it was going to be installed
15:24:47 on, and then as the materials started to be installed,
15:24:55 the various hours of the crew that were working on
15:25:00 laying it out and the other activity where people were
15:25:09 welding it together in the case of these new fabric
15:25:17 Q. And if I submitted a timesheet to you that
15:25:20 simply said, roof work, eight hours, would you accept
15:25:23 that?
15:25:28 A. No.
15:25:28 Q. Why not?
15:25:33 A. Not sufficient detail -- insufficient
15:25:33 detail.
15:25:53 Q. Okay. Turning your attention again to your
15:26:16 report -- before I move onto a different area. When
15:26:19 you said, insufficient detail, with respect to my
15:26:23 description of a timesheet that said, roof work, eight
15:26:27 hours, why is that insufficient in your opinion?
15:26:32 A. Because it doesn't give me the detail as to,
15:26:38 one, what was actually done to replace or repair the
15:26:45 roof. And that's the most fundamental thing you need

15:26:48 15:26:50 Q. All right. So if I understand your
15:26:50 testimony correctly, you would require a
15:27:02 construction manager a particularized identification
15:27:04 of the activities that were being performed in order
15:27:13 to provide sufficient detail for the timesheet we just
15:27:14 discussed?
15:27:14 A. Yes.
15:27:23 Q. All right.
15:27:23 A. Now, the way I've done that in the past is
15:27:26 to use numeric codes that did all of the above.
15:27:34 Q. I understand. Sir, if you would turn,
15:28:38 15:28:40 please, to Exhibit No. 5 in the notebook in front of
15:28:40 you.
15:28:40 A. Yes, sir. I guess I'm there.
15:28:50 Q. All right. And within Exhibit No. 5, which
15:28:55 is the construction management plan prepared by Petra,
15:29:01 could you please turn to page Bates No. CMO17077.
15:29:41 A. I'm there. It is an organogram.
15:29:48 Q. No, sir. I'm looking for the document that
15:29:51 I'm holding in my hand and showing you and it's
15:29:59 CMO17077.
15:30:10 A. Oh, I'm missing a zero -- 170 --
15:30:27 Q. Yes, sir. 17077.
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<thead>
<tr>
<th>Time</th>
<th>Transcription</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:30:49</td>
<td>A. Okay. I think I'm there.</td>
</tr>
<tr>
<td>15:30:57</td>
<td>Q. Okay. Sir, I'll present to you that this document appears to be a document prepared by Petra, which reflects the Phase II general conditions for the project; is that your understanding?</td>
</tr>
<tr>
<td>15:31:34</td>
<td>A. The Phase II shell.</td>
</tr>
<tr>
<td>15:31:37</td>
<td>Q. And I'm drawing my understanding in the following way, Mr. Lemley: If you see -- in the upper right hand corner you're going to see a division total of 189,029.</td>
</tr>
<tr>
<td>15:31:51</td>
<td>A. Yes. I see that.</td>
</tr>
<tr>
<td>15:32:28</td>
<td>Q. Now, in this breakdown, which is a part of Exhibit No. 5, we have a number of categories, for example, we have clean up; correct?</td>
</tr>
<tr>
<td>15:32:38</td>
<td>A. Yes, sir.</td>
</tr>
<tr>
<td>15:32:42</td>
<td>Q. Testing and inspection; correct?</td>
</tr>
<tr>
<td>15:32:43</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>15:32:49</td>
<td>Q. Temporary utilities?</td>
</tr>
<tr>
<td>15:32:50</td>
<td>A. Yes.</td>
</tr>
</tbody>
</table>

**Page 149**

<table>
<thead>
<tr>
<th>Time</th>
<th>Transcription</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:32:53</td>
<td>Q. And then we have a category, which is the sixth item down called, safety?</td>
</tr>
<tr>
<td>15:32:59</td>
<td>A. Yes, sir.</td>
</tr>
<tr>
<td>15:33:05</td>
<td>Q. What is the category safety in general conditions based on your professional experience?</td>
</tr>
<tr>
<td>15:33:25</td>
<td>A. It would involve signage and hard hats, safety belts, and that sort of thing.</td>
</tr>
<tr>
<td>15:33:31</td>
<td>Q. In your experience as a construction manager should all of the anticipated safety costs be gathered into this general condition category?</td>
</tr>
<tr>
<td>15:33:47</td>
<td>A. Well, I think it's a reasonable way to keep track of it and understand what is being spent on safety, and then you can make a judgment as to whether it's reasonable or not.</td>
</tr>
<tr>
<td>15:33:58</td>
<td>Q. Okay. So maybe I need to ask my question in a different way. Is this an appropriate way as a construction manager to capture all of the costs related to safety?</td>
</tr>
<tr>
<td>15:34:01</td>
<td>A. It won't capture all of the costs, because your general contractors are going to be carrying a significant amount of cost as they do their work, and they will have a safety responsibility right along side the owner and the construction manager.</td>
</tr>
<tr>
<td>15:34:12</td>
<td>Q. All right. But is this the correct way to capture all of the safety costs for the owner?</td>
</tr>
</tbody>
</table>

**Page 150**

<table>
<thead>
<tr>
<th>Time</th>
<th>Transcription</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:34:16</td>
<td>Q. Okay. So I take it that you would agree with the --</td>
</tr>
<tr>
<td>15:34:21</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>15:34:23</td>
<td>Q. Shall we talk about the general conditions shell?</td>
</tr>
<tr>
<td>15:34:26</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>15:34:31</td>
<td>Q. Okay. So maybe I need to ask my question in a different way. Is this an appropriate way as a construction manager to capture all of the costs related to safety?</td>
</tr>
<tr>
<td>15:34:37</td>
<td>A. It won't capture all of the costs, because your general contractors are going to be carrying a significant amount of cost as they do their work, and they will have a safety responsibility right along side the owner and the construction manager.</td>
</tr>
<tr>
<td>15:34:41</td>
<td>Q. All right. But is this the correct way to capture all of the safety costs for the owner?</td>
</tr>
<tr>
<td>15:34:45</td>
<td>A. Okay.</td>
</tr>
</tbody>
</table>
A. And it would -- after that, it would depend on whose responsibility it was that the work got laid into a period where the weather was adverse to the production.

Q. Okay. And if there was a contractor whose work was in the critical path and necessary to be done so that other work could be performed before the necessity of winter protection, and his work was delayed, would it be appropriate to charge that contractor for winter protection or winter conditions costs?

A. The contractor that delayed the next contractor?

Q. Yes, sir. Is that how you appropriately allocate costs for delay in your experience?

A. In my experience, a delay -- cost for delay --

(Cell phone ringing.)

THE WITNESS: Pardon me.

MR. TROUT: That's all right, sir.

THE WITNESS: That will handle that.

MR. TROUT: If you need to take that call, we are more than happy to do that.

THE WITNESS: It is my wife. She'll give me hell tonight, but let's get on with it.
Q. What's the difference?

A. Well, I think the general conditions are a little bit more broad and might even include some conditions which is identified in Exhibit No. 5, which is the Petra document?

Q. Okay. As part of your work, sir, did you have described in your list on page 5 of 12 in your report is reasonably included in the list of general conditions which is identified in Exhibit No. 5, which is the Petra document?

A. Yes.

Q. Okay. As part of your work, sir, did you examine a document called a building program that was prepared by Lombard-Conrad architects?

A. I did not.

Q. Okay. So would I be fair in stating that what you have described in your list on page 5 of 12 in your report is reasonably included in the list of general conditions which is identified in Exhibit No. 5, which is the Petra document?

A. It would be coincidental if they appear to.

Q. Okay. Were you provided with any document that were referred to by reference such as Article 4.7, which describes the activities in the construction phase?

A. That's the first time I've seen this.

Q. Okay. As part of your work, sir, did you understand that any building program prepared by Lombard-Conrad architects did not have anything to do with the opinions of Lemley International that were provided in this case?

A. Yes.

Q. And directing your attention to the middle of page 10 of 12 on Exhibit No. 91, you provide us with a direct quote from Exhibit No. 2, the Construction Management Agreement, quoting paragraph 4.7.2; correct?

A. Yes.

Q. All right. Is defining a Class A office space a generally accepted definition outside the scope of your purview as a construction manager?

A. Yes, sir. I am here.

Q. Okay. Is defining a Class A office space a generally accepted definition outside the scope of your purview as a construction manager?

A. Yes, sir. I am here.

Q. Okay. Is defining a Class A office space a generally accepted definition outside the scope of your purview as a construction manager?

A. Yes, sir. I am here.

Q. Okay. Is defining a Class A office space a generally accepted definition outside the scope of your purview as a construction manager?

A. Yes, sir. I am here.

Q. Okay. Is defining a Class A office space a generally accepted definition outside the scope of your purview as a construction manager?

A. Yes, sir. I am here.
16:06:47 1 coordinating the architect and things like that, but
16:06:51 2 there was no privities of contract or no real
16:06:54 3 authority granted Petra with regard to that.
16:07:08 4 Q. Well, let's make sure we understand clearly.
16:07:13 5 All of article 4 describe the scope of services for
16:07:14 6 Petra; correct?
16:07:15 7 A. Yes.
16:07:17 8 Q. All right. And that included a general
16:07:20 9 scope of services; correct?
16:07:26 10 A. Yes.
16:07:28 11 Q. It included a development strategies phase
16:07:28 12 scope of services; correct?
16:07:29 13 A. Yes.
16:07:32 14 Q. Site preparation phase; correct?
16:07:32 15 A. Yes.
16:07:36 16 Q. Preliminary design phase; correct?
16:07:38 17 A. Yes. Preconstruction phase.
16:07:45 18 Q. Okay. A construction documents phase;
16:07:46 19 correct?
16:07:48 20 A. Uh-huh. Yes.
16:07:49 21 Q. A bidding phase?
16:07:50 22 A. Yes.
16:07:53 23 Q. And then finally a construction phase, isn't
16:07:54 24 that correct?
16:07:54 25 A. That's correct.

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<table>
<thead>
<tr>
<th>Time</th>
<th>Line</th>
<th>Text</th>
</tr>
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<tbody>
<tr>
<td>16:12:13</td>
<td>1</td>
<td>THE WITNESS: That's wonderful.</td>
</tr>
<tr>
<td>16:12:16</td>
<td>2</td>
<td>MR. TROUT: All right. With that, we will</td>
</tr>
<tr>
<td>16:12:21</td>
<td>3</td>
<td>adjourn for today, and I will coordinate with Counsel</td>
</tr>
<tr>
<td>16:12:25</td>
<td>4</td>
<td>and you, sir, to make another date to continue your</td>
</tr>
<tr>
<td>16:12:26</td>
<td>5</td>
<td>deposition.</td>
</tr>
<tr>
<td>16:12:28</td>
<td>6</td>
<td>THE WITNESS: That will be fine, and my calendar</td>
</tr>
<tr>
<td>16:12:35</td>
<td>7</td>
<td>is relatively free for the rest of June and early</td>
</tr>
<tr>
<td>16:12:39</td>
<td>8</td>
<td>July, and then it starts to get jammed up.</td>
</tr>
<tr>
<td>16:12:41</td>
<td>9</td>
<td>MR. TROUT: Okay. We will try and accommodate</td>
</tr>
<tr>
<td>16:12:46</td>
<td>10</td>
<td>your calendar and that of everybody else involved.</td>
</tr>
<tr>
<td>16:12:46</td>
<td>11</td>
<td>Thank you, sir.</td>
</tr>
<tr>
<td>16:12:48</td>
<td>12</td>
<td>THE WITNESS: Thank you. I appreciate your</td>
</tr>
<tr>
<td>16:12:49</td>
<td>13</td>
<td>courtesy.</td>
</tr>
<tr>
<td>16:12:49</td>
<td>14</td>
<td>(The deposition adjourned at 4:12 p.m.)</td>
</tr>
<tr>
<td>16:12:49</td>
<td>15</td>
<td>(Signature requested.)</td>
</tr>
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<td>16:12:49</td>
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<td>16:12:49</td>
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<td>16:12:49</td>
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<td>16:12:49</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>16:13:00</td>
<td>1</td>
<td>REPORTER'S CERTIFICATE</td>
</tr>
<tr>
<td>16:13:00</td>
<td>2</td>
<td>STATE OF IDAHO )</td>
</tr>
<tr>
<td>16:13:00</td>
<td>3</td>
<td>) ss.</td>
</tr>
<tr>
<td>16:13:00</td>
<td>4</td>
<td>COUNTY OF ADA )</td>
</tr>
<tr>
<td>16:13:00</td>
<td>5</td>
<td>JANET FRENCH, Certified Shorthand Reporter and</td>
</tr>
<tr>
<td>16:13:00</td>
<td>6</td>
<td>Notary Public in and for the State of Idaho, do hereby</td>
</tr>
<tr>
<td>16:13:00</td>
<td>7</td>
<td>certify:</td>
</tr>
<tr>
<td>16:13:00</td>
<td>8</td>
<td>That prior to being examined, the witness named</td>
</tr>
<tr>
<td>16:13:00</td>
<td>9</td>
<td>in the foregoing deposition was by me duly sworn to</td>
</tr>
<tr>
<td>16:13:00</td>
<td>10</td>
<td>testify to the truth, the whole truth, and nothing but</td>
</tr>
<tr>
<td>16:13:00</td>
<td>11</td>
<td>the truth;</td>
</tr>
<tr>
<td>16:13:00</td>
<td>12</td>
<td>That said deposition was taken down by me in</td>
</tr>
<tr>
<td>16:13:00</td>
<td>13</td>
<td>shorthand at the time and place therein named and</td>
</tr>
<tr>
<td>16:13:00</td>
<td>14</td>
<td>thereafter reduced to typewriting under my direction,</td>
</tr>
<tr>
<td>16:13:00</td>
<td>15</td>
<td>and that the foregoing transcript contains a full,</td>
</tr>
<tr>
<td>16:13:00</td>
<td>16</td>
<td>true and verbatim record of said deposition.</td>
</tr>
<tr>
<td>16:13:00</td>
<td>17</td>
<td>I further certify that I have no interest in the</td>
</tr>
<tr>
<td>16:13:00</td>
<td>18</td>
<td>event of this action.</td>
</tr>
<tr>
<td>16:13:00</td>
<td>19</td>
<td>WITNESS my hand and seal this day of</td>
</tr>
<tr>
<td>16:13:00</td>
<td>20</td>
<td>2010.</td>
</tr>
<tr>
<td>16:13:00</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>16:13:00</td>
<td>22</td>
<td>JANET FRENCH,</td>
</tr>
<tr>
<td>16:13:00</td>
<td>23</td>
<td>CSR, RPR and Notary</td>
</tr>
<tr>
<td>16:13:00</td>
<td>24</td>
<td>Public in and for the</td>
</tr>
<tr>
<td>16:13:00</td>
<td>25</td>
<td>State of Idaho.</td>
</tr>
</tbody>
</table>

**Page 165**
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

) Case No. CV OC 09-7257

) Plaintiff,

) v.

) PETRA, INCORPORATED, an Idaho Corporation,

) Volume II

) Defendant.

CONTINUED DEPOSITION OF JACK K. LEMLEY
July 22, 2010
Boise, Idaho

Janet French, CSR #946, RPR

DEPOSITION OF JACK K. LEMLEY

BE IT REMEMBERED that the deposition of JACK K. LEMLEY was taken by the Plaintiff at the offices of Trout Jones Gledhill Fuhrman, P.A., located at 225 North 9th Street, Suite 820, Boise, Idaho, before Associated Reporting, Inc., by Janet French, a Court Reporter and Notary Public in and for the County of ada, State of Idaho, on Thursday, the 22nd day of July, 2010, commencing at the hour of 9:00 a.m. in the above-entitled matter.

APPEARANCES:
For the Plaintiff: TROUT JONES GLEDHILL FUHRMAN, P.A.
By: Kim J. Trout, Esq.
225 North 9th Street, Suite 820
Post Office Box 1097
Boise, Idaho 83701
Telephone: (208) 331-1170
Facsimile: (208) 331-1529
ktrout@idalaw.com

For the Defendant: COSHO HUMPHREY, LLP
By: Thomas G. Walker, Esq.
800 Park Blvd., Suite 790
Post Office Box 9518
Boise, Idaho 83707-9518
Telephone: (208) 344-7811
Facsimile: (208) 336-2900
twalk@cosholaw.com

P R O C E E D I N G S

JACK LEMLEY
By: Mr. Trout

E X H I B I T S

NO.

612. Mr. Lemley's handwritten notes

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Page 170
09:06:17 1 A. Yes.
09:06:21 2 Q. Can you please tell me, sir, why those
09:06:26 3 notebooks have been disassembled?
09:06:29 4 A. They were disassembled, from my
09:06:38 5 understanding, to convene the people in my office.
09:06:41 6 Q. And convene them for what purpose?
09:06:44 7 A. For the purpose of continuing to study them
09:06:48 8 and compare them with new information that we have
09:06:52 9 received the past week-and-a-half.
09:06:56 10 Q. And what new information have you received
09:07:01 11 in the past week-and-a-half?
09:07:06 12 A. We've received other expert reports and
09:07:21 13 other data that you and your client have released to
09:07:26 14 us.
09:07:30 15 Q. All right. And what, if any, task has been
09:07:35 16 assigned to Lemley International with the new data
09:07:36 17 that you received?
09:07:40 18 A. Nothing that I know of. It's a continuation
09:07:51 19 of reviewing our report to see that it's accurate and
09:07:57 20 up to date. And I think absent a written instruction
09:08:04 21 from Mr. Walker, we've taken that on our own
09:08:04 22 responsibility.
09:08:13 23 Q. All right. Well, what, if anything, have
09:08:19 24 you done in the interim since your first deposition
09:08:28 25 session to prepare yourself for today?
09:16:43 1 people like Lemley International, your firm, and
09:16:45 2 Mr. Walker's firm.
09:16:50 3 Q. Well, let's back up and take that one item
09:16:52 4 at a time.
09:16:57 5 First of all, what specifically have you
09:17:02 6 been told about settlement efforts?
09:17:07 7 A. That there have been offers of settlement
09:17:21 8 sometime ago, and then significantly higher values
09:17:27 9 requested more recently for payment to Petra to settle
09:17:30 10 differences.
09:17:34 11 Q. Anything else?
09:17:37 12 A. Not that I have specific recall of.
09:17:42 13 Q. All right. Do you have any general recall
09:17:45 14 of anything else?
09:17:48 15 A. I've given you my general recall, sir.
09:17:51 16 Q. And who spoke to you about offers of
09:17:53 17 settlement?
09:18:01 18 A. I had some conversation with Mr. Walker, and
09:18:15 19 I've had conversations with Jerry --
09:18:16 20 THE WITNESS: Is it Lewis?
09:18:17 21 MR. WALKER: Frank.
09:18:27 24 THE WITNESS: Jerry Frank. Pardon me. I'm very
09:18:27 25 sorry.
09:18:29 26 Q. (BY MR. TROUT) Who's Frank Lewis?
09:18:34 27 A. He's the managing executive of Petra.
09:18:38 28 Q. Anything else?
09:18:43 29 A. To correct him -- it's Jerry Frank, not Frank Lewis --
09:18:47 30 MR. TROUT: Well, I think the witness can speak
09:18:51 31 for himself, and I ask that you allow him to do so.
09:18:54 32 Q. (BY MR. TROUT) Tell me, Mr. Lemley, what
09:18:57 33 specifically did Mr. Walker say to you about
09:18:58 34 settlement?
09:19:00 35 A. Said there had been some conversations
09:19:09 36 within Petra, and they were trying to encourage
09:19:14 37 Meridian to join in an effort to settle the
09:19:17 38 differences between the two parties.
09:19:18 39 Q. Anything else?
09:19:19 40 A. Not that I recall.
09:19:24 41 Q. Okay. Tell me about your conversation with
09:19:27 42 Jerry Frank.
09:19:32 43 A. It was essentially the same -- the same
09:19:39 44 information, however, I had had a meeting on another
09:19:44 45 matter with him at the same time, and that has nothing
09:19:45 46 to do with this case.
09:19:50 47 Q. Well, tell me specifically what Mr. Frank
09:19:52 48 said to you about this case.
09:20:01 49 A. That they -- they, Petra, desired to find a
09:20:09 50 solution to the case, that their business had been
09:20:14 51 damaged in a broader sense beyond this particular
09:20:22 52 project, and they were anxious to get the matter
09:20:34 53 settled so that the damage to their reputation would
09:20:40 54 be corrected and hopefully turned around in the
09:20:41 55 industry.
09:20:46 56 Q. And so what did Mr. Frank tell you was the
09:20:51 57 damage to his business in the broader sense, as you
09:20:54 58 used that term?
09:21:04 59 A. Well, it's obvious that most businessmen
09:21:09 60 need new clients to continue to prosper just as your
09:21:12 61 law firm needs new clients to continue to prosper.
09:21:20 62 Q. And so what, if anything, did Mr. Frank tell
09:21:24 63 you about Petra's obtaining new clients?
09:21:28 64 A. They were having difficulty doing that now
09:21:35 65 and that their -- the calls that they had normally
09:21:39 66 received at this time of year were significantly below
09:21:48 67 those that had historically come in.
09:21:52 68 Q. And what, if anything, did Mr. Frank
09:22:01 69 attribute the volume of calls that were being made
09:22:02 70 to Petra?
09:22:06 71 A. That there had been allegations by one of
09:22:12 72 their clients that they had not lived up to their
09:22:16 73 contract with the City of Meridian.
09:22:21 74 Q. Okay. Anything else?
09:22:22 75 A. Not that I recall.
09:22:29 76 Q. (BY MR. TROUT) Who's Frank Lewis?
09:22:34 77 A. He's the managing executive of Petra.
09:22:38 78 A. He's the managing executive of Petra.
09:22:43 79 A. He's the managing executive of Petra.
09:22:51 81 A. He's the managing executive of Petra.
09:22:54 82 A. He's the managing executive of Petra.
09:22:57 83 A. He's the managing executive of Petra.
09:23:00 84 A. He's the managing executive of Petra.
09:23:09 85 A. He's the managing executive of Petra.
09:23:14 86 A. He's the managing executive of Petra.
09:23:17 87 A. He's the managing executive of Petra.
09:23:21 88 A. He's the managing executive of Petra.
09:23:24 89 A. He's the managing executive of Petra.
09:23:27 90 A. He's the managing executive of Petra.
09:23:30 91 A. He's the managing executive of Petra.
09:23:33 92 A. He's the managing executive of Petra.
09:23:36 93 A. He's the managing executive of Petra.
09:23:42 95 A. He's the managing executive of Petra.
09:23:45 96 A. He's the managing executive of Petra.
09:23:48 97 A. He's the managing executive of Petra.
09:23:51 98 A. He's the managing executive of Petra.
09:23:54 99 A. He's the managing executive of Petra.
09:23:57 100 A. He's the managing executive of Petra.
09:24:00 101 A. He's the managing executive of Petra.
09:24:03 102 A. He's the managing executive of Petra.
09:24:06 103 A. He's the managing executive of Petra.
09:24:09 104 A. He's the managing executive of Petra.
09:24:12 105 A. He's the managing executive of Petra.
09:24:15 106 A. He's the managing executive of Petra.
09:24:18 107 A. He's the managing executive of Petra.
09:24:24 109 A. He's the managing executive of Petra.
09:24:27 110 A. He's the managing executive of Petra.
09:24:30 111 A. He's the managing executive of Petra.
09:24:33 112 A. He's the managing executive of Petra.
09:24:36 113 A. He's the managing executive of Petra.
09:24:39 114 A. He's the managing executive of Petra.
09:24:42 115 A. He's the managing executive of Petra.
09:24:45 116 A. He's the managing executive of Petra.
09:24:48 117 A. He's the managing executive of Petra.
09:24:51 118 A. He's the managing executive of Petra.
09:24:54 119 A. He's the managing executive of Petra.
09:24:57 120 A. He's the managing executive of Petra.
09:25:00 121 A. He's the managing executive of Petra.
09:25:09 122 A. He's the managing executive of Petra.
09:25:14 123 A. He's the managing executive of Petra.
Q. Do you accept his opinions on the law as being valid?

MR. WALKER: Objection. Lack of foundation.

THE WITNESS: On things he knows about, I accept his opinions. I think he's pretty young, and he has senior partners in his firm that generally direct his activities.

Q. (BY MR. TROUT) If Mr. Lee provided you with a specific opinion about a subject that he was intimately familiar with in the law, would you accept it as valid?

MR. WALKER: Objection. Lack of foundation.

THE WITNESS: I would certainly read it and give it due consideration.

Q. (BY MR. TROUT) What is due consideration mean?

A. I would take it seriously and consider it in light of our report on this matter between the parties here.

Q. Okay. Do you recall having a conversation with Mr. Lee some two-and-a-half, three weeks ago?

A. Yes. That was the reason I called him.

Q. So did you specifically talk to him about this lawsuit were not doing justice to the contract between the parties and Meridian's potential liability.

A. Yes. That was the reason I called him.

Q. Did you talk to him about anything else?

A. Well, I said the purchase price of the building and the size of it.

Q. Okay. What is it that prompted you to call Mr. Lee?

A. In my office.

Q. Did anyone else ask you to call Mr. Lee?

A. No.

Q. All right. So tell me the process that was undertaken to analyze the agency's CM contract.

A. Well, we do have a reasonable level of expertise in agency type construction management contracts particularly here in the valley as related to the capitol restoration and expansion, so we were weighing what their obligations were as they understood them to Meridian to determine whether they have -- they had fulfilled their obligations with the data that we had and a site visit, granted that was a very cursory site visit well after the City had occupied the building and begun to use it, but I got a general picture of the overall appearance of the building and the size of it.

Q. Okay. When you say Petra's obligations as different than the express language of the construction management agreement?

A. No. There was not. We used the -- the actual agreement as the starting point for our review and weighed it against our similar obligations to the State of Idaho and then we held meetings with Petra's staff that was on site -- Jerry Frank was also present -- to get their understanding of what they were to do and how they had performed the various obligations that they had.

Q. Okay. So let's take that one item at a time.

PRIOR TO THE PREPARATION OF THIS REPORT, HOW MANY MEETINGS DID YOU HAVE WITH, FIRST OF ALL, JERRY FRANK?

A. I have no recall of the date.

Q. Okay. Okay. When was the first?

A. I have no recall of the date.

Q. All right. Do you recall where it took place?

A. In my office.
Q. All right. Was anyone else present?
A. Mr. Bauer and subsequently Mr. Walker were present.

Q. And you say, subsequently. What does that mean?
A. I said there was a couple of meetings.

Q. Mr. Walker sat in one of them, and we had a meeting of -- I'll call it the principals without counsel there.

Q. All right. Now, with respect to the first meeting, tell me what was said by Mr. Frank and what was said by Mr. Bauer.

Q. Okay. Did you keep any notes of that meeting?
A. No. I didn't. Mr. Bauer may have.

Q. Do you recall anything else that was said by Mr. Frank at that meeting?

Q. Okay. Did Mr. Frank say anything else?

Q. Okay. Who was present in that meeting?

Q. Okay. When was the second meeting with Mr. Frank?

Q. It very well could be.

Q. And that would be who?

A. Yes.

Q. Okay. Who was present in that meeting?

Q. Okay. When was the second meeting?

Q. And so let's go back to the first meeting? I have no specific recall of the agenda and [nothing more readable here]
09:40:59  A. No single individual, yes. That's correct.
09:41:06  Q. Okay. And it's your testimony that there
09:41:14  was no one to fill that role; is that correct?
09:41:18  Q. All right. Would that, in effect, be for
09:41:21  Q. Okay. What else does Mr. Bennett say, if
09:41:26  the architect was very well capable to manage his
09:41:34  staff in his office. I'm thinking it's more an
09:41:36  integration issue between the physical construction
09:41:42  and the design as it is carried forward.
09:41:46  Q. Okay. When you say, not getting direct responses,
09:41:49  anything, that you recall?
09:41:56  A. I don't have specific recollection. I think
09:42:12  he -- he was concerned that they weren't getting
09:42:17  direct responses to their budgets as they were
09:42:23  developed, and the budgets were climbing against the
09:42:27  12,200,000, and the City seemed to have little
09:42:36  interest in their value engineering proposals and
09:42:44  rejected those but continued to add aspects to the
09:42:51  program such as a LEED requirement for the program
09:42:56  that had not been part of their original instruction.
09:43:02  Q. When you say, not getting direct responses,
09:43:06  what does that mean?
09:43:12  A. Letters advising Petra exactly what the City
09:43:17  wanted and what the architect was going to do. I
09:43:21  think -- it's my experience that construction managers
09:43:28  generally want all changes documented in a letter from
09:43:33  a designated and appropriate person.
09:43:37  Q. Okay. That would seem to make perfect
09:43:38  sense, wouldn't it?
09:43:39  A. It would.
09:43:59  Q. Okay. And so what, if anything else, did
09:44:02  Mr. Bennett say during that meeting?
09:44:03  A. I can't remember.
09:44:10  Q. Okay. Is this the same meeting in which you
09:44:14  said you didn't take any notes; right?
09:44:18  Q. Okay. Do you remember anything that was
09:44:25  can't write it in a one-line description in a
day timer, I don't keep voluminous notes.
09:44:28  Q. Okay. Do you remember anything that was
09:44:30  said by Mr. Coughlin during that meeting?
09:44:33  Q. Okay. Do you remember anything that was
09:44:35  said by Mr. Coughlin during that meeting?
09:44:44  Q. My recollection is that he supported
09:44:48  Mr. Bennett's statements. There wasn't a disagreement
between the two that came to light.
09:44:57  Q. Okay. And the meeting you just described
occurred prior to writing your report; correct?
09:45:01  Q. All right. Let's move now to the next
meeting which occurred you say about a month ago?
09:45:01  Q. All right. And you said Mr. Bauer and
09:45:03  A. Yes.
09:45:08  A. Yes.
09:45:11  A. Yes.
09:45:15  Q. Okay. And it's your testimony that there
09:45:18  was no one to fill that role; is that correct?
09:45:20  A. Yes.
09:45:24  Q. Oh, going back to the first meeting. At the
09:45:29  time of that meeting, was Mr. Coughlin working
for?
09:45:30  Q. Okay. In the second meeting, yourself and
09:45:39  Q. Okay. All right. And you said Mr. Bauer and
09:45:43  Mr. Bauer were present. Mr. Frank was present as
09:45:45  A. Yes.
09:45:46  Q. Mr. Bennett and Mr. Coughlin?
09:45:47  Q. Mr. Walker?
09:45:49  Q. Mr. Walker?
09:45:53  A. Mr. Walker was present part time.
09:45:57  Q. All right. So what was the purpose of the
meeting which occurred about a month ago after you
wrote your report?
09:46:02  Q. Well, what would be the basis for your claim
of what they had -- what they believed was the situation,
which was that this whole process was dragging on and
was no one to fill that role; is that correct?
09:46:12  Q. Mr. Bennett and Mr. Coughlin?
09:46:14  A. It was more to go over the perceptions of
where the circumstances between the parties stood,
what they had -- what they believed was the situation,
which was that this whole process was dragging on and
was no one to fill that role; is that correct?
09:46:41  A. No. I said I would push the legal team to
write it in a one-line description in a
day timer, I don't keep voluminous notes.
09:46:47  Q. Okay. So let's kind of break it down.
09:46:54  What specifically was said by Mr. Frank?
09:46:59  I don't have specific recollection. I think
09:47:00  A. All I can do is paraphrase what I think --
my impression and recollection is that he was becoming
very impatient to get this settled and wanted to know
if we had any ideas about how to settle a matter.
09:47:07  Q. Okay. And did you offer any ideas?
09:47:13  A. No. I said I would push the legal team to
write it in a one-line description in a
day timer, I don't keep voluminous notes.
09:47:18  Q. Okay. And did you offer any ideas?
09:47:20  Q. Well, what would be the basis for your claim
of what they had -- what they believed was the situation,
which was that this whole process was dragging on and
was no one to fill that role; is that correct?
09:47:35  Q. Okay. And did you offer any ideas?
09:47:42  Q. Yes. I would claim that they had not done
anything, that you recall?
09:47:55  Q. Okay. And did you offer any ideas?
09:47:57  Q. Okay. And did you offer any ideas?
09:48:02  Q. Okay. And did you offer any ideas?
09:48:06  Q. Why would you sue them?
09:48:12  Q. In order to force them to start to react and
pay what they owed me.
09:48:19  Q. Why would you sue them?
09:48:22  Q. In order to force them to start to react and
pay what they owed me.
09:48:26  Q. Why would you sue them?
09:48:30  Q. Well, what would be the basis for your claim
of what they had -- what they believed was the situation,
which was that this whole process was dragging on and
was no one to fill that role; is that correct?
09:48:36  Q. Well, what would be the basis for your claim
of what they had -- what they believed was the situation,
which was that this whole process was dragging on and
was no one to fill that role; is that correct?
09:48:40  Q. Well, what would be the basis for your claim
of what they had -- what they believed was the situation,
which was that this whole process was dragging on and
was no one to fill that role; is that correct?
09:48:42  Q. Yes. I would claim that they had not done
anything, that you recall?
09:48:46  Q. Yes.
09:48:50  Q. Yes.
09:48:53  Q. Yes.
09:48:54  Q. Yes.
09:48:59  Q. Yes.
that claim?

A. Well, the fact that the building got built.

Q. It's a pretty decent looking building. Their
government is in their functioning, and they refuse to
pay what in the context of this whole situation is a
very small sum that they owed Petra to settle the
matter, and they could have done that several years
ago, and they would have more than saved that money in
your fees and my fees and Mr. Walker's fees.

Q. Is that the only basis?

A. Well, I'm not sure it's the only basis. I'm
drafting a complaint. If I was drafting a
complaint and had a couple days to think about it, I
probably could dredge up several more issues.

Q. Well, what would they be?

A. Well, they are not dredged up, so I can't
share them with you. But I will tell you I've done
this before, and it's brought about a settlement in a
rather method manner. And that's all we were talking
about anyway was generalizations.

Q. Who did you interview before you wrote your
report and submitted to the court in this case?

A. It was primarily done off of paper.

Q. Okay. So I should be able to hand you the
documents that you brought when we first deposited you
in order to have you verify the contents of your
report; is that correct?

A. Should, yes.

Q. MR. TROUT: Okay. Well, let's take a five-minute
break, and then we'll start that process.

MR. TROUT: Okay. Well, let's take a five-minute
break, and then we'll start that process.

MR. TROUT: Back on the record.

Q. (BY MR. TROUT) Mr. Lemley, before we took
the break, we were still discussing the meeting --
the second meeting that you had with Mr. Bennett,
Mr. Frank, and Mr. Coughlin. Other than what you have
presently testified to, do you recall anything else
that was said by Mr. Bennett during the second
meeting?

A. As I recall, he asked a series of questions,
and I don't recall the responses.

Q. Do you recall anything that was said by
Mr. Bauer asking questions of the Petra team at the
second meeting?

A. Nothing other than what I've previously
stated.

Q. Okay. What was said by Mr. Bauer during
that meeting?

A. As I recall, he asked a series of questions,
and the Petra team responded, but I don't recall the
questions, and I don't recall the responses.

Q. Okay. What was the purpose, if any, for
Mr. Bauer asking questions of the Petra team at the
second meeting?

A. To clarify certain aspects of the Meridian
City Hall program.

Q. When you use the term, program, what do you
<table>
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<th>Time</th>
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<tbody>
<tr>
<td>10:10:58</td>
<td>Q. Okay. What, if anything, was said about the demolition of the existing buildings?</td>
<td>10:15:41</td>
<td>Q. 39. It's the second page of your letter, sir.</td>
</tr>
<tr>
<td>10:11:04</td>
<td>4. Q. Okay. What, if anything, was said by Mr. Walker during that meeting?</td>
<td>10:15:46</td>
<td>5. A. That will help speed things up. I'm a little clumsy.</td>
</tr>
<tr>
<td>10:11:16</td>
<td>4. Q. Okay. So if I really wanted to know what happened at that meeting, I'd have to ask Mr. Bauer; correct?</td>
<td>10:15:50</td>
<td>7. Q. Okay. The second page of the letter says that there were meetings with Petra's senior project and corporate staff, and it identifies, Jerry Frank, Gene Bennett, and Tom Coughlin.</td>
</tr>
<tr>
<td>10:11:16</td>
<td>8. Q. Okay. So if I really wanted to know what happened at that meeting, I'd have to ask Mr. Bauer; correct?</td>
<td>10:15:54</td>
<td>10. Gene Bennett, and Tom Coughlin.</td>
</tr>
<tr>
<td>10:11:19</td>
<td>6. A. Nothing that I recall.</td>
<td>10:16:01</td>
<td>12. Q. Were there any meetings with Mr. Frank, Gene Bennett, and Mr. Coughlin that you didn't participate in?</td>
</tr>
<tr>
<td>10:11:30</td>
<td>7. Q. Okay. If you were going to examine the credibility of someone involved in a project like the Meridian City Hall?</td>
<td>10:16:02</td>
<td>13. A. Yes.</td>
</tr>
<tr>
<td>10:11:37</td>
<td>9. A. To the extent that he had notes or recollection of more specifics than I do, yes.</td>
<td>10:16:10</td>
<td>17. A. I don't know.</td>
</tr>
<tr>
<td>10:11:41</td>
<td>10. Q. Okay. You hold yourself out as an independent expert; is that correct?</td>
<td>10:16:18</td>
<td>18. Q. Okay. Who orchestrated those meetings?</td>
</tr>
<tr>
<td>10:11:47</td>
<td>11. To the extent that he had notes or recollection of more specifics than I do, yes.</td>
<td>10:16:18</td>
<td>19. A. Mr. Bauer.</td>
</tr>
<tr>
<td>10:12:01</td>
<td>12. Q. Okay. You hold yourself out as an independent expert; is that correct?</td>
<td>10:16:24</td>
<td>20. Q. Okay. So if I wanted to know what Lemley International learned from those meetings, I'd have to ask Mr. Bauer; is that correct?</td>
</tr>
<tr>
<td>10:12:10</td>
<td>15. Q. Okay. As an independent expert, how is it that you go about assessing the credibility of someone involved in a project like the Meridian City Hall?</td>
<td>10:16:30</td>
<td>22. Q. What did Mr. Bauer convey to you prior to your issuance of this report as to the substance of</td>
</tr>
<tr>
<td>10:12:16</td>
<td>16. A. I review the background of the individuals and what they are being considered to do in any future work.</td>
<td>10:16:37</td>
<td>24. A. Yes.</td>
</tr>
<tr>
<td>10:12:20</td>
<td>17. A. I review the background of the individuals and what they are being considered to do in any future work.</td>
<td>10:16:44</td>
<td>25. A. 969...</td>
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Q. Okay. So let's turn to page I of 12.

A. Presumably.

Q. Okay. When you use the word "inspection" in that context, what do you mean? Can you define that term for me?

A. I have no idea why it wouldn't be correct.

Q. Okay. When you use the word "inspection" in that context, what do you mean? Can you define that term for me?

A. I do see that, and it was read correctly.

Q. Okay. This says, "To do all things or, when appropriate, require the architect and each contractor to do all things necessary, appropriate, or convenient for this project?" Would you agree with me, sir, that Petra on behalf of the City as its agent had the authority pursuant to this quoted paragraph to require the architect to perform all tasks appropriate and necessary for this project?

A. Petra had the authority that this paragraph grants it, but they had no ability to monitor the costs of the architect and the instructions that the architect may be getting from the City directly.

Q. Okay. So let's turn to page 1 of 12.

A. Of the actual report?

Q. Yes.

Q. Okay. I'm there.

Q. Okay. Did he tell you any other substantive facts that he gleaned from meetings from Petra?

A. He told me basically what the balance of those meetings. What did he tell you?

Q. Okay. Do you see that, sir?

A. He told me basically what the balance of those meetings. What did he tell you?

Q. Okay. Did he tell you any other substantive facts that he gleaned from meetings from Petra?

A. He told me basically what the balance of those meetings. What did he tell you?

Q. Okay. Did he tell you any other substantive facts that he gleaned from meetings from Petra?

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<tr>
<th>Time</th>
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<tr>
<td>10:25:32</td>
<td>term for me, please?</td>
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<tr>
<td>10:25:39</td>
<td>A. Inspection in that context means to me very</td>
</tr>
<tr>
<td>10:25:46</td>
<td>careful analysis of – let’s take welding as an</td>
</tr>
<tr>
<td>10:25:52</td>
<td>example of non destructive testing relative to the</td>
</tr>
<tr>
<td>10:25:55</td>
<td>adequacy of the wells that are specified by the</td>
</tr>
<tr>
<td>10:26:01</td>
<td>architect and the structural engineer.</td>
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<tr>
<td>10:26:07</td>
<td>Q. Okay. Is there a difference between an</td>
</tr>
<tr>
<td>10:26:15</td>
<td>inspection of a weld and a construction observation by</td>
</tr>
<tr>
<td>10:26:18</td>
<td>a construction manager?</td>
</tr>
<tr>
<td>10:26:22</td>
<td>A. Yes. There is a difference between</td>
</tr>
<tr>
<td>10:26:24</td>
<td>observational and true inspections.</td>
</tr>
<tr>
<td>10:26:33</td>
<td>Q. Okay. So in the context of this paragraph,</td>
</tr>
<tr>
<td>10:26:39</td>
<td>in your opinion, on page 1 of 12 of Exhibit No. 91,</td>
</tr>
<tr>
<td>10:26:42</td>
<td>you’re speaking about a scientific inspection; is that</td>
</tr>
<tr>
<td>10:26:44</td>
<td>correct?</td>
</tr>
<tr>
<td>10:27:06</td>
<td>A. Yes. That’s the way I would read it, but I</td>
</tr>
<tr>
<td>10:27:11</td>
<td>know that the City retained the inspection of the</td>
</tr>
<tr>
<td>10:27:19</td>
<td>responsibilities and in some instances hired others to</td>
</tr>
<tr>
<td>10:27:20</td>
<td>do it for them.</td>
</tr>
<tr>
<td>10:27:23</td>
<td>Q. Okay. Well, let’s just examine that with a</td>
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<tr>
<td>10:27:26</td>
<td>little more clarity. When you say “inspection</td>
</tr>
<tr>
<td>10:27:37</td>
<td>responsibility,” you’re talking about, for example, a</td>
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<tr>
<td>10:27:40</td>
<td>materials inspection like steel; correct?</td>
</tr>
<tr>
<td>10:27:46</td>
<td>A. Yes. Now steel inspection may start at the</td>
</tr>
<tr>
<td>10:27:54</td>
<td>mill where the steel is produced, and I have often</td>
</tr>
</tbody>
</table>

10:25:32 | times sent inspectors into the vendor’s factory to |
10:25:41 | monitor the work in the factory. At other times, I’ve |
10:25:48 | monitored work as it has been hauled on site and |
10:25:51 | directed, but it depends on where you start that in |
10:25:58 | the supply chain. |
10:26:01 | Q. All right. So when you say, under the |
10:26:08 | contract inspection and testing services, you’re |
10:26:33 | referring to materials testing and inspections such as |
10:26:39 | the steel that was brought to this site; is that |
10:26:44 | correct? |
10:26:48 | A. That’s correct. |
10:26:54 | Q. All right. Now, you specifically quote a |
10:27:02 | section of the construction management agreement that |
10:27:08 | says, “Owner shall provide all required testing or |
10:27:15 | inspection of the work as may be mandated by law.” |
10:27:20 | Q. Okay. Do you see that? |
10:27:26 | A. You read that correctly. |
10:27:32 | Q. Very good. Tell me what testing or |
10:27:37 | inspection of the work was required by law? |
10:27:43 | A. Well, certainly plumbing work and electrical |
10:27:48 | work that had to be performed in the building. |
10:27:53 | Q. Okay. What else? |
10:27:59 | A. Well, those are the things that immediately |
10:28:05 | come to my mind. The City would have other standards |

10:25:32 | that would require their testing and inspection in |
10:25:41 | that this is their own building. |
10:25:46 | Q. Well, let me ask you this: Did you verify |
10:25:51 | what inspection and testing was required or mandated |
10:25:56 | by law? |
10:26:01 | A. I did not go to Mr. Walker and ask him that. |
10:26:06 | Q. Okay. Well, the capitol building is in |
10:26:11 | Boise, Idaho, isn’t it? |
10:26:15 | A. Yes, sir. |
10:26:22 | Q. Okay. Where would I find in Exhibit Nos. |
10:26:28 | A. Electrical and, I believe, plumbing. |
10:26:33 | Q. All right. And tell me where would I find |
10:26:39 | in Exhibits 86, 87 -- and I believe we have 88, which |
10:26:44 | I'm placing in front of you. These are the three |
10:26:49 | notebooks that you brought with you as the background |
10:26:54 | for your report, if I recall? |
10:26:59 | A. Yes, sir. |
10:27:04 | Q. Okay. Where would I find in Exhibit Nos. |
10:27:09 | 86, 87, or 88, your verification of the inspections |
10:27:14 | required? |
10:27:19 | A. I have no idea. |
10:27:25 | Q. Well, can you locate them for me? |
10:27:30 | A. If I counseled with Mr. Bauer, I probably |
10:27:36 | could shorten the process of locating them, but I'm |
10:27:41 | not sure I could locate them in the next hour, |
10:27:51 | Q. Well, this is your report? |
10:27:56 | A. I'm telling you what I believe about my |
10:28:02 | being able to find backup material to the specific |
10:28:12 | Q. That you can't do it? |
10:28:17 | A. I didn't say I can't. I said it would take |
10:28:22 | an hour, hour-and-a-half to do it. |
10:28:27 | Q. Well, will you explain for us on the record |
10:28:32 | why it will take you that long, as I thought you were |
10:28:37 | fully versed in this matter before you wrote your |
10:28:42 | opinion; isn't that the case? |
10:28:47 | A. That's been over a month ago, and I do have |
10:28:52 | a number of other matters that I have to work on, so |
10:28:57 | my memory doesn’t necessarily stay solely on the |
10:28:57 | Meridian City Hall. |
Q. Okay. Is it your testimony that utilizing Exhibit Nos. 86, 87, and 88 that you, in fact, did prior to the issuance of your report verify the inspections mandated by law, as you have stated in your report?

A. Yes. I verified that through Mr. Bauer documentation and gave me assurances of it, and some of it I read and some of it I took his assurance for.

Q. So at least for the inspections, you are relying on Mr. Bauer; is that right?

A. For a definition of the legally required inspections in Meridian, yes.

Q. Okay. And it's your understanding that Mr. Bauer verified that, and it is contained somewhere Exhibit Nos. 86, 87, and 88; right?

A. Yes. I verified that through Mr. Bauer in Exhibit Nos. 86, 87, and 88; right?

Q. Okay. So with respect to this portion of the City of Meridian, against defects in the construction management agreement, what does the phrase, guard the owner, workmanship?

A. To the best of my knowledge.

Q. Okay. So if we turn back to your opinion --

A. The word necessary is in there, but it's misplaced from my recollection, hired Material Testing Group to do the testing necessary in addition to the City's own inspection people.

Q. Okay. So with respect to this portion of the City of Meridian, against defects in the construction management agreement to guard the owner, the City of Meridian, against defects in the workmanship?

A. How do you define the word "guard"?

Q. Well, the term is a common term in construction management contracts, is it not, sir?

A. I've seen it in construction management contracts, but is normally put in a context, and the word guard by itself is -- can mean anything from a barricade to a physical activity that you have to do.

Q. Okay. In the context of a construction management agreement, what does the phrase, guard the owner against defects in the work, mean to you?

A. Well, it means to me that the construction manager will do what he's contractually obligated to do to protect the owner from badly developed specifications of the architect and engineer.

Q. Okay. So if we turn back to your opinion --

A. Yes, sir.

Q. -- all right? And we go up to the fifth paragraph where you have quoted the construction management agreement, based upon your experience and expertise, where it says that Petra shall, "do all things necessary, appropriate, or convenient" --

A. The word necessary isn't in there.

Q. Excuse me. Read that paragraph to me, sir.

A. "Do all things or when appropriate require architect and each contractor to do all things necessary, appropriate, or convenient to achieve the end result desired by the owner, including" -- the word necessary is in there, but it's misplaced from the way you were reading it.

Q. So you don't think that applies to Petra; is that right?

A. No. I didn't say that.

Q. Does it apply to Petra?

A. It applies to Petra to the extent they had a responsibility under the construction management contract for an owner.

Q. Well, let's talk about it in the context of this case. You said, instructions supplemented by the testing necessary in addition to the City's own inspection people.

A. How do you define the word "guard"?

Q. Well, let's talk about that then. Okay?

A. You used the word "supplement." When you use the word "supplement," what does that mean?

A. It would mean an instruction given to a contractor who is in the process of doing work under his contract for an owner.

Q. Well, let's talk about it in the context of this case. You said, instructions supplemented by the City of Meridian, is it not, sir?

A. Yes. The City of Meridian did a significant amount of inspection on the building as it was being constructed by Material Testing Group.

Q. And so what?

A. I believe that's -- I'm not sure what.

Q. Restate the question. I guess I have forgotten the question.

A. All right. Is it your contention that there exists some supplemental instruction to Petra which in any way modified its duties under the construction management agreement?

A. I think that's more a legal question than a question for a construction expert. I do know that Meridian did a significant amount of inspection on the building as it was being constructed by Material Testing Group. Currently, is it your contention as Petra's expert in this case that there was some kind of supplemental instruction issued by the City which modified Petra's duties under the construction management agreement?

A. I think the performance of Petra with regard to inspection, that obligation was met to the intent of the contract during the process of construction.

Q. Well, sir, I'm going to ask you to answer my question specifically, and then we'll come back to what you just stated.

A. My question specifically is this: As
MR. WALKER: Objection. Asked and answered.  
Q. (BY MR. TROUT) Exclusive of hazardous waste and Change Order No. 1, which we will come back and talk about, is it your contention as Petra's expert that there was some kind of supplemental instruction into hazardous waste.

THE WITNESS: I did say that he had made a deal of that responsibility under themselves, and that there was some kind of supplemental instruction issued by the City of Meridian, not that I'm aware of.

MR. WALKER: Objection. Asked and answered.

Q. (BY MR. TROUT) Exclusive of hazardous waste and Change Order No. 1, which we will come back and talk about, is it your contention as Petra's expert that there was some kind of supplemental instruction into hazardous waste.

THE WITNESS: Not that I'm aware of.

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Q. (BY MR. TROUT) Exclusive of hazardous waste and Change Order No. 1, which we will come back and talk about, is it your contention as Petra's expert that there was some kind of supplemental instruction into hazardous waste.

THE WITNESS: Not that I'm aware of.
10:59:27 1 A. Not that I can think of.
10:59:37 2 Q. Okay. So let's turn again to Exhibit No. 2, if you would, please. It is in the folder right in front of you, to your immediate right.
10:59:47 6 Q. You just had it open, sir.
10:59:53 7 A. Yes. All right.
10:59:56 8 Q. Okay. Do you have Exhibit No. 2 in front of you?
10:59:57 9 A. I do.
11:00:03 11 Q. Okay. Turning within Exhibit No. 2 to section 4.7.9, if you would, please.
11:00:12 13 A. 4.7.9?
11:00:36 14 Q. Yes, sir.
11:00:39 15 A. Are you referring to a bar chart or --
11:00:46 16 Q. I'm referring to 4.7.9 of Exhibit No. 2, if you would find that, please.
11:00:47 17 A. I opened the tab for 4, and it contained --
11:00:55 19 Q. The exhibit book that you have in your hand is in the folder right in 11:01:01 20 exhibit you want me to look at, or is this the exhibit that you would find that, please.
11:01:02 21 Q. The exhibit book that you have in your hand is the one which contains the exhibit I want you to look at.
11:01:11 23 Q. Why don't you try No. 2.
11:01:18 25 A. Well, it says, Volume I, Exhibits 1 to 22.

11:01:19 1 Q. Yes, sir.
11:01:24 2 A. All right. Now, what tab might I find this under?
11:01:28 4 Q. Why don't you try No. 2.
11:01:29 5 A. That's very helpful.
11:01:33 6 Q. Well, you're welcome.
11:01:44 7 A. I'm confused here. Is it -- is this the exhibit you want me to look at, or is this the exhibit that you would find that, please.
11:02:01 8 Q. It appears to be a contract between general contractors and construction management.
11:02:06 9 A. I just read, what was Petra supposed to do?
11:02:26 10 Q. Okay.
11:02:34 11 A. The first page is a letter to Ted W. Baird, the City attorney, and it's transmitting a construction management agreement for the City Hall Project.
11:02:44 12 A. The first page is a letter to Ted W. Baird, the City attorney, and it's transmitting a construction management agreement for the City Hall Project.
11:02:47 13
11:02:47 14
11:02:53 15 Q. Okay. Is there anything else contained in tab 2?
11:02:56 16 A. Construction management agreement, dated August 1, 2006.
11:03:03 17 Q. Okay. Have you seen that document before?
11:03:11 19 A. Yes.
11:03:12 20 Q. Okay. When was the first time you reviewed that document?
11:03:16 21 A. Before I wrote my report.
11:03:22 23 Q. Okay. Did you make any notes in your review?
11:03:29 24 A. I may have. I gave all of the notes that I had made on a variety of things to Mr. Bauer to sort through to be sure that they were copied and sent to Mr. Walker, who I -- it was my understanding would be sending them to you.
11:04:02 4 Q. Okay. Well, we'll come back to that a little bit later.
11:04:03 5 A. Yes, sir. I have it.
11:04:07 6 Q. Okay. Well, we'll come back to that a little bit later.
11:04:13 8 A. Yes.
11:04:17 9 A. Yes.
11:04:55 10 A. Yes.
11:04:57 11 Q. All right.
11:05:05 12 Q. Okay. I'd like you to read the section silently to yourself, and then signify for me when you are done.
11:05:15 13 Q. Okay.
11:05:43 15 Q. All right. This section required Petra to carefully observe the work no less frequently than each standard work day; correct?
11:05:47 14 A. Yes.
11:05:53 15 Q. All right. And it says, "The purpose of making such observations, the construction manager shall protect the owner from continuing deficient or defective work." Do you see that, sir?
11:06:04 16 A. Yes.
11:06:07 17 Q. Okay.
11:06:13 18 A. Yes.
11:06:17 19 Q. All right. And it says, "The purpose of making such observations, the construction manager shall protect the owner from continuing deficient or defective work." Did I read that correctly?
11:06:22 20 Q. All right. This section required Petra to carefully observe the work no less frequently than each standard work day; correct?
11:06:25 21 A. Yes.
11:06:29 25 Q. As Petra's expert in this case, based on the

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11:08:12 1 Q. As Petra's expert, what did that mean Petra
11:08:15 2 was supposed to do?
11:08:24 3 A. Well, I think it is quite explicit in the
11:08:27 4 sentence that you read, that's what they were
11:08:29 5 obligated to do.
11:08:35 6 Q. Okay. And it goes on to say, "In making
11:08:37 7 such observations, the construction manager shall
11:08:41 8 protect the owner from continuing deficient or
11:08:47 9 defective work and from continuing unexcused delays in
11:08:48 10 the schedule."
11:08:50 11 Do you see that, sir?
11:08:50 12 A. Yes.
11:08:53 13 Q. Did I read that correctly?
11:08:56 14 MR. WALKER: Objection. You misread the
11:08:57 15 statement.
11:09:00 16 THE WITNESS: I've lost where you are reading.
11:09:01 17 Q. (BY MR. TROUT) Well, it is the same
11:09:06 18 sentence. It goes on to say, "In making such
11:09:09 19 observations, the construction manager shall protect
11:09:16 20 the owner from continuing deficient or defective work,
11:09:23 21 from continuing unexcused delays in the schedule, and
11:09:25 22 from overpayment to a contractor."
11:09:28 23 Did I read that correctly?
11:09:28 24 A. Yes.
11:09:34 25 Q. All right. Where it says, the construction
11:09:38 1 manager shall protect from continuing unexcused delays
11:09:45 2 in the schedule, as Petra's expert, what does that
11:09:47 3 mean?
11:09:53 4 A. It means that they should coordinate the
11:09:57 5 work of the various general contractors in the manner
11:10:08 6 that allows the work to go forward in accordance with
11:10:14 7 the schedule to see that the overall structure is
11:10:19 8 completed on time as outlined in the master schedule.
11:10:22 9 Q. Okay.
11:10:30 10 A. And that at a quality that comports with the
11:10:34 11 anticipation in the general contractor's contract.
11:10:36 12 Q. I.e., in accordance with the plans and
11:10:38 13 specifications; correct?
11:10:39 14 A. Yes.
11:10:46 15 Q. All right. Now, in preparing your report,
11:10:54 16 were you aware that each prime contractor had a start
11:10:56 17 date in their contract?
11:10:57 18 A. Yes.
11:11:01 19 Q. And were you aware that each prime
11:11:06 20 contractor had a substantial completion date in their
11:11:07 21 contract?
11:11:07 22 A. Yes.
11:11:13 23 Q. And were you aware in preparing your report
11:11:20 24 that there was a liquidated damage provision in each
11:11:25 25 prime contract that would come into play if the prime
11:11:27 1 contractor failed to meet the date of substantial
11:11:29 2 completion stated in the agreement?
11:11:30 3 A. Yes.
11:11:31 4 Q. Okay.
11:11:39 5 A. Unless he was frustrated from starting his
11:11:47 6 work on the date specified by something on the project
11:11:54 7 that didn't allow the start up of the following
11:11:55 8 contractor's work.
11:11:58 9 Q. Okay. Well, we'll come back and talk about
11:11:58 10 that.
11:12:04 11 You were aware, were you not, sir, that in
11:12:16 12 the event that any prime contractor had an issue with
11:12:18 13 schedule, it was the prime contractor's responsibility
11:12:21 14 under the terms of the prime contract to make an
11:12:27 15 appropriate and timely request for adjustments to the
11:12:28 16 schedule?
11:12:31 17 A. Yes. That would be reasonable.
11:12:34 18 Q. And those requests would have to be in
11:12:35 19 writing; correct?
11:12:35 20 A. Yes.
11:12:40 21 Q. And they would have to be timely pursuant to
11:12:42 22 the prime contract as well; correct?
11:12:43 23 A. Yes.
11:12:46 24 Q. And if they weren't timely, they would be
11:12:48 25 waived in accordance with the prime contract, isn't
11:12:49 1 that correct?
11:12:51 2 A. They would be reviewed before they were
11:12:59 3 waived. It wouldn't be an automatic waiver, I think.
11:13:04 4 Q. Well, is there some provision of the A201
11:13:09 5 general conditions that you as Petra's expert contend
11:13:11 6 supports what you just said?
11:13:14 7 A. I don't know whether it does or not.
11:13:17 8 Q. Okay. You would agree with me, however,
11:13:22 9 that the precise terms of the A201 general conditions
11:13:27 10 would control the events surrounding either a request
11:13:28 11 or a waiver?
11:13:33 12 A. I would, barring exceptional events.
11:13:40 13 Q. Okay. Well, as we sit here today, given
11:13:45 14 your review in preparation and prior to the issuance
11:13:59 15 of your report, are you aware of some exceptional
11:14:03 16 event that somehow modified the specific provisions of
11:14:09 17 the A201 general provisions applicable to every prime
11:14:10 18 contractor?
11:14:13 19 A. Not applicable to every prime contractor,
11:14:21 20 but I believe the masonry contractor had an
11:14:28 21 extraordinary situation that called for some
11:14:32 22 negotiation of the time versus a potential claim from
11:14:32 23 the contractor.
11:14:50 24 Q. Well, we'll come back to that.
11:14:52 25 MR. WALKER: How about a break, Kim?
MR. TROUT: Sure. Let's take five minutes.

MR. TROUT: Back on the record.

Q. (BY MR. TROUT) Sir, you still have section 5.1 in front of me, yes, sir.

A. I can get there very quickly. 4.7.9 is in front of me, yes, sir.

Q. All right. Again, directing your attention to section 5.1, 4.7.9, it goes onto say that the construction manager shall protect the owner from "an overpayment to a contractor."

A. Do you see that, sir?

Q. Did I read that correctly?

A. Yes.

Q. All right. Based on your experience, if a prime contractor was subject to liquidated damages and was requesting payment in full, would it be Petra's responsibility to enforce in processing the pay application that the liquidated provision of the prime contract?

A. Yes.

Q. And that would be one method of preventing overpayment to a contractor; correct?

A. Yes.

Q. Now, turning your attention to the next page of Exhibit No. 2, the construction management agreement.

A. You are talking about page 137?

Q. Yes, sir.

A. Yes.

Q. Directing your attention to section 5.1, would you read that silently to yourself.

A. I will.

Q. And signify when you are done, sir.

A. I have read it.

Q. Okay. Directing your attention to the last full sentence, it says, "The time limits established by the project schedule are of the essence and shall not be exceeded by the construction manager without the owner's prior written consent."

A. Yes, you did.

Q. (BY MR. TROUT) Now, Mr. Lemley, as Petra's construction expert, you are familiar with time is of the essence clauses, are you not, sir?

A. I am.

Q. And time of the essence clauses like this one are to be strictly enforced, isn't that correct?

A. MR. WALKER: Objection. Calls for a legal conclusion.

Q. THE WITNESS: They are to be strictly enforced fairly.

A. MR. TROUT: All right.

Q. (BY MR. TROUT) Now, let's go back to 4.7.9 again, well, when you use the term "fairly," you mean in accordance with the contract document itself, don't you, sir?

A. Yes.

Q. All right. Let's go back to your opinion, if we can.

A. I'm not aware that they did any take off.

Q. Are there notes in your Exhibits 86, 87, and 88 in which you have documented the negotiations? I do.

Q. I can't.

Q. Okay. Can you tell me where in Exhibits 86, 87, or 88 I can find your notes or research relating to the negotiation of the contract between the City and Petra?

Q. Are there notes in your Exhibits 86, 87, and 88 in which you have documented the negotiations between the City and Petra?

A. I can't.

Q. Okay. So tell me, if you can, sir, what work was Petra to have performed for the $574,000 fee?

A. It is spelled out in their scope of work, which is clearly outlined in the contract.

Q. Well, let's break it down. Did you in the course of your investigation determine whether or not Petra had prepared any kind of take off or estimate with respect to the $574,000 fee?

A. I'm not aware that they did any take off.

Q. Take off is usually done by the general contractor in his performance or tendering process when he is about, Counsel.
City,


11:29:57 1 putting prices to performance of his work.
11:30:01 2 Q. Okay. Well, Petra is a general contractor
11:30:05 3 as well as a construction manager, isn't that correct?
11:30:09 4 A. Petra is not a construction manager at risk.
11:30:10 5 They are an agent of the owner --
11:30:14 6 Q. And we'll come back to that. My question --
11:30:15 7 A. -- in this context.
11:30:20 8 Q. Okay. My question though is, you are aware
11:30:22 9 in addition to performing construction management
11:30:26 10 services Petra is a general contractor as well; is
11:30:27 11 that correct?
11:30:28 12 A. I am aware of that, yes.
11:30:33 13 Q. All right. You would expect that Petra as a
11:30:40 14 general contractor would have the skills to do an
11:30:44 15 estimate or take off of their services under the
11:30:46 16 construction management agreement?
11:30:52 18 Q. THE WITNESS: I believe they would have the
11:31:00 19 skills to estimate the cost of services under a
11:31:06 20 construction management contract.
11:31:07 21 MR. TROUT: Okay.
11:31:08 22 Q. (BY MR. TROUT) And as a construction
11:31:12 23 manager, wouldn't Petra have the skills to estimate
11:31:18 24 the cost of their services under this construction
11:31:23 25 management agreement?

Q. Okay. Tell me, if you would, please, what 11:39:30 13 A. I have no knowledge of that. 11:39:37 14 Q. Okay. Anything else?
11:39:57 15 Q. (BY MR. TROUT) What was the project 11:39:13 16 THE WITNESS: I don't see it in this document.
11:39:21 17 It may have been in the solicitation. I know it has 11:39:19 19 Exhibit No. 2, if you would, please.
11:39:30 18 that's Exhibit No. 2. I keep looking for Exhibit 2 on
11:39:31 19 the front of it, and I don't find it.
11:39:44 21 Q. (BY MR. TROUT) So as we sit here today, you
11:39:57 22 can't verify that an 80,000 square foot building was,
11:40:01 23 quote, the project described in the contract, correct?
11:40:03 24 A. I can't find the reference to it in their

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11:40:11 1 Q. Okay.  
11:40:13 2 Q. -- you state that, "It should be noted that  
11:40:19 3 A. Sometimes I can't remember names. But it  
11:40:35 4 place that this was a tender to oversee the  
11:40:45 5 commercial real estate person.  
11:40:48 6 A. I didn't consult with any real estate --  
11:40:52 7 Q. All right. So, let me ask you this  
11:41:01 8 question: Turning your attention to Exhibit Nos. 86,  
11:41:09 9 Q. Okay. Now, you say Class A standards; is  
11:41:19 10 87, or 88, is there anything in those exhibits that  
11:41:25 11 you contend verifies an 80,000 square foot building as  
11:41:30 12 consultant with a real estate person?  
11:41:35 13 Q. So you don't know?  
11:41:37 14 A. No.  
11:41:50 15 Q. Okay. Now, you say Class A standards; is  
11:41:51 16 that correct?  
11:41:59 17 Q. All right. Where do I find a document that  
11:42:06 18 will tell me what a Class A standard building  
11:42:07 19 contains?  
11:42:12 20 A. I think it would be necessary to consult  
11:42:20 21 with real estate people who deal with building  
11:42:22 22 standards.  
11:42:30 23 Q. Did Mr. Bauer tell you that he had  
11:42:38 24 consulted with some real estate professional prior to  
11:42:41 25 the preparation of this report?  
11:42:47 26 Q. -- can you identify for me where you find a  
11:43:01 27 A. I don't know that as an absolute.  
11:43:19 29 A. Yes.  
11:43:50 30 Q. Okay. Now, you say Class A standards; is  
11:43:51 31 that correct?  
11:43:59 32 Q. All right. Where do I find a document that  
11:44:06 33 will tell me what a Class A standard building  
11:44:07 34 contains?  
11:44:12 35 A. I think it would be necessary to consult  
11:44:20 36 with real estate people who deal with building  
11:44:22 37 standards.  
11:44:26 38 Yes, sir.  
11:44:33 39 Q. Sometimes I can't remember names. But it  
11:44:36 40 Q. -- you state that, "It should be noted that  
11:44:40 41 Q. -- can you identify for me where you find a  
11:44:41 42 A. It isn't in here.  
11:44:44 43 Q. Okay.  
11:44:47 44 Q. -- can you identify for me where you find a  
11:44:49 45 Q. Yes.  
11:44:59 46 Q. All right. An inquiry of whom? Did you  
11:45:01 47 A. I did. I was thinking about it, if you hear  
11:45:04 48 A. I don't know that as an absolute.  
11:45:12 49 Q. Well, I apologize. You had told me --  
11:45:16 50 A. Yes.  
11:45:20 51 Q. Okay. We'll come back to that.  
11:45:24 52 A. It's Dennis something. I can't think of his  
11:45:29 53 Q. Okay. And when did you make an inquiry of  
11:45:33 54 A. Early on in my employment in this  
11:45:36 55 Q. Okay. We'll come back to that.  
11:45:39 56 Q. Okay. I was thinking about it, if you hear  
11:45:41 57 A. Lombard-Conrad."  
11:45:49 58 Q. Okay. We'll come back to that.  
11:45:52 59 A. It's Dennis something. I can't think of his  
11:45:56 60 Q. "Petra was only required to act as the  
11:45:58 61 A. Yes.  
11:46:10 62 Q. In the first full paragraph of page 2 of  
11:46:18 63 A. Yes.  
11:46:25 64 Q. In the first full paragraph of page 2 of  
11:46:26 65 Q. In the first full paragraph of page 2 of  
11:46:29 66 Petra's scope of work does not include being the agent  
11:46:32 67 Q. -- do you know if he did or not?  
11:46:34 68 Q. -- do you know if he did or not?  
11:46:37 69 Q. -- do you know if he did or not?  
11:46:42 70 Petra's scope of work does not include being the agent  
11:46:44 71 Q. -- do you know if he did or not?  
11:46:47 72 Petra's scope of work does not include being the agent  
11:46:49 73 Q. -- do you know if he did or not?  
11:46:50 74 Q. "Petra was only required to act as the  
11:46:52 75 Q. "Petra was only required to act as the  
11:46:54 76 Petra's scope of work does not include being the agent  
11:46:56 77 Q. -- do you know if he did or not?  
11:46:58 78 Q. "Petra was only required to act as the  
11:46:59 79 Q. "Petra was only required to act as the  
11:47:04 80 Q. Okay. Did you verify that in some fashion  
11:47:06 81 Q. Okay. Did you verify that in some fashion  
11:47:09 82 Q. Okay. Did you verify that in some fashion  
11:47:10 83 Q. Okay. Did you verify that in some fashion  
11:47:12 84 Q. Okay. Did you verify that in some fashion  
11:47:22 85 Q. Well, let's turn to Exhibit No. 2, again, if  
11:47:24 86 Q. Okay.  
11:47:26 87, or 88, is there anything in those exhibits that  
11:47:28 87, or 88, is there anything in those exhibits that  
11:47:32 87, or 88, is there anything in those exhibits that  
11:47:34 87, or 88, is there anything in those exhibits that  
11:47:38 87, or 88, is there anything in those exhibits that  
11:47:40 87, or 88, is there anything in those exhibits that  

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Mr. Trout: All right, sir. Now, if you would turn your attention to paragraph 4.1 of the construction management agreement, which is the first paragraph of what you just read, and that removes that duty from Petra?

Witness: By the same token, I don't believe there is a paragraph in the construction management agreement that removes that duty from Petra.

Mr. Walker: Objection. Calls for speculation.

Witness: Well, it means that in the event you're working either for, against, or alongside of, and controlling the organization that is managing and coordinating the design means.

Mr. Trout: All right. Is there another paragraph that would require Petra to contractually perform an integration of the design as well as the construction management?

Witness: You would have to ask that question of your expert.

Mr. Trout: All right. Well, is there something else you would like to add before we finish?

Witness: I'm happy to do that.

Mr. Trout: So for our record you have just read section 4.1, scope of services in general for Petra on this project; correct?

Witness: Yes.

Mr. Trout: And that's what it intended to have Petra do, isn't it?

Witness: That's what it says, yes.

Mr. Trout: And you just read paragraph 4.1 of the construction management agreement, and it says, "Owner has retained the construction manager to help it achieve the objective set forth in section 3.1 above by managing and coordinating the design." Do you see that language?

Witness: Yes.

Mr. Trout: Pursuant to section 4.1 of the construction management agreement, Petra was responsible for managing and coordinating the design, isn't that correct, sir?

Witness: As far as -- as far as 4.1 goes, I -- there is a generally acknowledged fact that the people that control payment, control the organization that is working either for, against, or alongside of, and Petra had no knowledge or no control over LCA's payment, but LCA, on the other hand, had full responsibility to sign off on payment for the construction contractors as well as Petra.

Mr. Trout: Q. Well, Mr. Lemley, I'm going to ask you my direct question one more time, and I would ask you if you would be so kind as to answer my direct question.

Witness: A. I will try.

Mr. Trout: Q. Contrary to the statement you made in your opinion, paragraph 4.1 of the construction management agreement mandates that Petra will manage and coordinate the design for this project, isn't that correct?

Witness: MR. WALKER: Objection. Lack of foundation. And also asked and answered.

Mr. Trout: THE WITNESS: It is correct as far as the paragraph goes, yes.

Witness: Q. (BY MR. TROUT) Well, is there some other paragraph in the construction management agreement that removes that duty from Petra?

Witness: No.

Mr. Trout: Q. (BY MR. TROUT) All right. Now, you just read paragraph 4.1; correct?

Witness: Correct.

Mr. Trout: Q. And this paragraph 4.1 says, "by managing and coordinating the design as well as the construction work to Petra."

Witness: Well, it means that in the event you're given full access to the architect and his work, or the engineer and his work, and you are making decisions relative to that organization's work, they then have a duty to contractually perform an integration of the design as well as the construction management.

Mr. Trout: Q. And if you would turn your attention to paragraph 4.1, scope of services in general for Petra's services as well as Petra.

Witness: Okay.

Mr. Trout: A. I have now read it.

Witness: Okay.
Q. -- you don't quote the first full sentence of paragraph 4.1, do you?
A. I do not.
Q. Okay. Can you tell me why it is that you chose in your report submitted to the Court in this case not to include the full description of Petra's services, including the first full sentence of paragraph 4.1?
A. Because it was my opinion, based on conversations with Petra's on-site people and their management that they felt they did not have control over the architect that the City was, in fact, working directly with the architect and not including Petra in those discussions and that would have had the effect of undermining anything Petra would say to LCA.
Q. Well, what did you do prior to issuing your opinion to verify whether or not what you were told by Petra's employees was true?
A. We studied the paper from the project that Petra began conferring with the owner and the architect; correct?
Q. So tell me where I find in any written report that Petra was ever excluded from a meeting.
A. No. And I would like to think that my opinion to verify whether or not what you were told by Petra's employees was true was my opinion, based on conversations with Petra's on-site people and their management that they felt they did not have control over the architect that the City was, in fact, working directly with the architect and not including Petra in those discussions and that would have had the effect of undermining anything Petra would say to LCA.
Q. All right. In preparation of your report, doesn't say anywhere in your report that Petra was ever excluded from a meeting.
A. I know of no such writing relative to this project, but I do have 50 years of working in similar situations in which there was an implied responsibility for something and no direct statement giving me the right to manage the engineer or the architect.
Q. All right. So let's turn our attention to tab 2, again, section 4.1.
A. I just happen to have it here.
Q. Is it your contention as Petra's expert that the language of section 4.1, which says, "Owner has responsibility for something and no direct statement giving me the right to manage the engineer or the architect," is not an express statement of Petra's duty?
Q. And did he also say at times more frequently than weekly?  
A. Yes.

Q. Did you verify that?  
A. Yes.

Q. You then say, and I'm assuming you've verified, "that meetings were typically weekly and at times more frequently."  
A. Yes.

Q. Then you say, and I'm assuming you've verified, "that meetings were typically weekly and at times more frequently."  
A. Yes.

Q. You then say, and I'm assuming you've verified, "that meetings were typically weekly and at times more frequently."  
A. Yes.

Q. And did he also say at times more frequently than weekly?  
A. Yes.

Q. Did you verify that?  
A. Yes.

Q. And you've already sworn to this as part of Exhibits No. 91, you say, 6 of 12 of your opinion, in Exhibit No. 91, you say, "Petra began conferring with the owner and the architect in September of '06," correct?  
A. Yes.

Q. Then you say, and I'm assuming you've verified, "that meetings were typically weekly and at times more frequently."  
A. Yes.

Q. Then you say, and I'm assuming you've verified, "that meetings were typically weekly and at times more frequently."  
A. Yes.

Q. Then you say, and I'm assuming you've verified, "that meetings were typically weekly and at times more frequently."  
A. Yes.

Q. And did he also say at times more frequently than weekly?  
A. Yes.

Q. Did you verify that?  
A. Yes.

Q. And you've already sworn to this as part of Exhibits No. 91, you say, "Petra began conferring with the owner and the architect in September of '06," correct?  
A. Yes.

Q. Then you say, and I'm assuming you've verified, "that meetings were typically weekly and at times more frequently."  
A. Yes.

Q. Then you say, and I'm assuming you've verified, "that meetings were typically weekly and at times more frequently."  
A. Yes.

Q. Then you say, and I'm assuming you've verified, "that meetings were typically weekly and at times more frequently."  
A. Yes.

Q. And did he also say at times more frequently than weekly?  
A. Yes.

Q. Did you verify that?  
A. Yes.

A. He must have, because it's in here. I didn't recall that but ...
Q. Well, let me ask you this, sir: What effort
did you make to interview Lombard-Conrad before you
signed your affidavit and signed this report?
A. I don't think I did any effort to do that.
Q. All right. What prevented you from making
an effort to interview Lombard-Conrad before you
signed your affidavit and signed this report?
A. Time constraints.
Q. Okay.
A. I do have other matters that I have to
attend to.
Q. Well, did you instruct Mr. Bauer to
coordinate the design?
A. I told him to verify the statements made in
the report and to assure himself that they were
absolutely correct.
Q. Okay. So can you tell me why it is when
Mr. Bauer was verifying the statements made in this
report he failed to include the language of section
4.1 regarding the duty of Petra to manage and
coordinate the design?
Q. Well, did you instruct Mr. Bauer to
coordinate the design?
A. Yes, sir.
Q. -- where you write, "Petra was only required
to act as the owner's representative in regard to the
construction contracts," that does not comport with
section 4.1 of the construction management agreement,
does it, sir?
A. I'm sitting here today trying to clarify the
issues that you are bringing up and asking me about.
Q. Well, Mr. Lemley, very directly, you did not
say anything about an assignment of the LCA contract
in your report; correct?
A. I did not.
Q. Okay.
MR. WALKER: Are we going to take a lunch break
sometime?
MR. TROUT: Yeah. I think now is a good time to
take a lunch break.
THE WITNESS: It seems to me on the face of it a
bright lawyer like yourself would have drawn that
conclusion without it having been written in the
report.
MR. TROUT: Well, I appreciate the compliment,
sir. I assume it was intended as one.
THE WITNESS: It was.
MR. TROUT: Good. Let's take our lunch break.
We'll be back here at 1:15.
MR. TROUT: Let's let the record reflect that
Mr. Walker had to find the exhibit for the witness.
He got the right binder and the right section.
Q. (BY MR. TROUT) Mr. Lemley, turning your
attention in Exhibit No. 91 to page 6 of 12.
A. Okay.
Q. (BY MR. TROUT) You should be in Exhibit
No. 91 --
A. Yes.
Q. (BY MR. TROUT) Let's go to where we were in
your report, Exhibit No. 91, and let's go again to
page 6 of 12, if you would, please.
A. Well, let's see if I can do this. I'm doing
something wrong here. Have I got the right binder?
MR. WALKER: Yes.
Q. (BY MR. TROUT) You should be in Exhibit
No. 91 --
A. I have it.
MR. TROUT: Yes, we have. We'll be back at 1:15.
We'll go off the record.
(Recess taken from 12:20 p.m. to 1:23 p.m.)
MR. TROUT: Back on the record.
THE WITNESS: I want the record to show I did get
a good lunch today. Tom was very generous.
MR. TROUT: That's good, sir. I hope you are
feeling well.
THE WITNESS: I am indeed.
Q. (BY MR. TROUT) Let's go to where we were in
your report, Exhibit No. 91, and let's go again to
page 6 of 12, if you would, please.
A. Well, let's see if I can do this. I'm doing
something wrong here. Have I got the right binder?
MR. WALKER: Yes.
Q. (BY MR. TROUT) You should be in Exhibit
No. 91 --
A. Okay.
Q. In the first full paragraph on page 6 of 12,
you write, "The owner's requirements were provided to
LCA."
A. I'm sitting here today trying to clarify the
Q. All right. Utilizing Exhibits 86, 87, or 88, will you please identify for me Lemley International's verification for that statement.

A. Well, I can try. It's been a long time since I've looked at this but -- that's Volume 1 --

Q. To your immediate right is Exhibits 86, 87, or 88, which are the volumes you brought along with you to your first deposition.

A. Yes.

Q. (Brief pause from 1:26 p.m. to 1:30 p.m.) THE WITNESS: Presumably the architect's contract is in here, but I have no knowledge of where it is.

A. (BY MR. TROUT) Tell me why you are looking for the architect's contract?

Q. Well, let me ask you this question: Is it your contention as Petra's expert that hazardous waste was overcome through collaboration; is that correct?

A. When you say paragraph 1, you're -- This is the one following the bullet point?

Q. Okay. So as we sit here today, you don't have the ability to verify that there is documentation which verifies that the owner's requirements were provided to LCA; is that correct?

A. None that I remember at this time.

Q. Okay. So as we sit here today, you don't have their instructions as to what the City of Meridian wanted.

A. Well, that really wasn't my question. My question was: Utilizing Exhibits 86, 87, or 88, can you please identify for me how you verified your statement that, "The owner's requirements were provided to LCA"?

Q. Okay. Tell me each and every problem that you contend was overcome through collaboration.

A. Well, I can thumb through each of the pages.

Q. Why, my question, sir, is: Did you found the documentation, and I used common sense that an architect does normally take instruction from an owner.

A. Yes.

Q. Personal verification.

Q. Well, this is your report, and they are your documents. I have assumed that your familiarity with them allowed you to sign this report; is that correct?

A. Not necessarily. I went through them, and as I drafted the report, I did it in consultation with Mr. Bauer, who found references, showed them to me. I read them and incorporated some of these statements in my report.

Q. So is it your testimony under oath today that Mr. Bauer showed you documents that verified that, "The owner's requirements were provided to LCA"?

A. Yes.
<table>
<thead>
<tr>
<th>Time</th>
<th>Text</th>
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<tbody>
<tr>
<td>13:37:42</td>
<td>A. All right.</td>
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<tr>
<td>13:37:44</td>
<td>Q. The last full sentence says, &quot;The problems were overcome through collaboration.&quot; I want to know what, other than hazardous waste, were the problems that you identified which were overcome through collaboration?</td>
</tr>
<tr>
<td>13:37:52</td>
<td>Q. And if you would, sir, if you would take the binder, which has Exhibit No. 2 in it, please. It is the one immediately to your right, I believe.</td>
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<tr>
<td>13:38:08</td>
<td>A. Okay.</td>
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<td>13:38:09</td>
<td>Q. Okay. So let's talk about the clear span in the council chambers.</td>
</tr>
<tr>
<td>13:38:15</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>13:38:26</td>
<td>Q. If you would, sir, if you would take the binder, which has Exhibit No. 2 in it, please. It is the one immediately to your right, I believe.</td>
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<td>13:38:40</td>
<td>Q. And if you would turn to the second tab, which is Exhibit No. 2.</td>
</tr>
<tr>
<td>13:38:46</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>13:38:53</td>
<td>Q. All right. This is the construction management agreement?</td>
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<td>13:39:29</td>
<td>Q. Okay. Would you identify for me in the construction management agreement where it contains a description for the City Council chambers.</td>
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<td>13:40:29</td>
<td>(Brief pause from 1:42 p.m. to 1:43 p.m.)</td>
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<td>13:40:31</td>
<td>Q. The last full sentence says, &quot;The problems encountered as they went forward. There was a clay layer, and the city council chambers, and LEED certification, can you tell me what other problems you encountered as they went forward. There was a clay layer that it was agreed they -- they didn't want to penetrate before the hazardous material was removed from the site, that, plus a water table caused the floor of the added basement to be raised four feet. And that -- that was a change outside of the instruction that was given in the letter law in this construction manager's agreement, that may be exactly what I was trying to say, that the -- there was a lot of the coordination issues that were covered in discussions between City representatives, the architect, and Petra.</td>
</tr>
<tr>
<td>13:41:11</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>13:41:20</td>
<td>Q. (BY MR. TROUT) Well, you said in your testimony, if I understood you correctly, that the clear span city council chamber was a change that was different than what was contemplated in the construction management agreement; is that correct?</td>
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<tr>
<td>13:41:25</td>
<td>A. That was my understanding.</td>
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<tr>
<td>13:41:39</td>
<td>Q. Okay. So show me in the construction management agreement what was contemplated for the city council chambers?</td>
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<tr>
<td>13:41:48</td>
<td>A. I can't show you the designs and specifications, because they are not in that construction management agreement.</td>
</tr>
<tr>
<td>13:41:51</td>
<td>Q. All right. Well, tell me what document you looked at to determine what the original design for the city council chambers was contemplated to be.</td>
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<tr>
<td>13:41:56</td>
<td>A. I can't do that.</td>
</tr>
<tr>
<td>13:41:58</td>
<td>Q. Why?</td>
</tr>
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<td>13:42:06</td>
<td>A. I have no recollection of where I saw it.</td>
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<tr>
<td>13:42:10</td>
<td>Q. All right. Well, did Mr. Bauer tell you what document he looked at to determine what the original design for the city council chambers would be?</td>
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<tr>
<td>13:42:24</td>
<td>A. No, he didn't tell me.</td>
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<tr>
<td>13:42:27</td>
<td>Q. All right. Did you ask him?</td>
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<tr>
<td>13:42:47</td>
<td>Q. Okay. And did you have a discussion with respect to the city council chambers with any other member of your staff?</td>
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<tr>
<td>13:43:13</td>
<td>Q. Okay. Other than the hazardous waste, the clay layer, and the city council chambers, and LEED certification, can you tell me what other problems you are referring to in the first full paragraph of page 6 of 12 of your opinion, which is Exhibit No. 91?</td>
</tr>
<tr>
<td>13:43:23</td>
<td>Q. Okay. I'll ask that in a slightly different way. Turning your attention, sir, back to page 2 of 12 of your report.</td>
</tr>
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<td>13:43:34</td>
<td>A. Yes. sir.</td>
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</table>
| 13:43:43 | Q. In the second full paragraph, you say, 'The
13:48:46 1 project described in the Petra contract was simply
13:48:48 2 never designed."
13:48:50 3 Do you see that, sir?
13:49:04 5 Q. Okay. Tell me what you did to verify that
13:49:07 6 the project described in the Petra contract was simply
13:49:10 7 never designed?
13:49:16 8 A. Well, Petra was led to believe that they
13:49:24 9 were to manage a relatively simple four-story, 80,000
13:49:41 10 square foot Class A office building, and LCA prepared
13:49:47 11 a design for a building consisting of three stories,
13:49:53 12 plus a basement, total of approximately 100,000 square
13:49:57 13 feet. That was the difference between what Petra
13:50:04 14 thought they were being retained to manage versus what
13:50:07 15 was --
13:50:09 16 Q. Well, let's take it --
13:50:15 17 A. -- constructed and the LEED silver
13:50:19 19 Q. All right. Let's take it one item if we
13:50:22 20 can, Mr. Lemley?
13:50:23 21 A. Any way you like.
13:50:27 22 Q. This morning you were unable to locate any
13:50:30 23 reference in the construction management agreement to
13:50:33 24 an 80,000 square foot building.
13:50:34 25 Remember that?

13:50:37 1 A. I remember I had difficulty referring you to
13:50:44 2 it. It's in the recitals, not in the body of the
13:50:47 3 contract, so...
13:50:51 4 Q. All right. Let's turn to Exhibit No. 2.
13:50:56 5 And I'm assuming you learned that from Mr. Walker
13:50:59 6 during one of the breaks; is that correct?
13:51:00 7 A. It was. It is.
13:51:13 8 Q. All right. So let's turn to Exhibit No. 2.
13:51:19 9 Do you have that in front of you?
13:51:36 10 A. Is it this binder here?
13:51:46 11 Q. Can you find the construction management
13:51:49 12 agreement, Mr. Lemley?
13:51:51 13 A. Yes. I have it in front of me.
13:52:09 14 Q. All right. So let's turn to the recitals.
13:52:09 15 A. Yes.
13:52:16 16 Q. All right. And directing your attention to
13:52:21 17 Exhibit No. 2, Recitals B; construction management
13:52:25 18 agreement. Would you read that silently to yourself.
13:52:54 20 Q. And then indicate when you are done with
13:52:55 21 A. I'm finished.
13:52:58 22 Q. All right, sir. Would you agree with me,
13:53:04 23 sir, that the specific language of Recital B is
13:53:10 24 "80,000 square feet of standard Class A office space."
13:53:12 25 Did I read that correctly?

13:53:12 1 A. Yes.
13:53:19 2 Q. All right, sir. Is the word, building,
13:53:25 3 utilized in Recital B in any fashion?
13:53:36 5 Q. All right. So tell me, sir, what document,
13:53:42 6 other than the construction management agreement, do
13:53:52 7 you rely upon for your repeated recitation in your
13:54:01 8 report that an 80,000 square foot building was
13:54:06 9 contemplated by Petra?
13:54:18 10 A. There was an agreement at the time that the
13:54:30 11 City and its administration selected a construction
13:54:36 12 manager to select one that had experience in building
13:54:43 13 buildings, and the interference, I think, is clear
13:54:48 14 that it was 80,000 square feet of standard Class A
13:54:53 15 office space. Now, that would be in a building, not a
13:55:06 16 mechanical shop. So I think this is clearly a --
13:55:11 17 representing a building, not a mechanical shop.
13:55:15 18 Q. Well, my question to you was, since the word
13:55:21 19 building isn't used in Recital B of Exhibit No. 2, are
13:55:25 20 you relying on some other document for your conclusion
13:55:32 21 that this was to be an 80,000 square foot building?
13:55:45 22 A. I'm relying on the recital that says the
13:55:50 23 owner desires to abate and demolish the existing
13:55:56 24 structures on the site and develop a new city hall
13:57:39 1 restrooms; is that correct?
13:57:45 3 Q. And in order to be ADA compliant, it would have to have elevators?
13:57:46 4 A. Yes.
13:57:49 5 Q. And stairwells?
13:57:54 7 Q. All of those components would take up square footage in the building footprint, would they not, sir?
13:58:03 9 Q. And you can't use a stairwell for office space?
13:58:05 10 A. I wouldn't think so.
13:58:10 11 Q. And you can't use a restroom for office space, can you?
13:58:12 12 A. I don't believe you could.
13:58:13 13 Q. Can you use an elevator shaft for office space?
13:58:18 14 A. Correct. The shaft is and how frequently it travels from the bottom of its run to the top.
13:58:33 15 Q. (BY MR. TROUT) So you'd be okay in having your office in an elevator shaft, is that what you are telling the Court?
13:58:38 17 THE WITNESS: I suggested to you that a senior commercial real estate person would be able to answer that question better than I could.
13:58:40 18 A. Yes.
13:58:42 19 Q. (BY MR. TROUT) Where was that?
13:58:45 20 THE WITNESS: Depending on how large the elevator is and how frequently it travels from the bottom of its run to the top.
13:58:48 21 Q. (BY MR. TROUT) So you'd be okay in having your office in an elevator shaft, is that what you are telling the Court?
13:58:55 23 THE WITNESS: I would not have a problem with that. I've had my office at the bottom of the shaft with an elevator in it that ran regularly.
13:58:58 25 Q. (BY MR. TROUT) Where was that?
13:59:01 26 THE WITNESS: I was in the city of New York. I was in charge of driving a 13-and-a-half mile long tunnel.
13:59:13 27 Q. (BY MR. TROUT) So tell me where I would find in Exhibit No. 2, the construction management agreement, what was contemplated at the time it was signed for the exterior cladding of this building.
13:59:17 28 THE WITNESS: I suggested to you that a senior commercial real estate person would be able to answer that question better than I could.
13:59:21 30 Q. (BY MR. TROUT) So tell me where I would find in Exhibit No. 2, the construction management agreement, what was contemplated at the time it was signed for the exterior cladding of this building.
13:59:24 31 A. I'm not sure that it had been specified at that time.
13:59:37 34 Q. (BY MR. TROUT) So tell me where I would find in Exhibit No. 2, the construction management agreement, what was contemplated at the time it was signed for the exterior cladding of this building.
13:59:40 35 THE WITNESS: I suggested to you that a senior commercial real estate person would be able to answer that question better than I could.
13:59:42 36 Q. (BY MR. TROUT) So tell me where I would find in Exhibit No. 2, the construction management agreement, what was contemplated at the time it was signed for the exterior cladding of this building.
13:59:44 37 A. I wouldn't think so.
13:59:46 38 Q. (BY MR. TROUT) Where was that?
13:59:49 39 THE WITNESS: I was in the city of New York. I was in charge of driving a 13-and-a-half mile long tunnel.
13:59:51 40 Q. Okay. Was your office within the envelope of the shaft itself?
13:59:53 41 A. Yes.
13:59:54 42 Q. Oh, it was?
13:59:56 43 A. Yes.
13:59:57 44 Q. Okay. Do you have photos?
<table>
<thead>
<tr>
<th>Time</th>
<th>Text</th>
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<tbody>
<tr>
<td>14:04:08</td>
<td>Q. Okay. So would it be your testimony today that there is a document in Exhibit 86, 87, or 88 that defines what a 200-year exterior cladding is?</td>
</tr>
<tr>
<td>14:04:18</td>
<td>A. I'm not sure that there is a clear definition of it. I am certain that there was a request for a 200-year exterior cladding, and that would then have to be discussed between the owner, the architect, and the construction manager.</td>
</tr>
<tr>
<td>14:04:24</td>
<td>Q. Okay. How are you certain that there was a request for a 200-year exterior cladding? Upon what did you rely for that statement?</td>
</tr>
<tr>
<td>14:04:32</td>
<td>A. Mr. Bauer.</td>
</tr>
<tr>
<td>14:04:55</td>
<td>Q. Okay. Are you certain that there was a request for a 200-year exterior cladding? Upon what do you rely for that statement?</td>
</tr>
<tr>
<td>14:10:00</td>
<td>Q. The last full paragraph?</td>
</tr>
<tr>
<td>14:10:03</td>
<td>A. Yes, sir.</td>
</tr>
<tr>
<td>14:16:06</td>
<td>A. Where are you?</td>
</tr>
<tr>
<td>14:16:32</td>
<td>Q. Exhibit 91, sir.</td>
</tr>
<tr>
<td>14:16:35</td>
<td>A. Exhibit 1, Exhibit 81. Is it in here where the green tab is? There is 89, 90, 91. I'm getting it now. Okay. I'm at Exhibit 91.</td>
</tr>
<tr>
<td>14:17:27</td>
<td>Q. All right. Would you turn to page 2 of 12 of your report.</td>
</tr>
<tr>
<td>14:17:37</td>
<td>A. I inquired of Petra's people and asked them if they had the full design of the building. I was told, no, they had not. They had only the description required.</td>
</tr>
<tr>
<td>14:19:26</td>
<td>A. No. Only the general description that I thought was going to be built.</td>
</tr>
<tr>
<td>14:20:07</td>
<td>A. I was relying pretty much on that and our conversations about what was built as opposed to what they thought was going to be built.</td>
</tr>
<tr>
<td>14:20:23</td>
<td>Q. Well, did you find some document upon which Petra relied in concluding what it is they thought was going to be built?</td>
</tr>
<tr>
<td>14:20:33</td>
<td>A. No.</td>
</tr>
<tr>
<td>14:20:35</td>
<td>Q. Okay. Did you make any inquiry with Lombard-Conrad as to what plans and specifications existed as of August 1, 2006?</td>
</tr>
<tr>
<td>14:20:36</td>
<td>A. No.</td>
</tr>
<tr>
<td>14:20:42</td>
<td>Q. Okay. Did you, prior to signing this report, review any plans and specifications for this project?</td>
</tr>
<tr>
<td>14:20:49</td>
<td>A. No.</td>
</tr>
<tr>
<td>14:21:06</td>
<td>Q. All right, sir. Would you tell me, sir, what, if any, document you relied upon to determine whether or not Petra performed value engineering, and could you identify that for me out of Exhibits 86, 87, or 88?</td>
</tr>
<tr>
<td>14:21:14</td>
<td>A. No.</td>
</tr>
<tr>
<td>14:21:40</td>
<td>Q. Why not?</td>
</tr>
<tr>
<td>14:21:46</td>
<td>A. Because I worked through Mr. Bauer.</td>
</tr>
</tbody>
</table>

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identifY for me from Exhibit K.

MR. TROUT: Well, no. This is your deposition, Mr. Lemley.

THE WITNESS: Yes.

MR. TROUT: And we would like you to handle this deposition by yourself, if you would, please.

THE WITNESS: Well, I will do that if you have no concern for the time. All right. I have the recitals in front of me.

MR. TROUT: All right, sir.

Q. (BY MR. TROUT) And so tell me where in a specific quote it says 80,000 square foot building?

MR. WALKER: Objection. Asked and answered.

THE WITNESS: Well, let's start with the fact that it's going to be a new city hall. The owner desires to abate and demolish the existing structures on the site and develop a new city hall facility, which would connote a building thereon consisting of a four-story structure with approximately 80,000 square feet of standard Class A office space and related improvements with surface parking.

Now, your question, air?

Q. (BY MR. TROUT) Yes, sir. You would agree with me, would you not, that it simply does not say this is going to be an 80,000 square foot building in...
14:49:04 Q. Well, let's make sure we understand. Where in the construction management agreement does it say that one of the stories isn't a basement?

14:49:10 A. In Exhibit No. 2, the construction management agreement.

14:49:26 Q. Does it say that one of the stories isn't a basement?


14:49:38 Q. And would you show me where in the agreement that Petra or the City was required to say that the contract described in the contract was complete before Petra needed to seek authorization for the claimed extra work?

14:50:00 A. Yes.

14:50:24 Q. All right. Did I read that correctly?

14:50:35 A. Yes.

14:50:40 Q. Tell me when you are done, please.

14:50:56 A. Okay. Let's turn again to page 3 of Exhibit No. 2.

14:51:02 A. Yes, sir.

14:51:07 Q. Okay. Other than that contention, which sentence in the construction management agreement that says one of the stories isn't a basement?

14:51:12 A. That is the fourth paragraph that commences with the phrase, the story underground is a change and a significant cost connected with it.

14:51:19 Q. All right. Turning your attention to the fourth paragraph that commences with the phrase, the story underground is a change and a significant cost connected with it.

14:51:25 Q. Okay. What page do you want me to go to?

14:51:30 A. Okay. Let's turn our attention to page 3 of Exhibit No. 2.

14:51:35 Q. Okay. Let's turn our attention to page 3 of Exhibit No. 2 again.

14:51:41 A. Yes.

14:51:46 Q. Okay. Let's turn again to page 3 of Exhibit No. 2.

14:51:51 A. Okay. Let's turn again to page 3 of Exhibit No. 2 again.

14:51:56 Q. Okay. Let's turn our attention to page 3 of Exhibit No. 2.

14:52:01 A. Yes, sir.

14:52:06 Q. All right. Turning your attention to the fourth paragraph that commences with the phrase, the story underground is a change and a significant cost connected with it.

14:52:12 Q. Okay. Let's turn again to page 3 of Exhibit No. 2.

14:52:17 A. Yes.

14:52:22 Q. Okay. Let's turn again to page 3 of Exhibit No. 2.

14:52:27 A. Yes, sir.

14:52:32 Q. Okay. Let's turn our attention to page 3 of Exhibit No. 2.

14:52:37 A. Yes, sir.

14:52:42 Q. Okay. Let's turn again to page 3 of Exhibit No. 2.

14:52:47 A. Yes, sir.
<table>
<thead>
<tr>
<th>Time</th>
<th>Page 280</th>
<th>Page 281</th>
<th>Page 282</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:00:53</td>
<td>1 Q. And you utilized Change Order No. 1 as your example; is that correct?</td>
<td>15:05:13</td>
<td>1 to do it, but that there were at times mitigating circumstances when changes need to be pushed forward in order to maintain a critical item that was fundamental to the schedule.</td>
</tr>
<tr>
<td>15:00:56</td>
<td>2</td>
<td>15:05:17</td>
<td>2</td>
</tr>
<tr>
<td>15:00:57</td>
<td>3 A. Yes.</td>
<td>15:05:21</td>
<td>3</td>
</tr>
<tr>
<td>15:01:03</td>
<td>4 Q. Who prepared Change Order No. 1?</td>
<td>15:05:26</td>
<td>4</td>
</tr>
<tr>
<td>15:01:08</td>
<td>5 A. I'm not sure whether Petra did or the City.</td>
<td>15:05:31</td>
<td>5 Q. All right. So tell me which change orders, if any, that were prepared late by Petra on this project were subject to the mitigating facts that you just stated.</td>
</tr>
<tr>
<td>15:01:14</td>
<td>6 Q. All right. Well, this suggests that you know when you wrote this report that it was prepared by the City, doesn't it?</td>
<td>15:05:38</td>
<td>6</td>
</tr>
<tr>
<td>15:01:19</td>
<td>7 Q. Well, isn't that what you intended, sir?</td>
<td>15:05:43</td>
<td>7</td>
</tr>
<tr>
<td>15:01:22</td>
<td>8 A. Yes.</td>
<td>15:05:45</td>
<td>8</td>
</tr>
<tr>
<td>15:01:26</td>
<td>9 A. Well, it can be read that way, yes.</td>
<td>15:05:46</td>
<td>9 MR. WALKER: Objection. Lack of foundation.</td>
</tr>
<tr>
<td>15:01:32</td>
<td>10 Q. Well, isn't that what you intended, sir?</td>
<td>15:05:56</td>
<td>10 THE WITNESS: Well, obviously the Change Order 01 was such a change order. That had to be -- the work had to be done with some dispatch in order to allow the substructure to the building to move forward and subsequently the steel and the frame for the building, which were all on critical path positions in the schedule.</td>
</tr>
<tr>
<td>15:01:35</td>
<td>11 A. Yes.</td>
<td>15:06:04</td>
<td>11</td>
</tr>
<tr>
<td>15:01:42</td>
<td>12 Q. All right. But would I be correct in understanding that before you wrote this report, you didn't verify who prepared Change Order No. 1?</td>
<td>15:06:07</td>
<td>12</td>
</tr>
<tr>
<td>15:01:52</td>
<td>13</td>
<td>15:06:13</td>
<td>13</td>
</tr>
<tr>
<td>15:01:54</td>
<td>14 A. That would be a correct assumption.</td>
<td>15:06:22</td>
<td>14</td>
</tr>
<tr>
<td>15:02:01</td>
<td>15 A. All right. And if Petra prepared Change Order No. 1, and they were late submitting that to the City, that would make a significant difference in this aspect of your report, wouldn't it, sir?</td>
<td>15:06:28</td>
<td>15</td>
</tr>
<tr>
<td>15:02:09</td>
<td>16 A. Yes, sir. It would.</td>
<td>15:06:28</td>
<td>16</td>
</tr>
<tr>
<td>15:02:13</td>
<td>17 Q. And if Petra was late in preparing change orders and didn't prepare them until after work was already performed by the prime contractors, is it your contention as a construction manager that that's good practice for a construction manager?</td>
<td>15:06:31</td>
<td>17 Q. (BY MR. TROUT) Tell me what the critical path is.</td>
</tr>
<tr>
<td>15:02:18</td>
<td>18</td>
<td>15:06:34</td>
<td>18</td>
</tr>
<tr>
<td>15:02:34</td>
<td>19 Q. (BY MR. TROUT) Tell me what the critical path is.</td>
<td>15:06:43</td>
<td>19 A. Well, I haven't studied the schedule for some time, but it certainly leads through the foundation work into the main structure of the building, and then the problem of closing the building in so that interior work could be done after weather turned against the program.</td>
</tr>
<tr>
<td>15:02:41</td>
<td>20 A. Yes, sir. It would.</td>
<td>15:06:47</td>
<td>20</td>
</tr>
<tr>
<td>15:02:45</td>
<td>21 Q. (BY MR. TROUT) Tell me what the critical path is.</td>
<td>15:06:50</td>
<td>21</td>
</tr>
<tr>
<td>15:02:50</td>
<td>22 Q. (BY MR. TROUT) Tell me what the critical path is.</td>
<td>15:06:59</td>
<td>22</td>
</tr>
<tr>
<td>15:02:56</td>
<td>23 A. Yes, sir. It would.</td>
<td>15:07:06</td>
<td>23</td>
</tr>
<tr>
<td>15:03:08</td>
<td>24</td>
<td>15:07:12</td>
<td>24</td>
</tr>
<tr>
<td>15:03:13</td>
<td>25</td>
<td>15:07:22</td>
<td>25 Q. Okay. So am I correct in assuming that Lemley International has performed some kind of schedule analysis for this project?</td>
</tr>
<tr>
<td>15:03:16</td>
<td>26</td>
<td>15:07:26</td>
<td>1</td>
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<tr>
<td>15:03:24</td>
<td>27</td>
<td>15:07:28</td>
<td>2</td>
</tr>
<tr>
<td>15:03:27</td>
<td>28</td>
<td>15:07:33</td>
<td>3 A. I would be amazed if Mr. Bauert hadn't looked carefully at the schedule. The schedule is the most fundamental element of a construction project to understand.</td>
</tr>
<tr>
<td>15:03:31</td>
<td>29</td>
<td>15:07:39</td>
<td>4</td>
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<tr>
<td>15:03:38</td>
<td>30</td>
<td>15:07:45</td>
<td>5</td>
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<tr>
<td>15:03:46</td>
<td>31</td>
<td>15:07:46</td>
<td>6</td>
</tr>
<tr>
<td>15:03:54</td>
<td>32</td>
<td>15:09:47</td>
<td>7 MR. TROUT: Okay. Let's go off the record for a moment.</td>
</tr>
<tr>
<td>15:03:58</td>
<td>33</td>
<td>15:09:47</td>
<td>8</td>
</tr>
<tr>
<td>15:04:01</td>
<td>34</td>
<td>15:10:10</td>
<td>9 MR. WALKER: Can we take a break?</td>
</tr>
<tr>
<td>15:04:12</td>
<td>36</td>
<td>15:15:19</td>
<td>11 (Recess taken from 3:09 p.m. to 3:15 p.m.) MR. TROUT: Back on the record.</td>
</tr>
<tr>
<td>15:04:16</td>
<td>38</td>
<td>15:15:51</td>
<td>13 (Deposition Exhibit No. 612 marked.) Q. (BY MR. TROUT) Mr. Lemley, I'm going to hand you what has been marked as Exhibit No. 612.</td>
</tr>
<tr>
<td>15:04:19</td>
<td>39</td>
<td>15:15:56</td>
<td>14 MR. TROUT: And I'm going to apologize, Counsel. I haven't made extra copies. I'll make some at the break.</td>
</tr>
<tr>
<td>15:04:22</td>
<td>40</td>
<td>15:16:01</td>
<td>15</td>
</tr>
<tr>
<td>15:04:28</td>
<td>41</td>
<td>15:16:05</td>
<td>16 MR. TROUT: And I'm going to apologize, Counsel. I haven't made extra copies. I'll make some at the break.</td>
</tr>
<tr>
<td>15:04:31</td>
<td>42</td>
<td>15:16:11</td>
<td>17</td>
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<tr>
<td>15:04:37</td>
<td>43</td>
<td>15:16:12</td>
<td>18</td>
</tr>
<tr>
<td>15:04:41</td>
<td>44</td>
<td>15:16:12</td>
<td>19 Q. (BY MR. TROUT) Do you recognize the handwriting on Exhibit No. 612?</td>
</tr>
<tr>
<td>15:04:45</td>
<td>45</td>
<td>15:16:17</td>
<td>20 A. I think it's probably mine.</td>
</tr>
<tr>
<td>15:04:52</td>
<td>46</td>
<td>15:16:19</td>
<td>21 Q. All right. And I'm going to represent to you that these documents in No. 612 were provided to us in electronic format pursuant to the notice of deposition duces tecum under which you originally...</td>
</tr>
<tr>
<td>Time</td>
<td>Transcript</td>
<td></td>
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<td>--------</td>
<td>------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:16:44</td>
<td>1. appeared and under which you had represented to me</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:16:49</td>
<td>2. that all of the notes related to this project were</td>
<td></td>
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<tr>
<td>15:16:51</td>
<td>3. going to be provided.</td>
<td></td>
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</tr>
<tr>
<td>15:16:53</td>
<td>4. Do you recall that, sir?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:16:54</td>
<td>5. A. Yes.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:16:59</td>
<td>6. Q. Okay. You'll notice on the face of Exhibit</td>
<td></td>
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<tr>
<td>15:17:02</td>
<td>7. No. 612 --</td>
<td></td>
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</tr>
<tr>
<td>15:17:03</td>
<td>8. A. Yes.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:17:07</td>
<td>9. Q. -- that there have been portions of this</td>
<td></td>
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<tr>
<td>15:17:15</td>
<td>10. document covered with something in order to preclude</td>
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<td>15:17:16</td>
<td>11. our seeing it.</td>
<td></td>
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<tr>
<td>15:17:19</td>
<td>12. Do you recognize that?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:17:28</td>
<td>13. A. Well, I don't, no. I thought I had</td>
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<td></td>
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<tr>
<td>15:17:37</td>
<td>14. described earlier today that I had given -- my normal</td>
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<tr>
<td>15:17:46</td>
<td>15. activity in my office is to keep a pad on my desk, and</td>
<td></td>
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<tr>
<td>15:17:56</td>
<td>16. as issues come up, then I generally write notes to</td>
<td></td>
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<tr>
<td>15:18:17</td>
<td>17. remind myself, and I think when Mr. Bauer sorted these</td>
<td></td>
<td></td>
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<tr>
<td>15:18:33</td>
<td>18. out, he didn't redact everything that wasn't germane</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:18:38</td>
<td>19. to this case.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:18:42</td>
<td>20. Q. So did you instruct Mr. Bauer to redact</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:18:45</td>
<td>21. these documents?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:18:51</td>
<td>22. A. I told him to sort the documents out and</td>
<td></td>
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</tr>
<tr>
<td>15:19:03</td>
<td>23. send you all the documents that had to do with the</td>
<td></td>
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</tr>
<tr>
<td>15:19:10</td>
<td>24. Meridian/Petra matter, and that's what I thought he</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15:19:12</td>
<td>25. had done.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Time</th>
<th>Transcript</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:19:18</td>
<td>1. Q. Well, did you give him some instruction to</td>
</tr>
<tr>
<td>15:19:22</td>
<td>2. redact portions of the notes that you made?</td>
</tr>
<tr>
<td>15:19:27</td>
<td>4. Q. So that was Mr. Bauer's decision on his own?</td>
</tr>
<tr>
<td>15:19:36</td>
<td>5. A. Well, he may have had a -- he's had a reason</td>
</tr>
<tr>
<td>15:19:42</td>
<td>6. to do what he did, but I don't know what it is.</td>
</tr>
<tr>
<td>15:19:47</td>
<td>7. Q. All right. But these are your notes, your</td>
</tr>
<tr>
<td>15:19:49</td>
<td>8. handwriting; correct?</td>
</tr>
<tr>
<td>15:19:59</td>
<td>10. Q. Okay. If I could see the exhibit for just a</td>
</tr>
<tr>
<td>15:20:01</td>
<td>11. moment, sir?</td>
</tr>
<tr>
<td>15:20:31</td>
<td>14. MR. TROUT: Let's go off the record for just a</td>
</tr>
<tr>
<td>15:20:31</td>
<td>15. moment.</td>
</tr>
<tr>
<td>15:21:24</td>
<td>16. (Off the record.)</td>
</tr>
<tr>
<td>15:21:26</td>
<td>17. MR. TROUT: Back on the record, please.</td>
</tr>
<tr>
<td>15:21:27</td>
<td>18. Q. (By MR. TROUT): Turning your attention,</td>
</tr>
<tr>
<td>15:21:34</td>
<td>19. again, to page 3 of 12 of your report.</td>
</tr>
<tr>
<td>15:21:44</td>
<td>21. Q. In the last full paragraph, second sentence,</td>
</tr>
<tr>
<td>15:21:50</td>
<td>22. you say, &quot;Change order No. 1 for the management of</td>
</tr>
<tr>
<td>15:21:54</td>
<td>23. contaminated soil work was issued September 7 even</td>
</tr>
<tr>
<td>15:21:59</td>
<td>24. though the work was completed in May of '07,&quot;</td>
</tr>
<tr>
<td>15:22:01</td>
<td>25. Do you see that, sir?</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Time</th>
<th>Transcript</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:22:08</td>
<td>2. Q. Did you verify prior to signing the</td>
</tr>
<tr>
<td>15:22:14</td>
<td>3. affidavit and this report that the contaminated soil</td>
</tr>
<tr>
<td>15:22:20</td>
<td>4. work was completed in May of '07?</td>
</tr>
<tr>
<td>15:22:28</td>
<td>5. A. To the extent that Mr. Bauer reviewed and</td>
</tr>
<tr>
<td>15:22:32</td>
<td>6. verified that to me, yes, I checked to see.</td>
</tr>
<tr>
<td>15:22:40</td>
<td>7. Q. Okay. Now, what does it mean when you say,</td>
</tr>
<tr>
<td>15:22:45</td>
<td>8. to the extent that Mr. Bauer reviewed something and</td>
</tr>
<tr>
<td>15:22:46</td>
<td>9. verified it to you?</td>
</tr>
<tr>
<td>15:22:49</td>
<td>10. A. It means that he has read and studied the</td>
</tr>
<tr>
<td>15:22:54</td>
<td>11. issue and represents to me that what is in this</td>
</tr>
<tr>
<td>15:22:57</td>
<td>12. paragraph is what he found.</td>
</tr>
<tr>
<td>15:23:10</td>
<td>13. Q. Okay. Now, did you review Change Order</td>
</tr>
<tr>
<td>15:23:13</td>
<td>14. No. 1 prior to preparing your report?</td>
</tr>
<tr>
<td>15:23:15</td>
<td>16. Q. Why not?</td>
</tr>
<tr>
<td>15:23:21</td>
<td>17. A. I didn't think it was germane to the report.</td>
</tr>
<tr>
<td>15:23:39</td>
<td>18. Q. Okay. And help me understand why Change</td>
</tr>
<tr>
<td>15:23:46</td>
<td>19. Order No. 1 wasn't germane to the report?</td>
</tr>
<tr>
<td>15:23:53</td>
<td>20. A. Because it was extra work, and it was -- had</td>
</tr>
<tr>
<td>15:24:03</td>
<td>21. a significant -- significantly different thrust as</td>
</tr>
<tr>
<td>15:24:10</td>
<td>22. opposed to the building itself, which I thought was</td>
</tr>
<tr>
<td>15:24:19</td>
<td>23. the primary point of the dispute between the parties,</td>
</tr>
<tr>
<td>15:24:24</td>
<td>24. and that the contaminated soil was clearly recognized</td>
</tr>
<tr>
<td>15:24:32</td>
<td>25. as such and disposed of.</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Time</th>
<th>Transcript</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:24:43</td>
<td>1. Q. Okay. So let's turn to page 6 of 12 for a</td>
</tr>
<tr>
<td>15:24:44</td>
<td>2. moment.</td>
</tr>
<tr>
<td>15:25:17</td>
<td>4. Q. Okay. So you say in the middle of the last</td>
</tr>
<tr>
<td>15:25:25</td>
<td>5. paragraph, &quot;That the soil removal delayed the framing</td>
</tr>
<tr>
<td>15:25:26</td>
<td>6. of the building.&quot;</td>
</tr>
<tr>
<td>15:25:30</td>
<td>7. Do you see that, sir?</td>
</tr>
<tr>
<td>15:25:38</td>
<td>9. Q. Okay. So in order for us to understand what</td>
</tr>
<tr>
<td>15:25:46</td>
<td>10. you did, let me ask you the following questions: Can</td>
</tr>
<tr>
<td>15:25:53</td>
<td>11. you tell me what framing you're referring to?</td>
</tr>
<tr>
<td>15:25:57</td>
<td>12. A. The steel structure that supports the</td>
</tr>
<tr>
<td>15:26:03</td>
<td>14. Q. All right. And can you tell me who the</td>
</tr>
<tr>
<td>15:26:07</td>
<td>15. contractor was for the steel structure?</td>
</tr>
<tr>
<td>15:26:08</td>
<td>16. A. I believe it was Rule Steel.</td>
</tr>
<tr>
<td>15:26:14</td>
<td>17. Q. All right, sir. And what was Rule Steel's</td>
</tr>
<tr>
<td>15:26:20</td>
<td>18. contractual start date?</td>
</tr>
<tr>
<td>15:26:20</td>
<td>19. A. I don't know.</td>
</tr>
<tr>
<td>15:26:27</td>
<td>20. Q. Okay. Prior to your signing your affidavit</td>
</tr>
<tr>
<td>15:26:34</td>
<td>21. and issuing your report, did you verify what Rule</td>
</tr>
<tr>
<td>15:26:39</td>
<td>22. Steel's contractual start date was?</td>
</tr>
<tr>
<td>15:26:53</td>
<td>24. Q. Okay. With reference to Exhibits 86, 87,</td>
</tr>
<tr>
<td>15:26:59</td>
<td>25. and 88, can you tell me today what Rule Steel's start</td>
</tr>
</tbody>
</table>

30 (Pages 284 to 287)
<table>
<thead>
<tr>
<th>Time</th>
<th>Transcript</th>
</tr>
</thead>
<tbody>
<tr>
<td>15:27:02</td>
<td>date was?</td>
</tr>
<tr>
<td>15:27:11</td>
<td>A. No. I would have to go back and study the schedule and determine it from that.</td>
</tr>
<tr>
<td>15:27:23</td>
<td>Q. Okay. Would you agree with me, sir, that Petra was responsible for setting the schedule?</td>
</tr>
<tr>
<td>15:27:28</td>
<td>A. Yes. With the knowledge that they had at the time they set the schedule.</td>
</tr>
<tr>
<td>15:27:31</td>
<td>A. I referred him to the schedule, and from there he had to work.</td>
</tr>
<tr>
<td>15:27:34</td>
<td>Q. Okay. Would you agree with me, sir, that Petra was responsible for setting the start dates in the prime contracts in accord with Petra’s schedule?</td>
</tr>
<tr>
<td>15:27:52</td>
<td>A. I referred him to the schedule, and from there he had to work.</td>
</tr>
<tr>
<td>15:27:54</td>
<td>A. Mr. Bauer is not with me. I don’t -- I don’t recall him saying that.</td>
</tr>
<tr>
<td>15:28:19</td>
<td>Q. Okay. And if the contaminated soil was completed in May of 2007, Rule Steel’s work would not be impeded if they were contractually required to start in June of 2007; correct?</td>
</tr>
<tr>
<td>15:28:39</td>
<td>A. There is another step in that process, and that’s to construct the foundations about which the framing would rest.</td>
</tr>
<tr>
<td>15:28:41</td>
<td>A. I did nothing except instruct Mr. Bauer to do to verify whether or not Petra did that?</td>
</tr>
<tr>
<td>15:28:50</td>
<td>Q. Okay. And did you verify prior to writing your report when the foundation construction was started.</td>
</tr>
<tr>
<td>15:29:04</td>
<td>A. I didn’t.</td>
</tr>
<tr>
<td>15:29:09</td>
<td>A. Mr. Bauer did.</td>
</tr>
<tr>
<td>15:29:12</td>
<td>Q. Okay. Tell me when the foundation construction started?</td>
</tr>
<tr>
<td>15:29:16</td>
<td>A. Mr. Bauer is not with me. I don’t -- I don’t recall him saying that.</td>
</tr>
<tr>
<td>15:29:20</td>
<td>A. But I do recall he was in the office the day that you were interviewing him.</td>
</tr>
<tr>
<td>15:29:22</td>
<td>A. I referred him to the schedule, and from there he had to work.</td>
</tr>
<tr>
<td>15:29:32</td>
<td>Q. Okay. Would you agree with me, sir, that Rule Steel had to erect scaffolding.</td>
</tr>
<tr>
<td>15:29:46</td>
<td>A. I referred him to the schedule, and from there he had to work.</td>
</tr>
<tr>
<td>15:29:51</td>
<td>Q. Okay. Tell me, based upon what you have written here, how long Rule Steel was delayed from its anticipated start date.</td>
</tr>
<tr>
<td>15:29:56</td>
<td>A. Well, I guess I’ll have to study it a bit.</td>
</tr>
<tr>
<td>15:32:52</td>
<td>9 (Brief pause from 3:29 p.m. to 3:32 p.m.)</td>
</tr>
<tr>
<td>15:32:55</td>
<td>THE WITNESS: I think I would have to look at the schedule relative to the critical path to determine the potential for lost time.</td>
</tr>
<tr>
<td>15:33:01</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>15:33:06</td>
<td>Q. (BY MR. TROUT) Well, that’s exactly what Petra would have to have done in the spring of 2007, correct?</td>
</tr>
<tr>
<td>15:33:13</td>
<td>Q. (BY MR. TROUT) Well, that’s exactly what Petra would have to have done in the spring of 2007, correct?</td>
</tr>
<tr>
<td>15:33:46</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>15:33:48</td>
<td>Q. All right. And what, if anything, did you do to verify whether or not Petra did that?</td>
</tr>
<tr>
<td>15:34:06</td>
<td>A. I did nothing except instruct Mr. Bauer to be sure that we understood the critical path for the project and that these dates were proper dates.</td>
</tr>
<tr>
<td>15:34:11</td>
<td>Q. Okay. Which dates are you referring to?</td>
</tr>
<tr>
<td>15:34:17</td>
<td>A. I’m referring to all of these dates, particularly that influence the completion of the city hall primarily, and the ability to close it in so that interior work could be carried forward.</td>
</tr>
<tr>
<td>15:34:54</td>
<td>A. No. I would have to go back and study the schedule and determine it from that.</td>
</tr>
<tr>
<td>15:34:59</td>
<td>A. Yes. With the knowledge that they had at the time they set the schedule.</td>
</tr>
<tr>
<td>15:35:05</td>
<td>Q. Okay. Would you agree with me, sir, that Petra was responsible for setting the schedule?</td>
</tr>
<tr>
<td>15:35:12</td>
<td>A. Yes. With the knowledge that they had at the time they set the schedule.</td>
</tr>
<tr>
<td>15:35:14</td>
<td>Q. (BY MR. TROUT) Well, that’s exactly what Petra would have to have done in the spring of 2007, correct?</td>
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<tr>
<td>15:35:18</td>
<td>A. No. I would have to go back and study the schedule and determine it from that.</td>
</tr>
<tr>
<td>15:35:28</td>
<td>A. Because there was a lot of building design removal is the only delay that affected the framing.</td>
</tr>
<tr>
<td>15:35:33</td>
<td>Q. Okay. Would you agree with me, sir, that Rule Steel had to erect scaffolding.</td>
</tr>
<tr>
<td>15:35:37</td>
<td>A. Yes, but I don’t -- I don’t recall the specifics of the subject.</td>
</tr>
<tr>
<td>15:35:40</td>
<td>Q. Okay. Did somebody else?</td>
</tr>
<tr>
<td>15:35:45</td>
<td>Q. Well, tell me what design changes you think you verified prior to writing this report?</td>
</tr>
<tr>
<td>15:35:50</td>
<td>Q. The design changes that I think I verified prior to writing this report?</td>
</tr>
<tr>
<td>15:35:55</td>
<td>Q. Okay. Tell me when the foundation construction was started.</td>
</tr>
<tr>
<td>15:35:57</td>
<td>A. I didn’t.</td>
</tr>
<tr>
<td>15:36:07</td>
<td>Q. Yes, sir.</td>
</tr>
<tr>
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<td>Q. Okay. Would you agree with me, sir, that Rule Steel had to erect scaffolding.</td>
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<td>15:37:49</td>
<td>A. Yes, but I don’t -- I don’t recall the specifics of the subject.</td>
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<tr>
<td>15:37:52</td>
<td>Q. And do you know what those issues were?</td>
</tr>
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<td>15:37:55</td>
<td>Q. Okay. Tell me when the foundation construction was started.</td>
</tr>
<tr>
<td>15:38:11</td>
<td>Q. Yes, sir.</td>
</tr>
<tr>
<td>15:38:27</td>
<td>Q. All right. And what, if anything, did you do to verify whether or not Petra did that?</td>
</tr>
<tr>
<td>15:38:33</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>15:38:38</td>
<td>Q. All right. And what was the next activity?</td>
</tr>
<tr>
<td>15:38:52</td>
<td>Q. (BY MR. TROUT) Well, that’s exactly what Petra would have to have done in the spring of 2007, correct?</td>
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<td>15:39:02</td>
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<td>15:39:12</td>
<td>A. Yes. With the knowledge that they had at the time they set the schedule.</td>
</tr>
<tr>
<td>15:39:21</td>
<td>A. Yes. With the knowledge that they had at the time they set the schedule.</td>
</tr>
<tr>
<td>15:39:34</td>
<td>Q. Okay. Did somebody else?</td>
</tr>
<tr>
<td>15:39:43</td>
<td>Q. Okay. Tell me when the foundation construction was started.</td>
</tr>
<tr>
<td>15:39:44</td>
<td>Q. Okay. Tell me when the foundation construction was started.</td>
</tr>
</tbody>
</table>

The City of Meridian v. Petra, Inc., et al.
A. I said I don't know.

Q. Okay. Can you tell me when the mason was supposed to begin their work pursuant to Petra's master schedule to this project?

A. No.

Q. Turning your attention to page 7 of 12.

A. Yes, sir.

Q. Can you tell me whether TMC made a written claim and collected a substantial amount of money, and your approach that we saw in the paper and gaining productivity that they had achieved in doing the work.

A. I don't believe they did.

Q. Well, what I'm asking you to do as Petra's Hall, which I felt -- and I believe in my last liquidated damages and then having TCM go to somebody upon which you relied in forming your opinion about the delinquency.

Q. Okay. And tell me what your analysis would consist of, starting at the foundation and working up?

A. This is all a hypothetical --

Q. Tell me how you make that calculation.

A. Maybe a million-and-a-half going forward in a rational way. That's how we drew it all with respect to the administration of the TMC.

Q. Okay. And tell me what documents we had that we could read and that included a contract

A. The fact that they did not turn in a claim 15:46:24 consist of, starting at the foundation and working up?

Q. So let me re-ask the question so we can be more specific.

A. The fact that they did not turn in a claim

Q. Would I therefore be correct in understanding that based on your review, TMC did not incur added costs for inefficiency?

A. The fact that they did not turn in a claim number of time it would have been.

Q. Okay. Can you tell me whether TMC actually did or not TMC --

A. Well, I would have to say it wasn't a matter

Q. Tell me what your analysis would consist of, starting at the foundation and working up?

A. This is all a hypothetical --

Q. Tell me how much you think you would have doing and were not fighting with the City of Meridian in defense of a claim like that, tell me what you would do to analyze who was responsible for the delay.

Q. Okay. And tell me what your analysis would consist of, starting at the foundation and working up?

A. This is all a hypothetical --

Q. Tell me how much you think you would have doing and were not fighting with the City of Meridian in defense of a claim like that, tell me what you would do to analyze who was responsible for the delay.

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Q. Okay. And tell me what your analysis would consist of, starting at the foundation and working up?

A. This is all a hypothetical --

Q. Tell me how much you think you would have doing and were not fighting with the City of Meridian in defense of a claim like that, tell me what you would do to analyze who was responsible for the delay.

Q. Okay. And tell me what your analysis would consist of, starting at the foundation and working up?
A. Okay. Well, then -- I answered you then.
Q. I asked what specific documents did you rely on in drawing that conclusion?
A. Those three binders that we brought to you.
Q. Okay. I'd like you to turn your attention to Exhibits 86, 87, and 88, which are the three binders, and I'd like to have you identify for me which documents within each of those binders you relied upon for your opinion stated on page 7 of 12 of your report.
Q. When you say, 88, what do you mean, sir?
A. I mean I see in there that there was a normalized communication back and forth until it became mired in legal discussion at which time it turned into a legal process, I was concerned about the construction part of it, not the litigation at that time, and we were looking at --
Q. Is it your contention that the City of Meridian committed some kind of fraud?
A. I said I was relying on all of them.
Q. Every single document?
A. Yes. In the context of the total problem, I'm relying on the general tone of all these documents.

Q. When you say, 88, what do you mean, sir?
A. I don't have a specific document that I rely on. Normalized communication back and forth until it became mired in legal discussion at which time it turned into a legal process, I was concerned about the construction part of it, not the litigation at that time, and we were looking at --
Q. Is there any specific document directly relied upon for your opinion stated on page 7 of 12 of these documents?
A. No. 88, your notebook, are you relying on?
Q. Do you have any facts upon which you contend your opinion?
A. I speculated that. I didn't make that statement for the record.
Q. Well, you are on the record right now. Are you contending that the City of Meridian was involved in some kind of fraud related to Petra?
A. No.
Q. Do you have any facts upon which you contend the City of Meridian conducted some kind of fraudulent activity related to Petra?
A. No.
Q. Are you claiming in some fashion, based on your expertise and investigation in this case, that the City of Meridian conducted some kind of activity that was fraudulent with respect to Petra?
A. I'm contending that the City of Petra -- the City of Meridian created a circumstance where Petra was contracted to manage a job without having been given all the tools that they needed to oversee and do the job, and the fact that -- from my reading, I see nothing that suggests that the City of Meridian had any concern about the cost of the project after they signed the construction management agreement with Petra. They -- they may not have perpetrated a fraud, but they certainly did not do their duty to their constituents in terms of managing this project.
They let the money float out there until it got to $20 million. Nobody accepted any value engineering. It was a game of gotcha. Well, what does that mean? What does a game of gotcha mean? What professional definition of that do you have based on your experience as a construction management expert? A. Well, it's a situation where you draw somebody into a circumstance to do certain activities that are purported to be one way, and when it starts, suddenly the game changes. Q. Is it your contention as Petra's expert that the City of Meridian and its staff was more experienced in the construction of the Meridian City Hall Project than Petra and its staff? A. No. That's not -- that is not my contention.

Q. Is it your contention that Petra is an unsophisticated construction manager? A. That's not my contention either.

Q. Is it your contention that Petra expressed the City of Meridian? A. That's an over simplification of my view. It is my normal way of considering situations where I am being asked to opine that I understand exactly what happened, and I can honestly say in this situation I don't understand what actually happened in the construction of that city hall that drew the cost to $20 million.

Q. All right. That's fair. Let me ask you this question, Mr. Lemley: Is it your contention that Petra had the unilateral right to modify substantial completion dates for prime contractors on this project? A. Not without approval of the owner.

Q. All right. And is it your contention that Petra obtained the approval of the City of Meridian in writing for the modification of any substantial completion date for any prime contract on this project? A. I haven't read all the correspondence yet, so I don't know whether that was papered properly or not.

Q. Do you understand -- A. But I am going to find out.

Q. Do you understand, sir, that there were no modifications of the prime contracts allowed unless they were in writing and signed by the prime contractor and by the City of Meridian? A. Except the City of Meridian could go to the architect and tell the architect to incorporate some new feature into the work, and that would then back down on the construction manager and the general contractors.

Q. And the general contractors had a right under their contracts to request appropriately in writing changes in contract time and contract value; correct? A. They did, yes.

Q. All right. And if they failed to do that in the appropriate fashion, would you agree with me that it was Petra's responsibility to enforce the terms and conditions of the prime contract for the benefit of the City of Meridian? A. To the extent that they had the authority to do that. They did not, as I said, have the authority to manage the Lombard-Conrad architectural firm. They haven't been given that power. So the -- the nicest thing I can say about the City of Meridian is that they are incompetent to build a new city hall.
MR. TROUT: Tell me, sir, what was your role in this project?

A. It's my contention that it's likely that Petra provided the instructions to the construction manager along with a construction manager's billings.

Q. Okay. And you said just a few minutes ago that there was nothing that gave Petra the authority to manage the architect, is that correct?

A. I said that to have properly expected Petra the authority to manage the architect, there should have been an assignment from the City to Petra that gave them a legal authority to manage the work of the architect.

Q. Okay. So if I turn your attention to page 16, line 52, and I ask you to direct your attention to the fifth full paragraph where you quote the Petra contract to the construction manager along with a new instruction.

THE WITNESS: There is a -- an issue here, and it's ambiguous.

MR. WALKER: Objection. Asked and answered.

Q. All right, sir. Is it your contention as a direct management of the architect, and the contractor get the instructions simultaneously so they can be aware of what is appropriate and convenient to achieve the end result desired by the owner, “that that language doesn't give Petra the authority to manage the architect on behalf of the City of Meridian?”

THE WITNESS: It's ambiguous.

Q. (BY MR. TROUT) Well, tell me, sir, what language would you have recommended based on your professional experience to allow the City to authorize Petra to manage and coordinate the design for this project?

A. It's --

Q. (BY MR. TROUT) So please tell me what administration Petra gave them.

THE WITNESS: Petra would have assigned the architect's instructions to the construction manager along with a construction manager's billings, and the architect had weekly meetings with the architect, and they provided the architect, the general contractor's billings, and the architect had a legal authority to manage the architect rather than have somebody wandering through the architect's office every week or so to give them a new instruction.

MR. WALKER: Objection. Asked and answered.

Q. And who was it from the City of Meridian that you think was wandering through the architect's office every week or so to give them a new instruction?

A. The City of Meridian.

Q. Is it your contention that that's exactly what happened in this case?

A. I didn't say exactly. That's your word.

Q. No. Is it your contention that those facts occurred in this case?

A. It's my contention that it's likely that that's the way the architect's contract was administered outside of what Petra -- what

THE WITNESS: I think in the last day-and-a-half I immediately recognize, wouldn't you agree?

THE WITNESS: It's ambiguous.

MR. WALKER: Objection. Asked and answered.
16:26:46 1 that LCA approved every Petra billing?
16:26:46 2 A. No.
16:26:59 3 MR. TROUT: Okay. We are going to adjourn for
16:27:03 4 the day. We will coordinate with Mr. Walker for an
16:27:05 5 appropriate time to complete this deposition.
16:27:10 6 Mr. Walker, I'm going to ask that you
16:27:16 7 provide us with the unredacted copies of documents
16:27:20 8 from Mr. Lemley's files.
16:27:25 9 THE WITNESS: Those files are certainly open for
16:27:30 10 your review on anything that relates to the
16:27:35 11 Petra/Meridian situation, but there are certain notes
16:27:40 12 on there that relate to other projects I'm doing --
16:27:42 13 MR. TROUT: Well --
16:27:46 14 THE WITNESS: -- and those will be redacted.
16:27:50 15 MR. TROUT: With all due respect, kind sir, you
16:27:54 16 have the right to preserve confidentiality, but we
16:27:58 17 will ask that the unredacted files be cumulated into
16:28:03 18 some privileged log, and we will ask the Court to
determine whether or not what has been redacted
relates to this project or not without deference to
the judgment of your staff.
16:28:21 24 Thank you, Mr. Lemley. You have a good day.
16:28:24 25 THE WITNESS: What's left of it will be good,
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,
Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,
Defendant.

TO: THE ABOVE NAMED DEFENDANT AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE, that the hearing on Plaintiff's Motion to Dismiss which is currently scheduled to be heard on Wednesday September 15, 2010 at the hour of 3:30 p.m. is hereby vacated pursuant to the agreement between Court and Counsel, and will be heard on Thursday September 16, 2010 at the hour of 3:00 p.m. before the Honorable Ronald J. Wilper. The hearing is scheduled at the Ada County Courthouse located at 200 W. Front St., Boise, ID, 83702.

AMENDED NOTICE OF HEARING RE: PLAINTIFF CITY OF MERIDIAN'S MOTION TO DISMISS (IDAHO TORT CLAIMS ACT)
DATED this 13th day of September, 2010.

TROUT ∙ JONES ∙ GLEDHILL ∙ FUHRMAN, P.A.

By: 
Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609
Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

PLAINTIFF'S MOTION IN LIMINE RE: EXPERT TESTIMONY OF JACK K. LEMLEY

COMES NOW the City of Meridian (hereinafter referred to as "the City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and hereby moves this Court pursuant to Rules 7(b) and 26(e) of the Idaho Rules of Civil Procedure, for an order in limine to exclude testimony and documents of Jack K. Lemley.

This motion is based on the pleadings, records and files in this case and the Plaintiff's Memorandum in Support of its Motion in Limine Re: Expert Testimony of Jack K. Lemley and the Affidavit of Kim J. Trout dated September 13, 2010.

Oral argument is requested on this motion and is currently scheduled for September 27, 2010 at 1:30 p.m.
DATED this 13th day of September, 2010.

TROUT • JONES • GLEDHILL • FUHRMAN •
Gourley, P.A.

By: ________________________________

Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Hand Delivered □
U.S. Mail □
Fax ☒
Email □

Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION IN LIMINE RE: EXPERT TESTIMONY OF JACK K. LEMLEY

The Plaintiff City of Meridian (hereinafter referred to as the “City”), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Memorandum in Support of its Motion in Limine re: Expert Testimony of Jack K. Lemley.

As part of the evidentiary record in this matter on the pending motions for summary judgment, the Defendant Petra Incorporated (hereinafter referred to as “Petra”) submitted the Affidavit of Jack K. Lemley dated April 30, 2010. Putting aside the lack of a timely, advance disclosure of Mr. Lemley as an expert witness, the truly troubling aspect of Mr. Lemley’s Affidavit is that it appears not to be the expert testimony of Mr. Lemley, but rather the expert testimony of the combined corporate entity that is Lemley International. There is no authority under the rules for a consulting firm to assimilate the efforts of its various employees into a combined opinion of one
representative, in this case Mr. Lemley. For this reason, the City should be entitled to an order in limine prohibiting Mr. Lemley from acting as the conduit of the assimilated, collective opinions of Lemley International.

ARGUMENT

A review of the Affidavit of Jack K. Lemley dated April 30, 2010 reveals that a substantial portion of the foundation for his purported expert opinions, as well as the expert opinions themselves, are derived not from his own independent analysis but rather those of the employees of his company, Lemley International. For example, Mr. Lemley admits that his opinions were assisted in the formulation by "various [unnamed] employees of Lemley International as well as his own, self-qualified "expert in the field of construction, construction management, and engineering" Richard K. Bauer. (Lemley Aff., ¶ 4-6.) As Mr. Lemley states, "all of the opinions contained herein are based upon interviews conducted by me and Mr. Bauer and upon our review of the pertinent documents, which we have discussed in detail." (Lemley Aff., ¶ 7.) (Emphasis added.) The Lemley Affidavit then proceeds to detail the various individuals, documents, and sites that either Mr. Lemley or Mr. Bauer, or others, interview, reviewed, or viewed, without any identification as to which one undertook which action.

Thus, in reviewing the foundation for Mr. Lemley’s expert opinions, the City is left completely in the dark about who undertook which action in the preparation of Mr. Lemley’s ultimate opinion that “... Petra exercised ordinary and reasonable care ...” (Lemley Aff., ¶ 15.) Thus Mr. Lemley’s expert opinion is admittedly, to some degree, in reliance upon the interviews of various individuals conducted by others as well as other individuals review of documents and sites. The City is left without any disclosure as to whether, for example, Mr. Lemley is relying upon an interview he conducted, a transcript of an interview that was conducted by Mr. Bauer or Mr. Bauer’s account of an interview he conducted. Additionally, as Mr. Lemley’s Affidavit discloses that his
opinions are generated as a result of his collaboration with Mr. Bauer, the City is unable to discern which opinions are Mr. Lemley's and which are those of Mr. Bauer. 1

In fact, given the attempted qualification of Mr. Bauer by Mr. Lemley within his affidavit, it is not only a question of what information served as the foundation for the opinions to be expressed, but whether in fact Mr. Lemley is the one presenting the expert testimony in this matter. At its most basic, it is apparent that Petra is seeking to disclose Lemley International, not Mr. Lemley, as the expert witness in this matter. However, there is absolutely no authority which would permit a witness to provide expert testimony as the designee for an entity. To allow Mr. Lemley to be qualified as an expert witness in this matter would essentially be to permit Mr. Lemley to offer the combined expert opinions of both himself and Mr. Bauer. While the Idaho Rules of Evidence provide some latitude to the qualification and disclosure of an expert witness, that latitude does not extend so far as to make the rules of evidence disappear entirely in the preparation and presentation of expert testimony as would be the case if Mr. Lemley were to testify as an expert witness in this matter.

Mr. Lemley's expert opinion is not based upon his own analysis, or the expression of his own opinion, but rather represents the collective assembly, review and development of at least one identified, and numerous other unidentified, individuals at Lemley International. The disclosure of Mr. Lemley's opinion wholly fails to comply with any aspect of I.R.E. 703 and should not permitted to be presented at the trial of this matter.

While not yet complete, the deposition of Mr. Lemley has revealed numerous instances where Mr. Lemley was unable to provide the basis and foundation for various expressions of fact and opinion without needing further reference to, and consultation with, Mr. Bauer. 1

(See Affidavit of Kim J. Trout dated September 13, 2010, Exhibits “A” & “B”.)
CONCLUSION

For the reasons stated, the City requests that this Court grant its Motion in Limine re: Expert Testimony of Jack K. Lemley.

DATED this 13th day of September, 2010.

TROUT & JONES & GLEDHILL & FUHRMAN &
Gourley, P.A.

By:

Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Email

Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

CASE NO. CV OC 09-7257

MOTION IN LIMINE RE: EXPERT TESTIMONY OF BENNETT, COUGHLIN, AND FRANK

COMES NOW the City of Meridian (hereinafter referred to as “the City”), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and hereby moves this Court pursuant to Rules 7(b) and 26(e) of the Idaho Rules of Civil Procedure, for an order in limine to exclude testimony and documents of Jack K. Lemley.

This motion is based on the pleadings, records and files in this case and the Plaintiff's Memorandum in Support of its Motion in Limine Re: Expert Testimony of Jack K. Lemley and the Affidavit of Kim J. Trout dated September 13, 2010.

Oral argument is requested on this motion and is currently scheduled for September 27, 2010 at 1:30 p.m.
DATED this 13th day of September, 2010.

TROUT • JONES • GLEDHILL • FUHRMAN •
Gourley, P.A.

By: [signature]
Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Email

[signature]
Kim J. Trout
The Plaintiff City of Meridian (hereinafter referred to as "the City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Memorandum in Support of its Motion in Limine re: Expert Testimony of Bennett, Coughlin and Frank.

As part of the evidentiary record in this matter on the pending motions for summary judgment, the Defendant Petra Incorporated (hereinafter referred to as "Petra") submitted Affidavits from Eugene Bennett, Thomas Coughlin, and Jerald Frank, which, among other statements, contained the expressions of expert opinion as to certain key matters in this case. However, it is undisputed, and apparently conceded by Petra, that none of these individuals were ever disclosed as expert witnesses. As such, the City is entitled to an order in limine prohibiting
Messrs. Bennett, Coughlin, and Frank from presenting any expert testimony at the trial of this matter.

ARGUMENT

As noted by the City in its Motion to Strike the Affidavits of Bennett, Coughlin and Frank submitted in support of Petra's Motion for Summary Judgment, Interrogatory No. 16 of the City's First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions required that Petra disclose "each and every person Petra expects to call as an expert witness at any hearing or at trial" along with all the information required by I.R.C.P. 26(b)(4). See Trout Affidavit in Support of Plaintiff's Rule 56(j) Motion, ¶ 3-5 and Ex. A. Petra has never disclosed Messrs. Bennett, Coughlin, and Frank as expert witnesses in this matter. Trout Affidavit in Support of Plaintiff's Rule 56(j) Motion, ¶ 6. In fact, Petra has apparently conceded that Messrs. Bennett, Coughlin, and Frank will not be providing expert testimony at the trial in this matter. See Petra’s Memorandum in Opposition to Plaintiff’s Motion to Strike the Affidavits of Bennett, Coughlin, Frank, and Lee, page 3.

Taking Petra’s representation at its face value, the City nonetheless believes that an order in limine prohibiting any potential expert testimony given by these individuals at trial is nonetheless required. A review of the Affidavits of these individuals reveals that on numerous occasions, these individuals proceeded to provide more than just factual testimony, but additionally opined as to all manner of subjects exclusively within the purview of expert testimony. For example, Mr. Bennett proffers expert testimony on subjects such as, but not limited to, whether or not Petra performed its work as construction manager in accordance with the applicable standard of care and offers opinions about soil contamination and containment issues. (Affidavit of Eugene Bennett dated August 5, 2010 In Support of Petra’s Motion for Summary Judgment, ¶ 10, and 71-73.) Mr. Coughlin likewise opines that Petra “performed its work as Construction Manager in accordance with this standard of care.” (Affidavit of Thomas R. Coughlin dated May 5, 2010, ¶ 7.) Finally, Mr.
Frank also provides an expert opinion that "[a]t all times during the course of this project, Petra performed its work in accordance with the applicable standard of care for construction managers."

(Affidavit of Jerald S. Frank dated May 4, 2010 in Support of Petra Incorporated's Motion for Summary Judgment, ¶ 8.)

All of these opinions are expert opinions which should not be considered in the course of the summary judgment proceedings and, given their lack of disclosure as expert witnesses, should not be presented in the course of the trial of this matter. Accordingly, an order prohibiting Messrs. Bennett, Coughlin, and Frank from providing expert opinions at the trial of this matter should be entered.

CONCLUSION

For the reasons stated, the City requests that this Court grant its Motion in Limine re: Expert Testimony of Bennett, Coughlin, and Frank.

DATED this 12th day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦
Gourley, P.A.

By:

Kim J. Trout
Attorneys for Plaintiff
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Kim J. Trout

Hand Delivered
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated, by and through its counsel of record, Thomas G. Walker, will take the continued testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure,
of Ted Baird, on Tuesday the 5th day of October, 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.


COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,
Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,
Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING CONTINUED AUDIO-VIDEO DEPOSITION DUCES TECUM OF STEVEN J. AMENTO

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the continued testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of
Civil Procedure, of Steven J. Amento, on Wednesday the 6th day of October, 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley P.A. ("Trout Jones") for this matter;

2. All documents utilized by you in the rendering of your opinion in this matter;

3. Your personal notes, including in electronic and all other forms, regarding this matter;

---

1 "Documents" means the original, all copies and drafts of papers and writing of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

NOTICE OF TAKING CONTINUED AUDIO VIDEO DEPOSITION DUCES TECUM OF STEVEN J. AMENTO
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

12. All photographs related to this matter;

13. All billing records related to this matter;

---

3 The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 "Communications" mean any and all written or oral communications, including but not limited to inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. Copies of all drafts of your July 2, 2010 affidavit;

16. All agreements entered into between the City of Meridian and you related to this matter; and

17. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.


COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of
the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING THE CONTINUED AUDIO-VIDEO DEPOSITION DUCES TECUM OF TODD WELTNER

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the continued testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of

NOTICE OF TAKING THE CONTINUED AUDIO VIDEO DEPOSITION DUCES TECUM OF TODD WELTNER

618574
Civil Procedure, of Todd Weltner, on Thursday the 7th day of October, 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. (“Trout Jones”) for this matter;

2. All documents utilized by you in the rendering of your opinion in this matter;

3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee,

---

1 “Documents” means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 “This matter” references the new Meridian City Hall Project, which is the subject matter of this litigation.

NOTICE OF TAKING THE CONTINUED AUDIO VIDEO DEPOSITION DUCES TECUM OF TODD WELTNER

Page 2

618574

006306
consultant or agent assisting you in this matter;³

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars⁴ appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;⁵

9. All communications⁶ between you and any employee, consultant or agent of you and any person related to this matter⁷;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

12. All photographs related to this matter;

13. All billing records related to this matter;

³ The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.
⁴ Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.
⁵ This request is specific for the calendar appointments related to this matter.
⁶ "Communications" mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.
⁷ "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. Copies of all drafts of your May 24, 2010 affidavit and your Second Affidavit dated July 6, 2010;

16. All agreements entered into between the City of Meridian and you related to this matter; and

17. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010. COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of the within and foregoing Third Amended Notice of Taking Audio Video Deposition Duces Tecum was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail

THOMAS G. WALKER
Thomas G. Walker (ISB No. 1856)
Erika K. Klein (ISB 5509)
Mackenzie Whatcott (ISB No. 6774)
Matthew B. Schelstrate (ISB No. 8276)
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Direct Facsimile: (208) 639-5609
E-mail: twalker@cosholaw.com; eklein@cosholaw.com;
mwhatcott@cosholaw.com; mschelstrate@cosholaw.com

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF TIM PETSCHE

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Tim Petsche, on Friday the 8th day of October 2010, beginning at the hour of 10:30 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;

2. All documents utilized by you in the rendering of your opinion in this matter;

---

1 "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010. COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of

the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile:
☐ E-mail:

THOMAS C. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF NEIL ANDERSON

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Neil Anderson, on Monday the 25th day of October 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents1 provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;2

2. All documents utilized by you in the rendering of your opinion in this matter;

---

1 "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memorandum, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. All agreements entered into between the City of Meridian and you related to this matter; and

16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.    COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petco Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of
the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail  ☐ Hand Delivery  ☐ Overnight Courier
☐ Facsimile:  ☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD

Case No. CV OC 0907257

NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF RAY WETHERHOLT

THOMAS G. WALKER (ISB No. 1856)
ERIKA K. KLEIN (ISB 5509)
MACKENZIE WHATCOTT (ISB No. 6774)
MATTHEW B. SCHELSTRATE (ISB No. 8276)

COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518

Direct Phone: (208) 639-5607
Cell Phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: twalker@cosholaw.com; eklein@cosholaw.com;
mwhatcott@cosholaw.com; mschelstrate@cosholaw.com

Attorneys for Defendant/Counterclaimant, Petra Incorporated
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Ray Wetherholt, on Tuesday the 26th day of October 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;2

2. All documents utilized by you in the rendering of your opinion in this matter;

---

1 "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars\(^4\) appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications\(^6\) between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

\(^3\) The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

\(^4\) Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

\(^5\) This request is specific for the calendar appointments related to this matter.

\(^6\) "Communications" mean any and all written or oral communications, including but not limited to inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

\(^7\) "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.             COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of
the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile:
☐ E-mail:

THOMAS G. WALKER
Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: twalker@cosholaw.com; eklein@cosholaw.com;  
mwhatcott@cosholaw.com; mschelstrate@cosholaw.com  

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,  

Plaintiff/Counterdefendant,  

vs.  

PETRA INCORPORATED, an Idaho corporation,  

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING THE CONTINUED AUDIO-VIDEO DEPOSITION DUCES TECUM OF  
LAURA KNOTHE

TO:  PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the continued testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Laura Knothe, on Wednesday the 20th day of October, 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;^1^2

2. All documents utilized by you in the rendering of your opinion in this matter;

---

^1^ "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

^2^ "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
2. All documents utilized by you in the rendering of your opinion in this matter;

3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

---

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. Copies of all drafts of your July 6, 2010 affidavit;

16. All agreements entered into between the City of Meridian and you related to this matter; and

17. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010. COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

        Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

        Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF MIKE SIMMONDS

TO:       PLAINTiFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Mike Simmonds, on Tuesday the 19th day of October 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;

2. All documents utilized by you in the rendering of your opinion in this matter;

---

1 "Documents" means the original, all copies and drafts of papers and writing of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.


COSHO HUMPHREY, LLP

[Signature]

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of

the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail

Hand Delivery

Overnight Courier

Facsimile:

E-mail:

THOMAS G. WALKER

NOTICE OF TAKING AUDIO VIDEO DEPOSITION DUCES TECUM OF MIKE SIMMONDS

618553

Page 5
006334
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TecUM OF JASON NEIDIGH

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Jason Neidigh, on Wednesday the 27th day of October 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;

2. All documents utilized by you in the rendering of your opinion in this matter;

NOTICE OF TAKING AUDIO VIDEO DEPOSITION DUCES TECUM OF JASON NEIDIGH

1 "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. All agreements entered into between the City of Meridian and you related to this matter; and

16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.


COSHO HUMPHREY, LLP  

THOMAS G. WALKER  
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF LEE COTTON

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Lee Cotton, on **Thursday** the 28th day of **October 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents[^1] provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;[^2]

2. All documents utilized by you in the rendering of your opinion in this matter;

---

[^1]: "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

[^2]: "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. All agreements entered into between the City of Meridian and you related to this matter; and

16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010. COSHUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF LEO GEISS

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Leo Geiss, on Friday the 29th day of October 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents1 provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;2

2. All documents utilized by you in the rendering of your opinion in this matter;

---

1 "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010. COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petre Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,
Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,
Defendant/Counterclaimant.

Case No. CV OC 0907257

SECOND AMENDED NOTICE OF TAKING AUDIO-VIDEO DEPOSITION OF CHARLIE ROUNTREE

TO: PLAINTIFF/COUNTERDEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEYS OR RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated, by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral
examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of 
Charlie Rountree, on Monday, the 20th day of September, 2010, beginning at the hour of 9:00 
am., at the offices of Trout Jones Gledhill Fuhrman, P.A., 225 North 9th Street, Suite 820, Boise, 
Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary 
Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic 
record and which will be recorded by audio-video means, at which time and place you are 
notified to appear and take such part in said examination as shall be deemed just and proper. 

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules 
of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the 
following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP 
will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.


COSHO HUMPHREY, LLP

THOMAS G. WALKER  
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy
of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile:
☐ E-mail:

THOMAS G WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

TO:   PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated, by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral
examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of William L. Nary, on Wednesday, 22nd day of September, 2010, beginning at the hour of 10:30 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010. COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of the within and foregoing Amended Notice of Taking Audio Video Deposition was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF SERVICE OF DISCOVERY REQUESTS

NOTICE IS HEREBY GIVEN that on this 14th day of September, 2010, Defendant Petra Incorporated’s Twelfth Requests for Production of Documents dated September 14, 2010, together with a copy of this Notice of Service, were served upon counsel for Plaintiff/Counterdefendant, the City of Meridian as follows:

Thomas G. Walker (ISB 1856)
Mackenzie Whatcott (ISB 6774)
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell Phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: twalker@cosholaw.com; mwhatcott@cosholaw.com

Attorneys for Defendant, Petra Incorporated
Kim J. Trout
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile: 331-1529
☐ E-mail:

THOMAS G. WALKER
Petra Incorporated (“Petra”), by and through its attorney of record, Thomas G. Walker and pursuant to the Order Setting Trial and Other Deadlines and Rule 26(b)(4) of the Idaho Rules of Civil Procedure, hereby discloses the following expert witnesses for hearings and trial of this matter.
1. Jerald Scott Frank  
Petra Incorporated  
1097 N. Rosario St.  
Meridian, ID 83642  
(208) 343-4500

Pursuant to I.R.C.P. 26(b)(4)(i):

- **A complete statement of all opinions to be expressed.** Mr. Frank's opinions are stated in his affidavits dated April 7, 2010, May 4, 2010, May 20, 2010, and September 13, 2010, that were filed in this case and served on the City of Meridian ("Meridian" or "City") during these proceedings.

- **The basis and reasons for the opinions.** The basis and reasons for the opinions are set forth in Mr. Frank's affidavits, including his more than 30 years of experience in the construction industry.

- **The data or other information considered in forming the opinions.** The data or other information considered by the witness in forming the opinions is set forth in Mr. Frank's affidavits, including the Project Records.

- **Exhibits to be used as a summary of or support for the opinions.** Mr. Frank expects to have exhibits prepared for use at hearings and the trial of this case that summarize the opinions set forth in his affidavits. Copies will be provided to the Court and counsel as required by the Court.

- **Qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years.** Mr. Frank's qualifications are described in his affidavits filed in this case. Mr. Frank has not authored any publications regarding the construction industry within the preceding ten years.

- **Compensation.** Mr. Frank is not being compensated for his expert opinions given in this case. Mr. Frank is an employee of Petra and is receiving compensation for his personal services rendered for and on behalf of Petra.

- **Listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.** Mr. Frank has not testified as an expert at trial or by deposition within the preceding four years.
• Rebuttal. Mr. Frank may also provide expert rebuttal testimony and documents in response to evidence that the City of Meridian may put on.

2. Eugene R. Bennett
Petra Incorporated
1097 N. Rosario St.
Meridian, ID 83642
(208) 343-4500

Pursuant to I.R.C.P. 26(b)(4)(i):

• A complete statement of all opinions to be expressed. Mr. Bennett’s opinions are stated in his affidavits dated April 7, 2010, May 5, 2010, September 8, 2010 and September 13, 2010, that were filed in this case and served on the City of Meridian ("Meridian" or "City") during these proceedings.

• The basis and reasons for the opinions. The basis and reasons for the opinions are set forth in Mr. Bennett’s affidavits, including his more than 39 years of experience in the construction industry.

• The data or other information considered in forming the opinions. The data or other information considered by the witness in forming the opinions is set forth in Mr. Bennett’s affidavits, including the Project Records.

• Exhibits to be used as a summary of or support for the opinions. Mr. Bennett expects to have exhibits prepared for use at hearings and the trial of this case that summarize the opinions set forth in his affidavits. Copies will be provided to the Court and counsel as required by the Court.

• Qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years. Mr. Bennett’s qualifications are described in his affidavits filed in this case. Mr. Bennett has not authored any publications regarding the construction industry within the preceding ten years.

• Compensation. Mr. Bennett is not being compensated for his expert opinions given in this case. Mr. Bennett is an employee of Petra and is receiving compensation for his personal services rendered for and on behalf of Petra.
• Listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Mr. Bennett has not testified as an expert at trial or by deposition within the preceding four years.

• Rebuttal. Mr. Bennett may also provide expert rebuttal testimony and documents in response to evidence that the City of Meridian may put on.

3. Thomas R. Coughlin
3785 N. Farlight Place
Boise, ID 83713
(208) 991-8787

Pursuant to I.R.C.P. 26(b)(4)(i):

• A complete statement of all opinions to be expressed. Mr. Coughlin’s opinions are stated in his affidavits dated June 29, 2009, May 5, 2010 and September 13, 2010, that were filed in this case and served on the City of Meridian (“Meridian” or “City”) during these proceedings.

• The basis and reasons for the opinions. The basis and reasons for the opinions are set forth in Mr. Coughlin’s affidavits, including his more than 26 years of experience in the construction industry.

• The data or other information considered in forming the opinions. The data or other information considered by the witness in forming the opinions are set forth in Mr. Coughlin’s affidavits, including the Project Records.

• Exhibits to be used as a summary of or support for the opinions. Mr. Coughlin expects to have exhibits prepared for use at hearings and the trial of this case that summarize the opinions set forth in his affidavits. Copies will be provided to the Court and counsel as required by the Court.

• Qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years. Mr. Coughlin’s qualifications are described in his affidavits filed in this case. Mr. Coughlin has not authored any publications regarding the construction industry within the preceding ten years.
Compensation. Mr. Coughlin is not being compensated for his expert opinions given in this case. Mr. Coughlin is an independent contractor engaged by Cosho Humphrey, LLP to assist with the document production and analysis in this case.

Listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Mr. Coughlin has not testified as an expert at trial or by deposition within the preceding four years.

Rebuttal. Mr. Coughlin may also provide expert rebuttal testimony and documents in response to evidence that the City of Meridian may put on.

4. John E. Quapp
   Petra Incorporated
   1097 N. Rosario St.
   Meridian, ID 83642
   (208) 343-4500

Pursuant to I.R.C.P. 26(b)(4)(i):

A complete statement of all opinions to be expressed. Mr. Quapp and the staff at Petra are in the process of preparing calculations of the damages suffered by Petra because of the City’s breach of the Construction Management Agreement and breach of the covenant of good faith and fair dealing that are required to put Petra in the same position it would have occupied had Meridian not breached the Construction Management Agreement and covenant of good faith and fair dealing. Such damages include lost past and future earnings, lost business and investment opportunities and interest and finance charges. Mr. Quapp’s work is on-going because the damages continue to accrue. This disclosure will be supplemented from time to time as the calculations are completed and as required by order of the Court.

The basis and reasons for the opinions. The basis and reasons for the opinions consist of an analysis of Petra’s historical financial records and a study of the construction and development market in which Petra has conducted its business. This study is intended to measure the total market as compared with Petra’s market share, both historically and currently.

The data or other information considered in forming the opinions. The data or other information considered in forming the opinions include Petra’s historical financial
records and a study of the construction and development market in which Petra has conducted its business.

- **Exhibits to be used as a summary of or support for the opinions.** Mr. Quapp expects to prepare exhibits for use at hearings and the trial of this case that summarize his opinions. Copies will be provided to the Court and counsel as required by the Court.

- **Qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years.** Mr. Quapp is Petra’s Chief Financial Officer. He has a bachelor’s of science degree from San Diego State University with a major in accounting. Mr. Quapp has not authored any publications regarding the construction industry or accounting within the preceding ten years.

- **Compensation.** Mr. Quapp is not being compensated for his expert opinions given in this case. Mr. Quapp is an employee of Petra and is receiving compensation for his personal services rendered for and on behalf of Petra.

- **Listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.** Mr. Quapp has not testified as an expert at trial or by deposition within the preceding four years.

- **Rebuttal.** Mr. Quapp may also provide expert rebuttal testimony and documents in response to evidence that the City of Meridian may put on.


COSHO HUMPHREY, P.L.

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010 a true and correct copy of

the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,  

Plaintiff,  

vs.  

PETRA INCORPORATED, an Idaho corporation,  

Defendant.  

Case No. CV OC 0907257

SUPPLEMENTAL AFFIDAVIT OF THOMAS G. WALKER DATED SEPTEMBER 14, 2010

I, THOMAS G. WALKER, being first duly sworn upon oath, depose and state:
1. I am one of the attorneys of record for the Defendant, Petra Incorporated ("Petra"), in the above entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. Attached hereto is the original signed and notarized signature page to the affidavit of Eugene Bennett dated September 8, 2010 In Opposition to the City of Meridian's Motion to Dismiss.

[Signature]
THOMAS G. WALKER

SUBSCRIBED AND SWORN to before me this 14th day of September, 2010.

[Signature]
Pamela R. Carson
Notary Public for Idaho
Residing at Eagle, Idaho
My commission expires: March 31, 2016.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14th day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
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Boise, Idaho 83701

[Signature]
THOMAS G. WALKER

SUPPLEMENTAL AFFIDAVIT OF THOMAS G. WALKER DATED SEPTEMBER 14, 2010

Page 2

006366
23. Petra's claim arose on February 24, 2009, the date it was notified by letter that the City of Meridian would not pay Change Order No. 2.

EUGENE R. BENNETT

SUBSCRIBED AND SWORN to before me this 8th day of September, 2010.

MONICA POPE
NOTARY PUBLIC
STATE OF IDAHO


COSHO HUMPHREY, LLP
By: THOMAS G. WALKER
Attorneys for Petra Incorporated
The Plaintiff City of Meridian (hereinafter referred to as the “City”), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Reply Memorandum in Support of its Motion to Dismiss all claims asserted by Petra, Incorporated, (hereinafter referred to as “Petra”), regardless of how characterized, against the City based on Petra’s failure to comply with the pre-suit notification requirements of the Idaho Tort Claims Act, I.C. § 6-901 et seq. (“ITCA”).

Although originally filed as a motion to dismiss pursuant to I.R.C.P. 12(b)(6), the City has subsequently moved for summary judgment on the issue of Petra’s failure to provide the City with not only a timely required notification of a claim pursuant to the provisions of the Construction
ARGUMENT

A. Petra Wholly Failed to Submit a Timely Notice of Claim Pursuant to the Provisions of the ITCA.

There is no dispute from Petra that the City is a municipal corporation which is entitled to pre-suit notice under the ITCA. Rather, it is Petra’s apparent contention that it served a notice of claim upon the City on or about March 16, 2009, which purported notice was within 180 days of the alleged February 24, 2009 accrual of its claim against the City. However, at the outset, even putting aside the issue of timeliness Petra must concede that even this “purported” notice was not served as required by the ITCA. Pursuant to Idaho Code Section 6-906, any notice of claim must be served upon the City Clerk. Petra does not assert that it served its purported notice on the City Clerk, nor could it as the irrefutable evidence is that the City Clerk never received any notice of claim from Petra. (See Affidavit of Jaycee L. Holman dated August 30, 2010 filed in Support of Plaintiff’s Motion for Summary Judgment, ¶ 3.)

However, putting aside the clear lack of compliance with I.C. § 6-906, it is evident from the record present in these proceedings that Petra knew, or reasonably should have discovered, the existence of its claims against the City as early as January and as late as July of 2007. Once again this Court must be mindful that Petra’s claim for damages is premised upon the increase in the cost of...
the Meridian City Hall Project (hereinafter referred to as the "Project"). Accordingly, as Petra's claim for damages is premised upon the increase in cost, its claim for damages arose, or reasonably should have been known, upon Petra's first notice of the fact that the cost of construction exceeded the $12.2 Million identified in the CMA. As the Idaho Supreme Court recognized in *Mitchell v. Bingham Memorial Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997), "a claimant is not required to know all the facts and details of a claim because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement." See also *Magnuson Properties Partnership v. City of Coeur d'Alene*, 138 Idaho 166, 59 P.3d 971 (2002) (stating that "the 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time.").

As set forth in detail in the City's Memorandum in Support of Motion for Summary Judgment filed on September 1, 2010, as early as January of 2007 Petra began representing to the City that the estimated cost of construction was in excess of $12.2 Million ($16,867,220) and, more importantly, represented that Petra's construction management fee would remain unchanged regardless. (City's Memorandum in Support of Summary Judgment, pages 5-12)

Rather than present its claim for an increase in its construction management fee based on the increase in cost at that time as required by the CMA's express terms as well as the ITCA, Petra did nothing. A pattern of silence that it continued in the subsequent representations to the City occurring in February, April, and July of 2007. For this reason, the importance of a timely presentation of a claim, under either the ITCA or the CMA, is evident. Had Petra disclosed in January of 2007, or at anytime thereafter through July 2007, that it would seek a construction management fee in excess of that previously agreed, both parties would have been able to timely address, and potentially resolve, at least one issue of the dispute between the parties that would ultimately arise two years later.
As Petra rightly concedes, this is precisely the purpose to which the ITCA is aimed. (Petra Opposition, page 10.) One of the primary purposes of the ITCA is “to save needless expense and litigation by providing an opportunity for amicable resolution of the differences between parties.”

_Pounds v. Denison_, 120 Idaho 425, 426-27, 816 P.2d 982, 983-84 (1991). Petra failed to present a proper and timely notice to the City at a time when it knew, or should have reasonably discovered, it believed it had a claim against the City for an increase in the construction management fee given the increase estimated costs of construction that was actively generating.

“[I]t is clear that failure to comply with the notice requirement bars a suit regardless of how legitimate it might be.” _Driggers v. Grafe_, 148 Idaho 295, 297, 221 P.2d 521, 523 (Ct. App. 2009).

Petra did not provide a timely, compliant pre-suit notice to the City as required by the ITCA and its counterclaims against the City must be dismissed as a matter of law.¹

**B. The Notice Requirements of the ITCA Are Not Exempted by Counterclaims, Compulsory or Otherwise.**

Petra also asserts that its counterclaims should not be dismissed as the ITCA does not apply to counterclaims. Before addressing the substance of this assertion which finds no basis in either the ITCA or Idaho cases interpreting it, Petra’s argument is premised upon the assertion that its counterclaim was timely asserted on May 6, 2009. However, as noted above, Petra’s claims arose in January of 2007 and thus in no sense could the counterclaim be considered timely.

However, the more fatal deficiency to Petra’s assertion is that its argument that the pre-suit notification requirements of the ITCA finds no basis whatsoever in the language of ITCA or any Idaho case interpreting it. As Petra is ultimately forced to concede in its Memorandum in Opposition, the Idaho Supreme Court has not ruled that a counterclaim can comply with the notice-

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¹ Petra makes a curious comment in its Memorandum in Opposition, noting that it is asserting contract claims rather than tort claims in this matter. The character of Petra’s claims is of no import as it is well recognized that the statutory bar of the ITCA applies to all claims, in tort, contract or otherwise. _Sweitzer v. Dean_, 118 Idaho 568, 572, 798 P.2d 27, 31.

However, directly contrary to the conclusion of the Oregon Court in Urban Renewal Agency of the City of Coos Bay v. Lackey, 549 P.2d 657 (Or. 1976), supra, other jurisdictions have concluded that a counterclaim does not obviate the need for timely and compliant notice. See City of Racine v. Waste Facility Siting Bd., 575 N.W.2d 712, 713-714 (Wis. 1998) (holding that a notice of claim is a “necessary prerequisite to all actions brought against the entities listed in the statute, including governmental subdivisions, whether a tort or non-tort action, and whether brought as an initial claim, counterclaim or cross-claim.”); Nassau County v. Wolfe, 273 N.Y.S.2d 984 (N.Y. Dist.Ct. 1966) (holding that the “fact that it was the County which first initiated this litigation does not relieve the defendant from complying with [notice of claim provisions] where defendant seeks affirmative relief by way of a counterclaim” and “[t]he institution of this action by the County creates no waiver or estoppel to assert the requirements of these sections.”); Department of Transportation v. PSC Resources, 387 A.2d 393, 396 (N.J. Super. 1978) (joining those other jurisdictions which have “barred the assertion of counterclaims when the defendant has not previously complied with notice of claim provisions of municipal ordinances.”).

Moreover, Petra’s citation to the decisions of federal authorities is inapplicable as the Federal Tort Claims Act expressly provides that counterclaims, and other like pleadings, satisfy the notice requirement. 28 U.S.C.A. § 2675(a) expressly provides that “The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.” Accordingly, no guidance from the federal courts would be applicable given Petra’s citation to Harms Memorial Hosp. v. Morton, supra.
can be had where the federal statute differs from that enacted by the Idaho Legislature. See Knudsen v. Agee, 128 Idaho 776, 778-779, 918 P.2d 1221, 1223-1224 (1996) (Court would not look to federal court interpretation of the federal wiretap statutes for creation of “discovery exception” where similar state statute does not expressly contain a discovery exception like the federal statute).

There is no basis for the assertion that the ITCA exempts from its notice requirements claims presented to the City first raised in a counterclaim, even if the counterclaim could be considered as timely presented. Petra’s argument in this regard must be rejected as a matter of law.

C. The Application of the ITCA is Jurisdictional and Cannot be Waived.

As a final matter, Petra asserts that the City has waived non-compliance with the ITCA by its failure to include such as an affirmative defense in its original response to Petra’s Counterclaim. However, Petra acknowledges, as it must, that the Idaho Court of Appeals has already addressed the jurisdictional significance of prerequisite notice of the ITCA in Udell v. Idaho State Bd. Of Land Comm’rs, 119 Idaho 1018, 812 P.2d 325 (Ct. App. 1991). However, in acknowledging the applicability of the Udell decision, Petra somewhat disingenuously asserts that the holding of the Court was “that the State did not waive the defense of failure to comply with Idaho Tort Claims Act by not raising it in its answer.” (Memorandum in Opposition, page 20.)

Petra's characterization of the holding in Udell is simply not accurate. As the Court actually stated:

However, we have not found any case similarly interpreting the Idaho Tort Claims Act, nor do we find any prior appellate decision which would support the argument that such a waiver would be judicially recognized in Idaho. In our view, the sovereign immunity protected by the Act should not be dissipated by ad hoc waivers. Nor do we find that the State’s failure to raise its defense in its answer to Udell’s complaint, or at the earliest convenience, of any consequence. If the State is immune from liability because of a failure by the claimant to comply with the notice requirements of the Tort Claims Act, that immunity may be raised at any time.

a limited exception where the counterclaim is brought within the time limits imposed by the Tort Claims Act. As noted above, Petra’s assertions of its claims are not timely.
Petra's argument that the City waived its right to assert the defense of noncompliance with 
the presuit notification requirements of the ITCA is without merit and must be rejected.

CONCLUSION

For the reasons stated this Court should grant the City's Motion To Dismiss (Idaho Tort 
Claims Act, I.C. Section 50-219).

DATED this 14th day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

By: [Signature]
Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2010, a true and correct copy of 
the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker                                      Hand Delivered  
MacKenzie Whatcott                                      U.S. Mail      
COSHO HUMPHREY, LLP                                     Fax            
800 Park Blvd., Ste. 790                                 Fed. Express   
P.O. Box 9518                                           Email          
Boise, ID 83707-9518                                    
Fax: (208) 639-5609                                      

[Signature]
Kim J. Trout
The Plaintiff City of Meridian (hereinafter referred to as the “City”), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Reply Memorandum in Support of Plaintiff’s Motion to Strike the Affidavits of Bennett, Coughlin, Frank and Lemley.

While the specific objections, and the responses, as to various paragraphs of these individual’s affidavits is best reserved for oral argument in this matter, a few key points must be raised with regard to the evidentiary record presented by the Defendant Petra Incorporated (hereinafter referred to as “Petra”).
ARGUMENT

1. The Affidavits of Bennet, Coughlin, and Frank Should be Stricken to the Extent That They Attempt to Express Expert Opinions.

In response to the City’s Motion to Strike, Petra concedes that “Bennett, Coughlin, and Frank are not designated experts.” (Memorandum in Opposition, page 4.) In view of this admission, the Affidavits of Bennett, Coughlin and Frank should be stricken to the extent that they purport to express expert opinions. This would include, but be not limited to, Mr. Bennett’s proffered expert testimony on subjects such as, but not limited to, whether or not Petra performed its work as construction manager in accordance with the applicable standard of care and opinions about soil contamination and containment issues. (Affidavit of Eugene Bennett dated August 5, 2010 In Support of Petra’s Motion for Summary Judgment, ¶ 10, and 71-73.) Likewise, it would include Mr. Coughlin’s opinion that Petra “performed its work as Construction Manager in accordance with this standard of care.” (Affidavit of Thomas R. Coughlin dated May 5, 2010, ¶ 7.) Finally, it would require the striking of Mr. Frank’s Affidavit wherein he also provides an expert opinion that “[a]t all times during the course of this project, Petra performed its work in accordance with the applicable standard of care for construction managers.” (Affidavit of Jerald S. Frank dated May 4, 2010 in Support of Petra Incorporated’s Motion for Summary Judgment, ¶ 8.)

2. The Lemley Affidavit Should be Stricken in its Entirety Given its Utter and Complete Lack of Foundation.

A review of the Lemley Affidavit reveals that it is comprised entirely of the assimilated investigation, review, and analysis of not only Mr. Lemley, but also that of various disclosed (Richard K. Bauer) and undisclosed employees of Lemley International. For example, Mr. Lemley admits that his opinions were assisted in the formulation by “various [unnamed] employees of Lemley International as well as his own, self-qualified “expert in the field of construction, construction management, and engineering” Richard K. Bauer. (Lemley Aff., ¶ 4-6.) As Mr. Lemley
states, "all of the opinions contained herein are based upon interviews conducted by me and Mr. Bauer and upon our review of the pertinent documents, which we have discussed in detail." (Lemley Aff., ¶ 7.) (Emphasis added.) The Lemley Affidavit then proceeds to detail the various individuals, documents, and sites that either Mr. Lemley or Mr. Bauer, or others, interview, reviewed, or viewed, without any identification as to which one undertook which action.

Thus there is absolutely no foundation for any assertion or opinion expressed in the Lemley Affidavit as it is truly impossible to identify what information he has reviewed, analyzed, relied, and/or rejected in the presentation of his opinions in this matter. There is a complete want of foundation to Mr. Lemley's Affidavit and it must be stricken in its entirety.

CONCLUSION

For the reasons stated, the City requests that this Court grant its Motion to Strike the Affidavits of Bennett, Coughlin, Frank and Lemley.

DATED this 14th day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦
Gourley, P.A.

By: Kim J. Trout
Attorneys for Plaintiff
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
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800 Park Blvd., Suite 790
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Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Hand Delivered       U.S. Mail       Fax       Email
☐                  ☐                   ☐                   ☐

Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

NOTICE OF HEARING

TO: THE ABOVE NAMED DEFENDANT AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE, that the hearing on Plaintiff's Motion in Limine re: Expert Testimony of Jack K. Lemley and on Plaintiff's Motion in Limine re: Expert Testimony of Bennett, Coughlin, and Frank will be heard on Monday September 27, 2010 at the hour of 1:30 p.m. before the Honorable Ronald J. Wilper. The hearing is scheduled at the Ada County Courthouse located at 200 W. Front St., Boise, ID, 83702.
DATED this 14th day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

By:

Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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Kim J. Trout
Petra Incorporated ("Petra") submits this Memorandum in Opposition to the Motion for Partial Summary Judgment Re: Liability filed by the City of Meridian ("Meridian" or "City").
1. INTRODUCTION

The City filed its untimely motion for partial summary judgment on September 2, 2010. Despite accepting the Meridian City Hall with words of praise for Petra, the City now seeks to avoid paying Petra its earned Construction Management fee ("CM fee") by scouring through the history of the Project in an effort to find fault with Petra's performance as Construction Manager. Instead of addressing directly the issue of Petra's CM fee, the City has seized on alleged breaches of the Construction Management Agreement. The City's arguments ignore and misapply Idaho law on material breach, and gloss over issues of fact. Petra requests that the Court deny the City's Motion for Partial Summary Judgment.

2. LEGAL ANALYSIS

2.1 Petra did not breach Section 4.2 of the Construction Management Agreement and was honest in billing for the Development Strategies Phase.

The City alleges that Petra materially breached Section 4.2 of the Construction Management Agreement, which states:

Construction Manager shall carefully examine Owner's Criteria and consult with Owner and Architect in detail about the same in detail. Based on its review and consultations, and with the assistance of Architect, Construction Manager shall prepare and submit to Owner a written report detailing its understanding of Owner's Criteria and identifying any design, construction, scheduling, budgetary, operational or other problems or recommendations that may result from Owner's Criteria.

1 As a preliminary matter, the City has again ignored the deadlines set by this Court under its scheduling order. Pursuant to the Order Resetting Trial, all summary judgment motions are to be filed and heard no later than September 29, 2010. The City did not file a motion to enlarge time or a motion to alter or amend the scheduling order. Furthermore, to have the matter heard on or before September 29th, the last day the City could have filed its motion was September 1st. Rather than request leave of the Court, City again chooses to ignore the Order and schedule the hearing for October 4th - five days past the deadline.

2 Affidavit of Gene Bennett dated April 7, 2010 ("Bennett April 7 Affidavit") at ¶ 8, Exh. A.
Factually, the City’s allegation is difficult to grasp in light of the undisputed fact that the City never provided Petra with a discrete document setting forth the Owner’s Criteria. Section 3.2 of the Construction Management Agreement states: “Owner shall provide Construction Manager with Owner’s preliminary planning and programming information regarding the Project, including, but, not limited to, Owner’s purposes, concepts, desires and any design, construction, scheduling, budgetary or operational needs, restrictions or requirements, as the same may be amended from time to time (‘Owner’s Criteria’).” Providing a discrete document setting forth the Owner’s Criteria was a condition precedent to Petra providing a discrete written report in response. The City acknowledges in its brief that it did not provide the Owner’s Criteria, as stated in Gene Bennett’s testimony, “The owner didn’t provide us with the owner’s criteria, and Petra did not produce the report.”

Rather, the parties never contemplated that Petra would provide the type of written report that the City retroactively claims it was owed. As Gene Bennett testified, Petra met every two weeks with the City, the Architect, and Engineers during the Development Strategies Phase. Commencing in approximately April 2007, Petra presented periodic updates to the City that were reviewed by the Mayor, the City Council and City staff during the meetings of the Mayor’s Building Committee and City Council workshop meetings. And, Petra provided detailed monthly reports commencing in December 2007 and continuing through November 2008.

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3 Id.
5 Affidavit of Gene Bennett dated May 5, 2010 (“Bennett May 5 Affidavit”) ¶ 80.
6 Affidavit of Gene Bennett dated Sept. 13, 2010 (“Bennett Sept. 13 Affidavit”) at ¶64.
7 Id. ¶65.
development of the Owner's Criteria and the responses and reports generated by Petra and the Architect were the result of a collaborative effort among the parties that evolved over time.\(^8\) As Gene Bennett details in his affidavit: 

"There was never a point when a report could have been issued that would have been relevant and not immediately outdated."\(^9\) The Development Strategies Phase was ongoing and Petra addressed the City's evolving design, construction, scheduling, budgetary, operational issues in a series of meetings, reports, and other interactions.\(^10\)

Likewise, the City is incorrect in alleging Petra was dishonest in its billing for work done during the Development Strategies Phase. The City claims that because Petra did not provide the discrete written report, it should not have received its fee for the Development Strategies Phase in Pay Application No. 1.\(^11\) This argument ignores the reality of the Project as described above. It is simply not reasonable to argue that Petra did not earn its fee for its work during the Development Strategies Phase when it provided updates every two weeks and was responding on a near daily basis to the City's ever evolving and expanding plans.

In addition to being disconnected from the basic facts, the City's arguments regarding the written report and Petra's fee for Development Strategies Phase have no support in the law.

First, the City is estopped from raising these arguments at this late date. The time to raise the issue was prior to paying Petra its fee based on Pay Application No. 1. In other words, the City should not be allowed to now complain – four years later – that although the City paid Petra

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\(^8\) Affidavit of Eugene R. Bennett dated Sept. 20, 2010 ("Bennett Sept. 20 Affidavit") at ¶¶15, 17-19; Bennett May 5 Affidavit at ¶¶80-94.

\(^9\) Bennett Sept. 20 Affidavit at ¶ 16.

\(^10\) Id. at ¶ 17.

its fee with full knowledge of what had transpired prior to presenting Pay Application No. 1, that Petra had not provided a discrete written report, it was owed this report and that the failure to provide it is a material breach of the Construction Management Agreement. 12

Simply put, despite the City’s hyperbole, the City was always well-informed in all its decisions. This is a textbook example of why in the construction context the doctrine of waiver developed. As one court put it:

A party to a contract may waive, by express agreement or by its course of conduct, its legal right to strict performance of the terms of a contract. The waiver doctrine is intended to prevent the waiving party from lulling another into a false belief that strict compliance with a contractual duty will not be required and then suing for noncompliance.


Lastly, even setting aside the fact that there was a modification of terms of the Construction Management Agreement, Petra’s alleged failure to provide a single written report was not a material breach. Petra fully performed under the Construction Management Agreement. The City received a state-of-the-art, brand new building, built in accordance with the plans and specifications approved and accepted by the City’s officials. Despite Petra’s full performance, the City has not paid Petra for all of its services and reimbursable expenses. Yet, the City claims that Petra’s failure to prepare a single report – based upon a review of information that was not provided by City – constitutes a “material” breach of the contract. This claim is simply not supported by either the facts or law.

12 Bennett Sept. 20 Affidavit at ¶ 13.
In support of its argument, the City cites *J.P. Stravens Planning Associates, Inc. v. City of Wallace*, 129 Idaho 542, 928 P.2d 46 (Ct. App. 1996), but does not discuss the case or apply its legal principles to this case. The case law does not support City’s argument. “A substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract.” *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 699, 874 P.2d 506, 510 (1993). “A breach of contract is not material if substantial performance has been rendered.” *J.P. Stravens*, 129 Idaho at 545, 928 P.2d at 49 (citing *Mountain Restaurant Corp. v. ParkCenter Mall Associates*, 122 Idaho 261, 265, 833 P.2d 119, 123 (Ct. App. 1992). “Substantial performance is performance which, despite a deviation from contract requirements, provides the important and essential benefits of the contract to the promisee.” *Id.* A material breach of contract excuses the other party’s performance. *Id.* “Whether a breach of contract is material is a question of fact.” *Id.*

The evidence overwhelmingly supports a finding that Petra substantially performed its duties and responsibilities in this case. Petra completed the construction of the building, all certificates of occupancy were issued and the City has been occupying the Project since the temporary occupancy permits were issued on October 15, 2008. 13 The City held a grand opening ceremony on November 21, 2008 during which Mayor DeWeerd and Council President Charlie Roundtree publically praised Petra for its work. The City’s tardy claim that Petra did not provide a single written report is not material. Moreover, at a minimum, whether or not a breach is material is a question of fact. *J.P. Stravens*, 129 Idaho at 545, 928 P.2d at 49; *Independence*

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13 Bennett April 7 Affidavit at ¶¶87-92; Bennett May 5, 2010 Affidavit ¶ 102, Exh. 38.
Lead Mines Co. v. Hecla Mining Co., 143 Idaho 22, 28, 137 P.3d 409, 415 (2006). This was a $20+ million project that was completed more than a year ago. Going back in time to find instances where Petra allegedly did not cross every "t" or dot every "i" is why the doctrines of material breach and substantial completion exist in the construction context. See Bruner & O’Connor on Construction Law, § 18:12 (West 2002).

2.2 Petra correctly administered the Prime Contracts in accordance with its duties under the Construction Management Agreement.

Next, the City argues Petra failed in its duty to administer the Prime Contracts. The City’s analysis is flawed. First, the City waived its right to make these after-the-fact claims, years after the alleged breaches occurred and in direct contradiction to the City’s course of conduct. Second, the City’s argument glosses over key factual issues, ignoring the standard to be applied on summary judgment. Third, the alleged breaches are not material.14

Specifically, the City alleges Petra did not properly administer the Prime Contracts, particularly with regard to Rule Steel. The City alleges (1) Change Orders No. 1 and 2 for Rule Steel did not contain an extension of time, but "TBD" was added later by Petra; (2) there is no evidence in the record that Petra enforced the requirement that Rule Steel make a timely, written, and substantiated request for a time extension due to a weather delay; (3) Petra did not first apply Rule Steel’s delay against the built-in “float” of thirty days for the benefit of the City; (4) Petra waived the City’s right to collect no less than $15,000 in liquidated damages; (5) Petra did not

14 This is particularly true in light of the fact that the City is unable to quantify or even explain what damages it sustained as a result of the alleged breaches.
ensure that a Certificate of Substantial Completion was issued by the Architect for each Prime Contractor. These arguments lack merit.

2.2.1 The City has waived its right to make these claims.

First, as a general matter applicable to all of the City's arguments, each of these arguments is waived. Waiver is the "voluntary, intentional relinquishment of a known right or advantage." Brand S. Corp v. King, 102 Idaho 731, 734, 639 P.2d 429, 432 (2005). The waiver doctrine is intended to prevent a waiving party from lulling another into a false belief that strict compliance with contractual duty will not be required and then sue for nonperformance. See, Lake County Grading Co. of Libertyville v. Advance Mechanical Contractors, 654 N.E. 2d 1109, 1119 (Ill. Ct. App. 1995) (In building context waiving party should not be allowed to lull another party into noncompliance with contractual terms and then sue for nonperformance).

The Idaho Supreme Court has addressed an analogous situation in Obray v. Mitchell, 98 Idaho 533, 567 P.2d 1284 (1977). In Obray, a subcontractor sought payment for additional work it had performed at the request of the general contractor. 98 Idaho at 535, 567 P.2d at 1286. In defense, the contractor argued that the subcontractor was not entitled to be paid because he had not complied with certain provisions in the contract. Id. at 536, 567 P.2d at 1287. The subcontractor demonstrated that the contractor ignored the contractual requirements during the course of the contract. Id. In awarding additional compensation to the subcontractor for the extra work it had performed, the Court held that the contractor could not now insist on a contractual requirement he had had previously ignored. Id. The Court held the contractor waived these requirements and ordered him to pay the subcontractor for the additional
performed. *Id; see also, Swenson v. Lowe*, 486 P.2d 1120 (Wash Ct. App. 1971) (Contractor entitled to compensation for services rendered where owner waived strict requirement of contract terms during course of construction).

Each of the City’s arguments is waived. If the City had issues with Petra’s performance under the Construction Management Agreement with regards to how Petra enforced the Prime Contracts, it had numerous opportunities to voice those concerns. For example, Gene Bennett details how the pay applications for the Prime Contractors were handled:

(a) After compiling the pay application Petra would submit it to LCA on or about the 5th of the following month for their review and approval; (b) If LCA had any questions Petra would address them prior to LCA certifying the pay application, the Architects certification provided that the Work had progressed as indicated, the quality of the Work was in accordance with the contract Documents and that the Contractors and vendors were entitled to payment of the amounts certified; (c) The certified pay application was then delivered to Keith Watts, the City’s authorized representative and purchasing agent, for his and Councilman Keith Bird’s review and approval; (d) Any questions that the City would have would be addressed by discussion, email or a meeting prior to the City approving and dispersing the payments to the contractors and Petra.15

The City made its decisions with all available information at hand. The City has waived the right to go back years and argue that something was amiss. The City approved Petra’s conduct at every turn. And most importantly, the City occupied the Project and put it to beneficial use.16 The City has waived all the following arguments, which in any event lack merit, as will be discussed below.

15 Bennett Sept. 13 Affidavit at ¶ 84.
16 Bennett May 5 Affidavit at ¶ 102.
2.2.2 Petra correctly administered the Rule Steel Contract with regard to Rule Steel Change Orders No. 1 and 2.

The City has offered no evidence that Petra failed to properly administer Rule Steel's contract with regard to Change Orders No. 1 and 2. Instead, the City is inviting the Court to speculate in its favor based on the City's bare assertions.

As a preliminary matter, the City alleges that Change Order No. 1 and No. 2 were submitted to the City with "no additional time." These were then altered by Petra with the notation "To Be Determined." In support of this allegation, the City cites to the Affidavit of Steven J. Amento.17 Amento only speaks about Change Order No. 1.18 Therefore, nothing is before the Court regarding Change Order No. 2.

Therefore, the question is whether Petra handled Change Order No. 1 correctly and in conformity with any obligation it had under Section 7.2.4 of the Prime Contracts. Section 7.2.4 states "Any Change Order shall constitute final and full settlement of all matters relating to or affected by the change in the Work . . . ."19 In support of the allegation that Petra "failed to enforce this provision," the City proffers the testimony of Amento, their retained expert. This use of expert testimony puts the cart before the horse. The City cites no factual allegations in the record in support of the City's assertion. The City cites no factual evidence that Petra was not authorized to make the notation on the two versions of Change Order No. 1, or that anyone was misled by it. The City only offers the two documents, one with the relevant handwriting and one without, and then makes the allegation via its expert witness.

17 Affidavit of Steven J. Amento dated July 2, 2010 in Opposition to Defendant's Motion for Summary Judgment ("Amento Affidavit").
18 Id. at ¶ 24(c).
More importantly, the facts are otherwise. As Tom Coughlin details in his affidavit, the parties, including the City, were all aware that the timing issue "was in flux" and still needed to be addressed with regard to Rule Steel at a later date.\(^\text{20}\) There was no intent to deceive.\(^\text{21}\) This agreement with the City modified Section 7.2.4, to the extent it even applies. Again, the City leaps to a conclusion unsupported by the facts.

In fact, the City's argument with regard to Rule Steel Change Order No. 1 is emblematic of its entire approach to this case. The City imagines a world where a 20+ million dollar public works project, involving at least 53 contractors and hundreds of change orders, ASIs and RFIs proceeds to the very letter of each of the multiple standard form contracts. This defies common sense and simply ignores the reality of the construction world: "Construction, even on a normal and seemingly routine project, is an extraordinarily complex process — rarely proceeding as planned' in strict conformance with the requirements of contract documents; subject to a 'range of reasonably expected adverse conditions' requiring skillful coordination of numerous tradesman; subject to changes invoked under agreements of the parties or due to conditions beyond the control of the parties ...." Bruner & O'Connor on Construction Law.

2.2.3 Petra received written requests from Rule Steel for time extensions

The City has offered no evidence that Petra did not "require timely, written, and legitimate request for delay." Evidence in the record suggests Petra did receive written requests from Rule Steel. The City makes an allegation that no such request from Rule Steel exists and then cites to a paragraph in its counsel's affidavit indicating he was unable to locate such a

\(^{20}\) Affidavit of Thomas Coughlin dated September 20, 2010 (Coughlin September 20, 2010 Affidavit) at ¶ 12-18.
\(^{21}\) Id. at ¶19.
document. As Tom Coughlin states in his affidavit, Rule Steel made written requests for time extensions.\footnote{Coughlin September 20, 2010 Affidavit at ¶ 11, 27.} Tom Coughlin testified that Petra received written notice from Rule Steel.\footnote{See Affidavit of Thomas G. Walker dated September 20, 2010 at Exhibit A; Coughlin depo: 37:15-42:17, Feb, 26, 2010.} The City’s allegation is contrary to the facts.

\subsection*{2.2.4 Petra correctly addressed the provisions of Section 8.3.1 in the Prime Contracts.}

The City argues that Petra did not address the provisions of Section 8.3.1 in the Prime Contracts. Although the City cites nothing other than the contract itself to support this factual allegation, it appears to be based on Mr. Amento’s affidavit. Mr. Amento alleges, without any basis in fact or even a purported basis in fact, that Petra recommended an extension to Rule Steel “without making an adjustment for the 30-days float allowance as required by contract.”\footnote{Amento Affidavit at ¶ 24(b).} Mr. Amento then recites Section 8.3.1 and moves on to other issues.\footnote{\textit{Id.}} In other words, in asking for summary judgment with respect to Petra’s breach in failing to address Section 8.3.1, the City offers no evidence, other than to say there is no “evidence in the record that Petra even attempted to apply § 8.3.1.” The City is the plaintiff in this case and has the burden of proof at trial. \textit{O’Connor v. Harger Const., Inc.}, 145 Idaho 904, 910, 188 P.3d 846, 852 (2008). As the moving party on summary judgment, “the initial burden of establishing the absence of a genuine issue of material fact rests with that party.” \textit{Thomson v. Idaho Ins. Agency, Inc.}, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). The City has failed in its burden.
More importantly, neither Mr. Amento nor the City’s representatives understand how “float” is defined in the Prime Contracts or how the concept of a “float” functions in a project like this one. Section 8.3.1 of the Prime Contract states: “The Owner and Contractor acknowledge and agree that the critical path construction schedule for the Project incorporates not less than thirty (30) days of ‘float’ for owner caused delays and that an extension of time is warranted only if events identified above cause delay on the critical path in excess of such float days.” A “float is ‘owned by the project’ rather than by either the contractor or the owner . . . .” Bruner & O’Connor on Construction Law 15:9 (West 2002).

Here, the 30 day float was consumed by the delays that had already occurred for unforeseen conditions.\textsuperscript{26} By the time Rule Steel started, the Project had already been delayed.\textsuperscript{27} As detailed by Tom Coughlin in his affidavit, the 30-day float issue was not applicable to the Rule Steel change orders.\textsuperscript{28} Again, the City’s argument is contrary to the undisputed facts and to any reasonable interpretation of the relevant contracts.

\textbf{2.2.5 Petra obtained all allowable Liquidated Damages on behalf of the City}

The City argues that Petra’s alleged failure to apply Section 8.3.1 to the Rule Steel liquidated damage analysis resulted in a “wrongful waiver by Petra of not less than $15,000 in liquidated damages.” Again, the City does not provide any factual support for this assertion. It appears to stem from Mr. Amento’s affidavit. Amento is of the opinion that Rule Steel should have been assessed more liquidated damages.

\textsuperscript{26} Coughlin Affidavit at ¶ 30-31
\textsuperscript{27} Id. at ¶ 30.
\textsuperscript{28} Id. at ¶ 28-31.
The City glosses over the analysis given the City by Tom Coughlin and the fact that the City agreed with the terms of the Rule Steel settlement.\(^{29}\) Coughlin’s communications with the City are in the record.\(^{30}\) The City agreed with Coughlin’s recommendations.\(^{31}\) The City provides no indication or analysis as to how Petra waived $15,000 in liquidated damages. It is one thing for the City in November of 2007 to take issue with Petra’s analysis of the Rule Steel situation when it comes up, it is quite another to take issue with it almost three years later, and after accepting and occupying the Project. Rule Steel was one of 53 contractors who worked on the Project. Rule Steel was assessed liquidated damages in a manner Petra considered appropriate and that the City approved with full knowledge of all relevant circumstances. As Richard Bauer details in his affidavit, Petra’s handling of all potential liquidated damages was within the standard of care.\(^{32}\)

As addressed above, by accepting Petra’s assessment of the Rule Steel situation and moving forward, the City waived its right to object to Petra’s conduct. Even if it was objectionable on some grounds, the City does not even explain how it could constitute a material breach of the Construction Management Agreement.

2.2.6 Petra fulfilled its duties with regard to ensuring Substantial Completion of the Project.

The City argues that Petra breached the Construction Management Agreement by failing to ensure the Architect delivered a Certificate of Substantial Completion to the City for each of the Prime Contractors. It is important to note carefully what the City argues here. The City does

\(^{29}\) Id. at ¶¶ 13-23.
\(^{30}\) Id. at ¶ 22, Exh. 11.
\(^{31}\) Id. at ¶¶ 13-23.
not argue that any of the Prime Contractors failed to achieve Substantial Completion. The City only argues that Petra apparently failed to ensure that the Architect delivered a Certificate of Substantial Completion for each of the Prime Contractors.

Thus, despite the fact that the City accepted the Project when it was completed, despite the City making final payment to each of the Prime Contractors, despite the City agreeing with Petra and the Prime Contractors regarding the substantial completion dates, the City now wants to argue that because Architect failed to deliver certain certificates, Petra is in breach of the Construction Management Agreement. This argument lacks merit for a number of reasons.

First, Petra did not have a duty under the Construction Management Agreement to deliver certificates of substantial completion. Again, Petra’s duties must arise from the Construction Management Agreement. The City cites Section 4.7.1, which provides that “Construction Manager shall have and perform those duties, obligations and responsibilities set forth in the construction agreements [Prime Contracts] between Owner and each Contractor.” Therefore, with this reference, the Construction Management Agreement imposes on Petra as Construction Manager those duties imposed on it by Prime Contracts. But the Prime Contracts impose no such duty, nor does any other document.

The City’s interpretation of Section 9.8.2 of the Prime Contract is erroneous. This section does not impose an affirmative duty on Petra to deliver the certificates of substantial completion. Section 9.8.2 states:

When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion . . . . The Certificate of Substantial
Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate.

This language imposes this duty on the Architect, not Petra.

Furthermore, Petra was not given the authority to legally compel the Architect to do anything. The relevant contractual document is the Professional Services Agreement, entered into between the City and the Architect, LCA, on July 11, 2006. The LCA Agreement was never assigned to Petra. In other words, the City did not designate Petra as its authorized representative vis-à-vis the Architect. The LCA Agreement does not include a provision stating that the Construction Manager will administer the LCA Agreement. This would be customary if in fact the City wanted the Construction Manager to control the design of the Project, which it did not. Instead, the City chose to retain control over the design and did not make Petra the City's agent with regard to the Architect.

Therefore, the contractual relationship between Petra and the Architect is encapsulated in paragraph 3.3 of the Construction Management Agreement. This section states: "Construction Manager shall consult and coordinate with Architect as needed to fulfill its duties hereunder, and shall assist the Architect as need [sic] for Architect to fulfill its duties to Owner under the Architectural Agreement." The only authority the City cites for its argument that Petra had a duty to compel the Architect to deliver the certificates to the City is a section of a Construction Management Plan that is not a contract and does not grant any authority even if it was a contract.

33 Bauer Sept. 13 Affidavit at ¶22.
34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
This document simply outlines methods and procedures that may be utilized by Petra as Construction Manager. There is no reasonable reading of this section that would lead to the conclusion that it created a legal right on the part of Petra to command performance by the Architect regarding the certificates of substantial completion. This type of relationship was specifically not intended by the City. The contractual relationships between the parties should be determined with reference to contract documents (the Construction Management Agreement and the LCA Professional Services Agreement), not with reference to methods and procedures handbooks.

Therefore, the City’s contorted reading of various agreements and documents does not withstand scrutiny. Petra had no affirmative duty under either the Construction Management Agreement or any of the Prime Contracts to command the Architect to deliver the certificates of substantial completion. In any event, the City’s point is immaterial. Substantial Completion was achieved by each of the Prime Contractors on a date – October 15, 2008 – agreed upon by all parties, including the City.39 The City mischaracterizes substantial completion. It is not “achieved when the Architect has prepared ‘a certificate of Substantial Completion which shall establish the date of Substantial Completion . . . ‘”40 On the contrary, substantial completion is “the stage in the progress of the Work as certified in writing by the Construction Manager and Architect when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended

39 Bennett Sept. 20 Affidavit at ¶ 22.
40 The City’s Memorandum in Support of Motion for Partial Summary Judgment Re: Liability at pg. 9 (emphasis removed).
Notably, the Meridian City Hall was substantially completed on October 15, 2008, a date agreed upon by all parties. Likewise, the Prime Contractors with the exception of Rule Steel each achieved substantial completion.

Second, even if it were true that Petra had the duty to ensure that the Architect deliver the certificates of substantial completion, any failure by Petra to do so would not be a material breach of the Construction Management Agreement. As stated above, "a substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 699, 874 P.2d 506, 510 (1993). "Substantial performance is performance which, despite a deviation from contract requirements, provides the important and essential benefits of the contract to the promisee." *J.P. Stravens Planning Associates, Inc. v. City of Wallace*, 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct. App. 1996).

The City quickly jumps to the language in the Prime Contracts, but the focus should be on the terms of the Construction Management Agreement. The City's "objective for the Project is to develop a new cost efficient city hall facility and public plaza on the Site." The City retained Petra "to help it achieve the objectives set forth in Section 3.1 above by managing and coordinating the design and construction of the Project on behalf of the [City]." This was the purpose of the Project. Any failure to ensure that the Architect delivered certificates of substantial completion for prime contracts, even if this can be considered a duty of Petra, is not a material breach of Petra's duty under Section 4.7.1. The Project was completed. All certificates

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42 Bennett Sept. 20 Affidavit at ¶ 22.
43 Bennett Sept. 20 Affidavit at ¶ 23.
of occupancy were issued and City has been occupying the Project since the temporary occupancy permits were issued on October 15, 2008.\textsuperscript{44} The City held a grand opening ceremony on November 21, 2008, during which it praised Petra for its work.

Therefore, even if Petra was at fault for failing to ensure delivery of the certificates of substantial completion, Petra did not materially breach the Construction Management Agreement. At a minimum, this is a question of fact. \textit{See Ervin Construction}, 125 Idaho at 702, 874 P.2d at 513. On summary judgment, construing the facts in favor of the non-moving party, the Court should deny the City’s motion with respect to the Certificates of Substantial Completion and Petra’s liability.

\textbf{2.2.7 Petra fulfilled its duty to protect the City from defective or deficient Work.}

The City accuses Petra of not protecting the City against defective or deficient work. The City does not actually identify a single defect in materials and workmanship, rather it simply refers the Court to affidavits previously filed by City with the expectation that the Court will find the evidence to which it is referring. In any event, whatever defects the City has allegedly discovered fall within the warranties.\textsuperscript{45} Items identified after the punch list inspection are resolved under the warranties.\textsuperscript{46} Once the building is turned over to the owner, the owner is responsible for administering the warranties.\textsuperscript{47} Petra did not have any responsibility under the Construction Management Agreement to administer the warranties.\textsuperscript{48}

\textsuperscript{44} Bennett April 7 Affidavit at ¶87-92; Bennett May 5, 2010 Affidavit ¶102, Exh. 38.
\textsuperscript{45} Bauer Sept. 13 Affidavit at Exh. 504.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Bauer Sept. 13 Affidavit at ¶34.
The City’s repeated allegations regarding defects stem from a misunderstanding of a construction manager’s role and Petra’s contractual duties under the Construction Management Agreement. A construction manager is not liable for every defect (patent or latent) that may manifest itself months after a project is completed. This is the reason for warranties. An agency construction manager not-at-risk observes the work while it’s underway, monitors its progress, checks for consistency with the contractor’s pay applications, checks for consistency with the contractor’s reports of scheduled progress, notes safety issues, and gathers information for coordinating between contractors. If the construction manager observes an apparent defect, he may contact an inspector to do a technical inspection. The City kept the right and obligation to conduct inspection and testing.

2.2.8 The City’s claim that Petra had a fiduciary duty to the City is contrary to the intent of the parties, the standards applicable to construction managers and relevant law.

Lastly, the City persists in its argument, both here and now apparently in seeking punitive damages, that Petra owed the City a fiduciary duty. This assertion ignores significant problems inherent in the language of the Construction Management Agreement. Despite the appearance of the phrase “trust and confidence,” the parties did not intend a fiduciary relationship. The language of the Construction Management Agreement does not support this conclusion. Petra’s representatives have testified they never intended this relationship, which is relevant in interpreting this ambiguous language. Further, the City drafted the document and this ambiguity should be interpreted against the City.

49 Bauer Sept. 13 Affidavit at ¶ 32.
50 Id.
51 Id.
The City focuses on the words “trust and confidence” in Section 1.1. But these words must be read in the context of the entire agreement. Section 1.1 also states: “Construction Manager further covenants that Construction Manager will perform its services under this Agreement, in the exercise of ordinary and reasonable care and with the same degree of professional skill, diligence and judgment as is customary among construction managers of similar reputation performing work for projects of a size, scope and complexity similar to the Project.” This language does not describe the heightened duties of a fiduciary.

Even more importantly, Section 2.8 states: “Construction Manager acknowledges that it is an independent contractor and not an employee or agent of Owner” (emphasis added). In other words the Construction Management Agreement contains a term of art often used the fiduciary context, but goes on to describe a standard relationship, and then states Petra is not even an agent of the City, but only a mere independent contractor. This confusing language, drafted by the City, does not support the City’s simplistic assertion that a fiduciary relationship was created in this agreement. At a minimum, the Construction Management Agreement is ambiguous on this point. As such, it should be construed against the drafter.

Furthermore, Petra did not intend to enter into a fiduciary relationship. As testified to in the affidavits of Jerald S. Frank and Eugene R. Bennett, the words “trust and confidence” refer only to the standard commercial relationship that exists between an owner and an agency construction manager not-at-risk. “Owners don’t do business with construction managers they don’t trust and have confidence in, and construction managers don’t represent owners that they
don't trust and have confidence in.” In other words, the relationship of trust and confidence is reciprocal.52

The understanding of Messrs. Frank and Bennett is confirmed by Richard Bauer, who states in his affidavit that –

The relationship established by and the duties and responsibilities described in the foregoing paragraph [paragraph 1.1 of the Construction Management Agreement] express the standard commercial relationship that exists between an owner and an agency construction manager not-at-risk.

Lastly, the course of conduct of the parties does not indicate a fiduciary relationship was contemplated by the parties. As Richard Bauer details:

Petra’s duties and responsibilities were limited by the terms and conditions of the Construction Management Agreement. For instance, Petra’s scope of services under the Construction Management Agreement did not include acting as the City’s agent with regard to the architects. Rather, Petra’s responsibility was to “consult and coordinate with the architect as needed.” See Construction Management Agreement at 3.3. In addition, Petra did not have any inspection or testing responsibilities. Petra’s duty was to observe the Work of the contractors hired directly by the City. Further, I have concluded from my review of the affidavits and legal memoranda filed by Meridian that the City is attempting to greatly expand the duties and responsibilities Petra undertook as an agency construction manager not-at-risk. Importantly, Petra was only required to act on the City’s behalf with regard to the construction contracts.53

Therefore, the City is attempting to over-simplify this case by repeatedly claiming that a fiduciary relationship existed. At a minimum, this is a factual issue. And, for purposes of punitive damages, the weight of the evidence suggests that not only is the nature of the parties’ relationship in this case a matter of dispute, but that the dispute is immaterial. Petra did not breach its duty to the City, however that duty is described.

52 Affidavit of Jerald S. Frank dated September 13, 2010 at ¶ 41; Affidavit of Eugene R. Bennett dated September 13, 2010 at ¶ 89. Affidavit of Richard Bauer dated September 17, 2010 at ¶¶ 6 and 7.
53 Affidavit of Richard Bauer dated September 17, 2010 at ¶¶ 6 and 7.
3. CONCLUSION

As set forth above, the City’s Motion fails to establish that Petra breached the Construction Management Agreement, or even if it did, that any of the breaches are material. Petra substantially performed under the Construction Management Agreement and under Idaho law. Consequently, the City cannot be excused from performing its obligations under the contract. Moreover, the City has waived these claims through its conduct. At a minimum, there are issues of material fact. Petra respectfully requests that the Court deny City’s Motion for Partial Summary Judgment.


COSHO HUMPHREY, LLP

By: THOMAS G. WALKER
Attorneys for Defendant/Counterclaimant
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 20th day of September, 2010, a true and correct copy of the
within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

Hand Delivery

THOMAS G. WALKER
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Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant.

STATE OF IDAHO )
) ss.
County of Ada )

1. I, Thomas Coughlin, being first duly sworn upon oath, depose and state:

AFFIDAVIT OF THOMAS COUGHLIN
DATED SEPTMBER 20, 2010 IN
OPPOSITION TO THE CITY OF
MERIDIAN’S MOTION FOR
SUMMARY JUDGMENT AND
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE: LIABILITY
2. I make this Affidavit based upon my own personal knowledge and I am competent to testify to the facts set forth below if called as a witness.

3. I have more than 26 years of experience in the construction industry.

4. During times relevant to this case I was employed by Petra Incorporated ("Petra").

5. I served as a project engineer on the new Meridian City Hall project ("Project").

6. I am one of the custodians of Petra's business records.

7. The documents referred to herein are true, correct and complete copies of the documents in Petra's files or documents produced by the City of Meridian ("City" or "Meridian") during the course of this litigation, which files and documents are kept in the course of Petra's regularly conducted business activity. It is Petra's regular practice to make or keep such documents.

8. I have reviewed the allegations contained in the City's Motion for Partial Summary Judgment Re: Liability, as well as and the supporting affidavits and their exhibits.

9. I particularly note the allegations regarding Rule Steel on pages 7 through 9 of the City's Memorandum.

10. I have personal knowledge of all relevant events with regard to the Rule Steel issues from December 13, 2007 onwards and I am the custodian of records generated prior to this date during the course of Petra's regularly conducted business activity.

11. Rule Steel did request time extensions with each ASI quoted.
12. Steven J. Amento refers to two versions of Change Order No. 1 and an apparent discrepancy between them regarding time extension. See Exh. 1, Exh. 2.

13. The typical procedure pursuant to our agreement with Keith Watts was to have each change order approved by the contractor, architect, and construction manager (Petra) prior to the City's final approval and payment.

14. This change order was handled differently because Keith Watts had designed/redesigned the approval signature sheet used for change orders during this period time.

15. In this instance the new change order approval sheet (Exhibit 1) was forwarded to Petra after it had been signed on behalf of the City.

16. The change order was then forwarded to Rule Steel, who added the notation “27” for added calendar days and initialed it “RA.” See Exhibit 2.

17. Then I, on behalf of the City deleted the “27” and added “TBD” in the time extension area. See Exhibit 2.

18. This fully executed form, Exhibit 2, was then sent to the City. Keith Watts was informed that the time extension issue with Rule Steel was in flux and still needed to be resolved. This Change Order, Exhibit 2, was approved by the City.

19. I never entertained any thought of concealing any information from the City. On multiple occasions, I provided all relevant information to Mr. Watts and kept him and other representatives of the City fully informed.
20. I informed Mr. Watts, the City's authorized representative, on multiple occasions regarding all relevant issues concerning the Rule Steel delays and liquidated damages negotiations. See Exh. 3-8, 10, 11, 12.

21. Mr. Watts instructed me that Petra should move forward with its best recommendation regarding the Rule Steel matter. See Exh. 6.

22. I provided all relevant information to Mr. Watts prior to the drafting and approval of Change Order No. 3, which contained the liquidated damage settlement Petra had negotiated with Rule Steel on behalf of the City. See Exh. 3-8, 10, 11, 12.

23. For the City representatives to now claim that they were unaware of the Rule Steel change orders and the changes to the substantial completion date is not supported by any facts considering the amount of information I provided to Keith Watts prior to receiving the City's approval of the liquidated damage settlement Change Order No. 3. See Exhibit 13.

24. Petra was in daily contact with Rule Steel regarding production and erection issues and I kept the City's representative fully informed of all developments.

25. Rule Steel was assessed liquidated damages based on Petra's recommendation as reviewed and approved by the City's representatives in Change Order No. 3. See Exhibit 13.

26. The delays experienced in the fabrication and erection of the steel were not solely Rule Steel's fault. Design changes detailed in multiple ASIs and RFIs included in the change orders also impacted Rule Steel's fabrication and erection schedule.

27. Rule Steel submitted requests for time extensions with the various ASI's and RFIs.
28. Regarding the City's allegations that Petra did not correctly apply Section 8.3.1 of the AIA A201/CMa - 1992 to the Rule Steel analysis, the City's assertions demonstrate that neither Mr. Amento nor the City's representatives understand how the "float" works in this situation.

29. The 30-day float that Amento refers to is not for each contractor. There is a 30-day float for the Project as a whole. If there was a 30 day float for each contractor, the Project would have never been finished.

30. The 30-day float had already been consumed by the contaminated and unsuitable soil and design issues related to raising the building.

31. The float provision in Section 8.3.1 was therefore not relevant to the Rule Steel situation.

32. Petra sought all allowed liquidated damages and kept the City's representatives fully informed regarding all delays.

SUBSCRIBED AND SWORN to before me this 20th day of September, 2010.

THOMAS R. COUGHLIN

DEBBIE GORSKI
NOTARY PUBLIC
STATE OF IDAHO

DATED: September 20, 2010

COSHO HUMPHREY, LLP

By:

THOMAS G. WALKER
Attorneys for Petra Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of September, 2010, a true and correct copy

of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☒ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

THOMAS G. WALKER

AFFIDAVIT OF THOMAS R. COUGHLIN DATED SEPTEMBER 20, 2010. 619288_3

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006410
CONTRACT CHANGE ORDER

CONTRACTOR: RULE STEEL
PROJECT: STEEL AND STEEL ERECTION

The Contractor is hereby directed to make the following changes from the Contract Documents and Plans.

Description: Additional structural requirements per ASI's #7, 8, 18, 19, 23.

Reason for Change Order: Redesign by Architects

Attachments: Architect's Supplemental Instructions #7, 8, 18, 19 & 23.

<table>
<thead>
<tr>
<th>Original Contract Price</th>
<th>Original Contract Times</th>
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<tr>
<td>$1,874,000.00</td>
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<tr>
<th>Net changes form previous Change Orders</th>
<th>Net increase (decrease) of this Change Order</th>
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<tr>
<td>No. ___ to ___ $0.00</td>
<td>$35,766.00</td>
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Contract Price Prior to this Change Order: $1,847,000.00

Net Increase (decrease) of this Change Order: $35,766.00

Contract Price with all Approved Change Orders: $1,882,766.00

RECOMMENDED: (Construction Manager)
By: 
Date: 

APPROVED: (City Purchasing Agent)
By: Keith Watts
Date: 12-14-07

ACCEPTED: (Contractor)
By: 
Date: 

ATTEST: 
By: City Clerk, Will Berg Jr.
Date: 12-18-07

APPROVED: (City)
By: Mayor Tammy de Weerd
Date: 12-18-07

ATTEST: 
By: City Clerk, Will Berg Jr.
Date: 12-18-07
CONTRACT CHANGE ORDER

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PROJECT: STEEL AND STEEL ERECTION

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</tr>
<tr>
<td>$1,882,766.00</td>
<td>(calendar days)</td>
</tr>
</tbody>
</table>

RECOMMENDED: (Construction Manager)
By: ____________________________
Date: ____________

ACCEPTED: (Contractor)
By: ____________________________
Date: ____________

APPROVED: (CITY PURCHASING AGENT)
By: ____________________________
Date: ____________

ATTEST: approved by City Council
By: City Clerk, Will Berg Jr.
Date: ____________

APPROVED: (CITY)
By: Mayor Tammy de Weed
Date: ____________

ATTEST: ____________________________
By: City Clerk, Will Berg Jr.
Date: ____________
Tom Coughlin

From: Tom Coughlin
Sent: Wednesday, March 12, 2008 2:32 PM
To: 'Keith Watts'
Subject: Rule Time Extension & Liquidated Damages
Attachments: COM Memo- Rule Time Ext 031208.doc

Keith

Attached is a draft of a memo to you addressing the Rule Steel time extension & liquidated damages issue. I would like to discuss this with you and get the city's input prior to approaching Rule with a proposed settlement for these issues.

Let me know.
Thanks
Tom Coughlin
Date: March 12, 2008
To: Keith Watts, Purchasing Manager, City Of Meridian
From: Tom Coughlin, Project Manager
Re: Rule Steel – Time Extension & Liquidated Damages

In an attempt to address the time extensions that Rule Steel has requested for various ASI’s and RFI’s issued to-date Petra Inc. has reviewed the requests and the actual scenario involving the progress of their work.

Petra had previously informed Rule Steel that they would be assessed liquidated damages starting on 11/26/07 if the entire structural steel scope of work was not completed by that date. It is Petra’s opinion that the steel scope of work was not substantial complete until 2/08/08. This date represents the date that Petra feels the structural steel was completed to a point so as not to impede any of critical path follow-on work required to complete and/or dry-in the building. This period amounts to 75 calendar days. The period of time that Rule Steel would be assessed liquidated damages for would be the 75 days minus any time extensions granted for the various ASI’s & RFI’s that have impacted the structural steel scope of work.

Rule Steel had previously requested a total of 27 days for the items that were included in Rule’s CO#01. This request was held in abeyance pending the completion of the work.

For the items previously included in CO #01:
- ASI-7 Lower Floor Structure at 1st Floor– Time requested 5 days. OK to recommend to the City.
- ASI-8 Steel Connection Modifications – Time requested 10 days. OK to recommend to the City.
- ASI-118 Add Camber & Revise Moment Connections – Time requested 5 days. OK to recommend to the City.
- ASI-19 Connection Fix for Bsmt Wall to Low – Time requested 2 days. Not recommended, didn’t impact the progress of the work.
- ASI-23 Stair Tower Support Steel – Time requested 5 days. OK to recommend to the City.

This is totals to 25 of the 27 work days requested.

For the items pending change order submittal:
- ASI-13 Elevator Tube Upgrade – Time requested 10 days. Not recommended, this work was done after the substantial completion date.
- ASI-52 Elevator Penthouse Beams – Time requested 10 days. Would recommend 5 days.
- ASI-54 Roof Elevation & Slope @ CMU Wall – Time requested 3 days. OK to recommend.
- RFI-73 Sun Shade Connection – Time requested 3 days. Not recommended, did not impact the progress of the work.
- RFI-74 Angle Clips for Support of Wall – Time requested 3 days. Not recommended, did not impact the progress of the work. As of Friday, 3/7/07 these clips had not been installed.
- Bent Plate @ Grid H (Included with RFI-74) – Add bent plate, shop drawings marked incorrectly. Time requested 5 days. OK to recommend to the City.
• RFI-93 Relief Angle @ Stair Towers – Time requested 5 days. Not recommended, did not impact the work. This was for furnishing only.
• RFI-94 Furnish and install two chiller beams. Time requested 5 days. Not recommended, did not impact the work. This was issued and accomplished after the base building work on the critical path was completed.

The time for these pending changes that Petra can recommend to the City would be 13 work days.

The total time extension, considering both the CO#01 items and the new items, that Petra would propose to recommend is 38 days work days, which translates to 52 calendar days. The 52 calendar days represent a time extension that Petra feels would be fair and responsible to both Rule Steel and the City. Based on this Rule Steel would still be liable for liquidated damages for a period of 23 calendar days based on a substantial completion date for their work of 2/8/08. The total cost for these 23 days at $500/Day would be $11,500.

Please review this scenario and let me know if this line of reasoning is acceptable to the City. If this is acceptable Petra will propose this to Rule as settlement of the matter of the schedule delays and the time extensions requested for the various delays. Currently Petra has not approached Rule with proposal regarding their time extension requests.
From: Tom Coughlin [mailto:tcoughlin@petrainc.net]
Sent: Wednesday, March 12, 2008 2:32 PM
To: Keith Watts
Subject: Rule Time Extension & Liquidated Damages

Keith

Attached is a draft of a memo to you addressing the Rule Steel time extension & liquidated damages issue. I would like to discuss this with you and get the cities input prior to approaching Rule with a proposed settlement for these issues.

Let me know.
Thanks
Tom Coughlin
Keith

Any feedback on the Rule Steel Time Extension question? I would like to get this all wrap up in a final change order if possible.

Let me know if you have any questions.

Tom C

From: Tom Coughlin  
Sent: Tuesday, March 18, 2008 12:46 PM  
To: Keith Watts  
CC: Gene Bennett; Jon Anderson  
Subject: FW: Rule Time Extension & Liquidated Damages  
Attachments: image001.jpg; COM Memo- Rule Time Ext 031208.doc

This Communication contains proprietary business information and may contain confidential information. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately destroy, discard, or erase this information.
responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, 
distribution, or copying of this communication is strictly prohibited. If you have received this 
communication in error, please immediately destroy, discard, or erase this information.
Tom, the Council stated today that Petra should move forward with their best recommendation as the Council is relying on the Construction Manager to look out for its rights/best interests in the contracts.

I would however, like clarification on the issue.

The contract has a Substantial Completion Date of 10/5/07. Why do we not assess LD’s until 11/26/07? I am in possession of the letter Petra sent to Rule Steel dated November 1, 2007. In this letter Petra states that the erection start date is June 4, 2007. The contract states a start date of Substantial Completion of July 16, 2007 and finishing October 5, 2007. This is pretty confusing to me. I read this as START DATE of 7/16/07 and completion of 10/5/07. Am I wrong? With 4 weeks delay due to soil Start date would be 7/13/07 and completion of 11/2/07. If this is correct we need to create CHANGE ORDER #2 for the extension in time to make it official. I need the Contract Documents to match what is agreed upon not just memos. I’m still unclear why we did not assess LD’s until 11/26.

Can you tell me what day Rule actually started?

If after July 16th how many days were due to the soil?

Am I correct by stating Substantial Completion was achieved on 2/8/08?

Change Order #1 did not give them any time extension. Someone (Petra?) wrote in To Be Determined. Was there any correspondence with Rule to determine this?

I show 10/5/07 to 2/8/08 to be 126 Calendar Days. The memo from you dated 3/12/08 has a recommendation of relief for 33 days. That leaves 93 days. I need to know where the difference of 70 days is.

On November

Keith Watts

Purchasing Agent
City of Meridian
33 East Idaho Avenue
Meridian, ID 83642

Ph. 208-888-4433 x207
Fax: 208-887-4813
Tom Coughlin

From: Tom Coughlin
Sent: Thursday, April 24, 2008 1:27 PM
To: 'Keith Watts'
Cc: Gene Bennett; Jon Anderson
Subject: Rule Steel Schedule Issues

Keith

In response to your questions I have reviewed the Rule Steel issues in an effort to clarify the situation regarding liquidated damages and a time extension.

Rule Steel’s contract has a start date of July 16th, 2007 and a Substantial Completion Date of October 5, 2007. These dates take into account the delay in the start due to the soil issues. Rule Steel actually started on July 30, 2007 and Substantial Completion was achieved on February 8, 2008. Change Order No 1 did not include any time extension since at the time the change order was submitted an equitable extension could not be determined. That is why it was noted that the change in contract time was to be determined.

The November 26th date mentioned in Petra’s November 1st letter was an estimated contract completion date based on adjusting for weather delays and a time extension for the change order work included in CO#01. As of the November 1st date the project had experienced 12 weather days and Rule Steel had requested a time extension of 27 work days for the ASI/change order work include in their CO#01. Converting the work days to calendar days would result in an extension of 53 days. This is how the November 25th completion and the November 26th start of liquidated damages dates were generated. Since November 1st Rule Steel has requested an additional 44 days for the pending change items that would be included in CO#02 to Rule Steel. LCA is currently reviewing the scope of the changes included in CO#02. Of the 44 days requested, Petra currently is of the opinion Rule is due an extension of approximately 13 work days (17 calendar days). The actual length of the time extension will need to be finalized with Rule. If the schedule is extended another 17 calendar days plus the 16 calendar days lost to weather during that period it totals 33 calendar days and would push the completion date out from 11/25 to 12/28/07. This leaves a total of 42 calendar days between the proposed contract completion date of 12/28 and the actual substantial completion of date of 2/8/08. At a rate of $500/Day this would amount to liquidated damages in the amount of $21,000 being assessed against Rule Steel.

On the first go around I had included the time allotted for the CO#01 items into the time period after 11/26 when it was already figured into the prior period that pushed to the date out to 11/26, this accounts for the difference in the proposed end dates.

Let me know if this clarifies the situation for you. If this meets with your approval Petra would like to proceed with negotiating a settlement with Rule Steel on the time extension they would be due and the resulting liquidated damages. After Rule and Petra have reached agreement on the matter we would submit the proposed settlement to the City for approval and draft the appropriate change order to closeout the contract.

Please let me know as soon as possible if this meets with your approval and we can proceed. If you have any further questions please contact me.

Thanks
Tom Coughlin

---

Tom Coughlin
Project Manager
Petra, Inc.
1097 N. Rosario
Meridian, ID 83642
Phone: (208) 323-4500 Fax: (208) 323-4507
E-Mail: tcoughlin@petrainc.net

4/30/2008
This Communication contains proprietary business information and may contain confidential information. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately destroy, discard, or erase this information.
June 9, 2008

Via E-Mail: snorquist@westernsteelmfg.com, ron_allen@rulesteel.com

Mr. Steve Norquist & Mr. Ron Allen
Rule Steel Tanks, Inc.
21986 Middleton Rd.
Caldwell, ID 83605

RE: Time Extension Request & Liquidated Damages
Meridian City Hall Steel Fabrication & Erection

Gentlemen:

Following additional review of Rule Steel’s request for a time extension and the assessment of the liquidated damages on the project with the City of Meridian Petra has prepared the following updated synopsis of the timeline of events concerning this issue.

Rule Steel’s contract indicated a start date of July 16th, 2007 and a substantial completion date of October 5th, 2007. Rule Steel actually started erection on July 30th, 2007 and in Petra’s opinion obtained substantial completion on February 8th, 2008. The substantial completion date is the date that Petra feels the structural steel was completed to a point so as not to impede any critical path follow-on work required to complete and/or dry-in the building. Work on the project by Rule Steel did continue after this date.

Rule Steel had previously been informed that liquidated damages would be assessed starting November 26th, 2007 if the entire structural steel scope of work was not completed prior to the 26th. The November 26th date stated in Petra’s November 1st letter was an estimated contract completion date based on adjustments for weather days and a time extension for the change order work included in CO#01. As of the November 1st date the project had experienced 12 weather days and Rule Steel had requested a time extension of 27 work days for the ASI/change order work included in CO#01. Converting the 39 work days to calendar days would result in an extension of 53 calendar days. Adding the 53 days to the contractual completion date of October 5th results in a projected completion date of November 26th, 2007.

Since November 1st Rule Steel has requested an additional 44 days for the pending change items included in proposed change order number PCO#02. Outlined below is a summary of the time extensions requested and recommended for the items included in both CO#01 and CO#02:

For the items included in CO #01:

- ASI-7 Lower Floor Structure at 1st Floor- Time requested 5 days. OK to recommend to the City.
- ASI-8 Steel Connection Modifications - Time requested 10 days. OK to recommend to the City.
- ASI-18 Add Camber & Revise Moment Connections – Time requested 5 days. OK to recommend to the City.
- ASI-19 Connection Fix for Basement Wall to Low – Time requested 2 days. Not recommended, didn’t impact the progress of the work.
- ASI-23 Stair Tower Support Steel – Time requested 5 days. OK to recommend to the City.
This totals to 25 of the 27 work days requested.

For the items included in CO#02:

- ASI-13 Elevator Tube Upgrade – Time requested 10 days. Not recommended, this work was done after the substantial completion date.
- ASI-52 Elevator Penthouse Beams – Time requested 10 days. Recommend 5 days.
- ASI-54 Roof Elevation & Slope @ CMU Wall – Time requested 3 days. Recommend 3 days.
- RFI-73 Sun Shade Connection – Time requested 3 days. Not recommended, did not impact the progress of the work.
- RFI-74 Angle Clips for Support of Wall – Time requested 3 days. Not recommended, this did not impact the progress of the work. As of Friday, 3/7/07 these clips had not been installed.
- Bent Plate @Grid H (Included with RFI-74) – Add bent plate, shop drawings marked incorrectly. Time requested 5 days. Recommended 5 days to the City.
- RFI-93 Relief Angle @ Stair Towers – Time requested 5 days. Not recommended, did not impact the work. This was for furnishing only.
- RFI-94 Furnish and install two chiller beams. Time requested 5 days. Not recommended, did not impact the work. This was issued and accomplished after the base building work on the critical path was completed.

This totals 13 of the 44 work days requested.

Converting the 13 work days recommended to calendar days results in an extension of 17 days. Extending the schedule another 17 calendar days plus the 16 days lost to weather during the period would result in an additional extension of 33 calendar days and would push the contract completion date out from November 25 to December 28, 2007. This leaves a total of 42 calendar days between the proposed contract completion date of December 28, 2007 and the actual substantial completion date of February 6, 2008. Per the contract liquidated damages are assessed at a rate of $500/day. Based on a period of 42 days at a rate of $500/day this would amount to liquidated damages in the amount of $21,000 being assessed against Rule Steel for delays in completing your scope of work for the project.

In response to the additional questions you posed in your March 25th email:
1. It is the City of Meridians intent to impose liquidated damages.
2. The weather delays have been factored into the extensions.
3. No time extensions have been considered for the separately for the moment field welds. This is not a changed condition and the City does not bare the responsible for the time required. In addition the additional time extensions proposed would more than offset this item.
4. ASI-52 Elevator Penthouse Beams – In response to your request for a total of 10 additional days Petra feels the 5 days currently recommended are fair, the additional five days requested have not been recommended.

Petra is proposing that a final change order be prepared based on the above synopsis as final settlement of the Meridian City Hall contract. The change order (CO#03) would extend the contract substantial completion date to December 28, 2007 and deduct the amount of the liquidated damages assessed, $21,000, from the contract amount.
Please let me know as soon as possible if this meets with your approval and we can proceed with the submittal of the final change to the City of Meridian for approval. If you have any questions do not hesitate to contact me.

Sincerely,

[Signature]

Thomas R. Coughlin
Project Manager

CC: Gene Bennett - Petra, Inc.
    Keith Watts - City of Meridian.
August 21, 2008

Mr. Tom R. Coughlin
Petra Construction
1097 N. Rosario Place
Meridian, ID 83642

RE: Meridian City Hall

Dear Tom,

I write in response to your letter of June 9, 2008 concerning time extension request and liquidated damages for the Meridian City Hall. Our position on this is as follows.

You indicate a contract erection start date of 7/16/08 and an actual start date of erection of 7/30/08. This 7/30/08 date is accurate but the initial two week delay was of no cause by Rule Steel or its steel erection subcontractor, Boise Steel Erectors. Neither the required concrete/foundation work or masonry stair tower work was sufficiently completed by 7/16/08 to allow required access to initiate steel erection or to continue erection in an efficient manner. The required concrete/foundation progress and the need for all three masonry stair towers to be completed prior to the start of erection was discussed and agreed to in pre-construction meetings with Petra Incorporated. At weekly jobsite meetings I attended in June and July the progress of the concrete and masonry trades were updated and documented each week and there was clear agreement that erection could not begin until at the earliest 7/30/08 when steel shipments began. If the site would have been ready for erection to begin as agreed on 7/16/08 there would have been no reason for that not to occur. This is also supported by Boise Steel Erectors daily logs. Our position is Rule Steel should not be responsible for these 14 days.

In addition, we are still requesting the full 10 day extension required by ASI #52 in lieu of 5 days. This item caused several additional re-submittals to be provided and approved to determine the changes requested by the owner prior to the work being fabricated and completed.
Your letter assesses 42 calendar days of delay. We are agreeable to 23 days (42 days less 19 days) per our position stated above and will accept a deductive change order for the amount $11,500.00.

Please review these items and contact me as soon as it is convenient to meet and finalize this issue.

Thank you.

Steve Norquist
Rule Steel
I will need to take this to Council. Probably an Exec. Session.

Keith Watts
Purchasing Agent
City of Meridian
33 East Broadway Avenue
Meridian, ID 83642
Ph. 208-888-4433
Fax: 208-887-4813

From: Tom Coughlin [mailto:tcoughlin@petrainc.net]
Sent: Thursday, November 20, 2008 7:42 AM
To: Keith Watts
Cc: Gene Bennett
Subject: Rule Steel CO - MCH

Keith

Attached is a memo outlining Petra's recommendation concerning the issue of liquidated damages and time extension for Rule Steel.

I do not know if this is an issue that you can act on or if it is something you want to but in front of the council. Either way it is something we need to resolve in order close things out. After you have had a chance to review the attached give me a call.

If this is acceptable I will prepare a change order to formalize this.

Let me know.

Thanks
Tom Coughlin

Tom Coughlin
Project Manager
PETRA, Inc.
1097 N Rosario St.
Meridian, ID 83642
Ph: 208-323-4500
C: 208-919-8583
F: 208-323-4507
tcoughlin@petrainc.net
www.petrainc.net
Attached is a memo outlining Petra’s recommendation concerning the issue of liquidated damages and time extension for Rule Steel.

I do not know if this is an issue that you can act on or if it is something you want to but in front of the council. Either way it is something we need to resolve in order close things out. After you have had a chance to review the attached give me a call.

If this is acceptable I will prepare a change order to formalize this.

Let me know.

Thanks

Tom Coughlin

Tom Coughlin
Project Manager
PETRA, Inc.
1097 N Rosario St.
Meridian, ID 83642
P:208-323-4500
C:208-919-8583
F:208-323-4507
tcoughlin@petrainc.net
www.petrainc.net
Date: November 19, 2008

To: Keith Watts, Purchasing Manager, City Of Meridian

From: Tom Coughlin, Project Manager

Re: Rule Steel – Time Extension & Liquidated Damages
Meridian City Hall

As a result of discussions with Rule Steel concerning time extensions for additional work and the assessment of liquidated damages Petra has formulated a recommendation for a full settlement with Rule Steel on these issues. It is our recommendation that Rule Steel be granted a time extension of 97 calendar days and be assessed liquidated damages for a period of 28 calendar days in the amount of $14,000. The methodology used to arrive at this recommendation is summarized below.

Rule Steel would be assessed with liquidated damages as a result of their failure to complete the contract work within the originally scheduled duration. However the originally scheduled duration has been impacted by the numerous changes to the project. Rule Steel has requested time extensions for the various ASIs and RFI's issued to-date. Petra Inc. has reviewed the requests and the actual scenarios involving the progress of their work and has prepared the following updated synopsis of the timeline of events concerning this issue.

Rule Steel’s contract indicated a start date of July 16th, 2007 and a substantial completion date of October 5th, 2007. Rule Steel actually started erection on July 30th, 2007 and in Petra’s opinion obtained substantial completion on February 8th, 2008. The substantial completion date is the date that Petra feels the structural steel was completed to a point so as not to impede any critical path follow-on work required to complete and/or dry-in the building. Work on the project by Rule Steel did continue after this date.

The delay in the start of the steel erection was the result of the work on the CMU stair towers not being completed to a point to allow the steel erection to proceed until July 30th. The 14 calendar days lost to due to this delay will need to be credit to the contract duration allowed for the steel erection. It should be noted that the delay was not the fault of the masonry contractor or another contractor but was due to the impact of the changes to the building design relating to the unsuitable material, raising the building and the addition of the basement.

Rule Steel had previously been informed that liquidated damages would be assessed starting November 26th, 2007 if the entire structural steel scope of work was not completed prior to the 26th. The November 26th date stated in Petra’s November 1st letter was an estimated contract completion date based on adjustments for weather days and a time extension for the change order work included in CO#01. As of the November 1st date the project had experienced 12 weather days and Rule Steel had requested a time extension of 27 work days for the ASI/change order work included in CO#01. Converting the 39 work days to calendar days would result in an extension of 53 calendar days. Adding the 53 days to the contractual completion date of October 5th results in a projected completion date of November 25th, 2007.

Since November 1st Rule Steel has requested an additional 44 days for the pending change items included in proposed change order number PCO#02. Outlined below is a summary of the time extensions requested and recommended for the items included in both CO#01 and CO#02:
For the items included in CO #01 (Previously approved with the caveat that any time extension due would be determined at a later date):

- ASI-7 Lower Floor Structure at 1st Floor - Time requested 5 days. OK to recommend to the City.
- ASI-8 Steel Connection Modifications - Time requested 10 days. OK to recommend to the City.
- ASI-18 Add Camber & Revise Moment Connections - Time requested 5 days. OK to recommend to the City.
- ASI-19 Connection Fix for Basement Wall to Low - Time requested 2 days. Not recommended, didn't impact the progress of the work.
- ASI-23 Stair Tower Support Steel - Time requested 5 days. OK to recommend to the City.

This totals to 25 of the 27 work days requested.

For the items included in CO#02 (currently pending with Rule Steel):

- ASI-13 Elevator Tube Upgrade - Time requested 10 days. Not recommended, this work was done after the substantial completion date.
- ASI-52 Elevator Penthouse Beams - Time requested 10 days. Recommend 5 days.
- ASI-54 Roof Elevation & Slope @ CMU Wall - Time requested 3 days. Recommend 3 days.
- RFI-73 Sun Shade Connection - Time requested 3 days. Not recommended, did not impact the progress of the work.
- RFI-74 Angle Clips for Support of Wall - Time requested 3 days. Not recommended, this did not impact the progress of the work. As of Friday, 3/7/07 these clips had not been installed.
- Bent Plate @Grid H (Included with RFI-74) - Add bent plate, shop drawings marked incorrectly. Time requested 5 days. Recommended 5 days to the City.
- RFI-93 Relief Angle @ Stair Towers - Time requested 5 days. Not recommended, did not impact the work. This was for furnishing only.
- RFI-94 Furnish and install two chiller beams. Time requested 5 days. Not recommended, did not impact the work. This was issued and accomplished after the base building work on the critical path was completed.

This totals 13 of the 44 work days requested.

Converting the 13 work days recommended to calendar days results in an extension of 17 days. Extending the schedule another 17 calendar days plus the 16 days lost to weather during the period would result in an additional extension of 33 calendar days and would push the contract completion date out from November 25 to December 28, 2007. Crediting Rule Steel with the 14 calendar days the start of erection was delayed would extend the completion date further to January 11, 2008.

The total time extension, considering both the CO#01, CO#02 items and the weather delays that Petra would recommend is 97 calendar days. The 97 calendar days represents a time extension that Petra feels would be fair and responsible to both Rule Steel and the City. Based on this Rule Steel would be liable for liquidated damages for a period of 28 calendar days based on the difference between the new proposed contractual completion date of January 11, 2008 and the actual substantial completion date of February 8, 2008. Per the contract liquidated damages are assessed at a rate of $500/day. The total cost for these 28 days at $500/Day would be $14,000.

Please review this scenario and let me know if this line of reasoning is acceptable to the City. If this is acceptable Petra will propose this to Rule as settlement of the matter of the schedule delays and the time extensions requested for the various delays.
From: Tom Coughlin  
Sent: Monday, December 01, 2008 02:43 PM  
To: 'Keith Watts'  
CC: Gene Bennett; 'Kathy Wanner'  
Subject: FW: Payments & Change Orders - MCH  
Attachments: image001.gif

Keith

What is the status for payments for October, including Petra's? I have been getting calls from contractors.

What needs to happen to get $5,842 that is outstanding from the July 08 billing resolved?

On the change order side you should have 8 change orders in your possession for approval plus the Rule Steel issue which needs your OK. The Rule issue will generate one or two additional change orders. I am working on three additional change orders that involve work older than October. I should have all three of these to LCA this week.

When can we set a time to sit down and review the Petra change order request with your self and Ted? We would like to get this settle as soon as possible. Currently we are working for free.

We also need to get a contract setup for the East Parking Lot. We had sent you a proposal previously.

Can you let me know the status on each of these items?

Thanks  
Tom Coughlin

Tom Coughlin  
Project Manager  
PETRA, Inc.  
1097 N Rosario St.  
Meridian, ID 83642  
P:208-323-4500  
C:208-919-8583  
P:208-323-4507  
tcoughlin@petrainc.net  
www.petrainc.net

From: Tom Coughlin  
Sent: Saturday, November 22, 2008 12:27 PM  
To: 'Keith Watts'  
Cc: 'Kathy Wanner'; Gene Bennett  
Subject: FW: Payments & Change Orders - MCH  

Keith

Any news on the Oct payments? How about the July payment?

Will you and Ted have time to sit down and discuss the Petra change order on Tuesday, 11/25?

Thanks  
Tom C
From: Tom Coughlin  
Sent: Wednesday, November 19, 2008 2:13 PM  
To: 'Keith Watts'  
Cc: 'Kathy Wanner'; Gene Bennett  
Subject: Payments & Change Orders - MCH  

Keith  

With Thanksgiving next week what is the timetable for payments of the October billing. I have not had any feedback or questions so I am assuming we are good to go on everything. Let me know if this is not the case.  

The $5,842 from the July billing is still outstanding, can we get that cut loose.  

You should have 16 contractor change orders in your possession; this would include three being developed today.  

Any more though on when we can sit down with you and Ted to review the Petra change order request? Gene and I are both available on Monday or Tuesday next week.  

If you have any questions please call me.  

Thanks  

Tom
CONTRACT CHANGE ORDER

CONTRACTOR: RULE STEEL

PROJECT: MERIDIAN CITY HALL - Settlement of Liquidated Damages

The Contractor is hereby directed to make the following changes from the Contract Documents and Plans.

Description: Settlement of all issues related to liquidated damages and contractor requested time extension, painting back charges and remedial work on sunshada frames.

ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME.

Reason for Change Order: Settlement of liquidated damages

Attachments: Change order items description, dated 3/11/09, with contractor quotes

CHANGE IN CONTRACT PRICE:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original Contract Price</td>
<td>$1,847,000.00</td>
</tr>
<tr>
<td>Net changes from previous Change Orders</td>
<td>$79,485.00</td>
</tr>
<tr>
<td>Contract Price Prior to this Change Order</td>
<td>$1,926,485.00</td>
</tr>
<tr>
<td>Net Increase (decrease) of this Change Order</td>
<td>($15,750.00)</td>
</tr>
<tr>
<td>Contract Price with all Approved Change Orders</td>
<td>$1,910,735.00</td>
</tr>
</tbody>
</table>

CHANGE IN CONTRACT TIMES:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original Contract Times: Substantial Completion</td>
<td>10/5/07</td>
</tr>
<tr>
<td>Net changes from previous Change Orders</td>
<td>None</td>
</tr>
<tr>
<td>Contract Times prior to this Change Order</td>
<td>10/5/07</td>
</tr>
<tr>
<td>Net Increase (decrease) of this Change Order</td>
<td>97 Calendar Days</td>
</tr>
<tr>
<td>Contract Times with all Approved Change Orders: Substantial Completion</td>
<td>1/11/08</td>
</tr>
</tbody>
</table>

RECOMMENDED: (CONSTRUCTION MANAGER)

Petra Inc.
By: Thomas R. Coughlin
Date: 3/19/09

ACCEPTED: (CONTRACTOR)

Rule Steel
By: Ron Allen
Date: 3/19/09

APPROVED: (CITY PURCHASING AGENT)

By: Keith Watts
Date: 3-24-09

APPROVED: (CITY)

By: Mayor Tammy de Weerd
Date: 5-1-09

ATTEST:

By: City Clerk, Jaycee Hofman
Date: 5-7-09

EXHIBIT 13
Change Order
No. 00003

1097 N. ROSARIO STREET • MERIDIAN, ID 83642 • PHONE: (208) 323-4500 • FAX: (208) 323-4507

TITLE: Settle of Outstanding Liq. Damages
PROJECT: Meridian City Hall
TO: Attn: Steve Norquist
Rule Steel
21986 Middleton Road
Caldwell, ID 83605
Phone: 208 585-3031 Fax: 208-585-2506

RE: To: From: Number:

**allis taxes are included in costs**

<table>
<thead>
<tr>
<th>Number</th>
<th>Description</th>
<th>Unit</th>
<th>Amount</th>
<th>Net Amount</th>
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</thead>
<tbody>
<tr>
<td>00001</td>
<td>Settlement of all issued related to Contractors time extension requests and the assessment of liquidated damages for delays in completing the project by the contractual substantial completion date.</td>
<td>1.000</td>
<td>($14,000.00) 0.00%</td>
<td>$0.00 ($14,000.00)</td>
</tr>
</tbody>
</table>

The Original Contract Sum was ........................................ $1,847,000.00
Net Change by Previously Authorized Requests and Changes ........................................ $79,485.00
The Contract Sum Prior to This Change Order was ........................................ $1,926,485.00
The Contract Sum Will be Decreased ........................................ ($15,750.00)
The New Contract Sum Including This Change Order ........................................ $1,910,735.00
The Contract Time Will be Increased ........................................ 97 days

The Date of Substantial Completion as of this Change Order Therefore is ........ 2/11/08

ACCEP TED:
Rule Steel
By: Steve Norquist
Date: 3/19/09

Petra Incorporated
By: Tom Coughlin
Date: 3/19/09

LCA Architects, PA
By: Steve Christensen
Date: 3/13/09

Unit Cost: ($15,750.00)
Unit Tax: $0.00
Lump Sum: $0.00
Lump Tax: $0.00
0.0% GC markup: $0.00
Total: ($15,750.00)
The Contractor is to be assessed liquidated damages for the 28 calendar days their work extended beyond the contractual substantial completion date. Per the contract liquidated damages are assessed at a rate of $500/day. The total cost to be assessed against the contractor for the 28 calendar days at $500/day is $14,000.

For further details reference attached Petra memo to Keith Watts, City of Meridian, dated 11/19/08; Re: Rule Steel - Time Extension & Liquidated Damages - Meridian City Hall.

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>Quantity</th>
<th>Unit Cost</th>
<th>Unit Tax</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0002</td>
<td>Sunshade Remedial Work - Labor and equipment to bondo &amp; smooth rolls marks and seams in sunshade steel members. Roll marks and seams are normal for structural steel unless specifically noted as architectural exposed. Rule Steel quote 8/28/08.</td>
<td>1.000</td>
<td>$2,943.00</td>
<td>0.00%</td>
<td>$0.00</td>
</tr>
<tr>
<td>0003</td>
<td>Backcharge for additional painting work done on sunshade steel after misplaced clips had to be re-located. Commercial Painting invoices #290275, dated 10/1/08 &amp; #290277, dated 10/3/08</td>
<td>1.000</td>
<td>$(1,105.00)</td>
<td>0.00%</td>
<td>$(0.00)</td>
</tr>
<tr>
<td>0004</td>
<td>Backcharge for removing sunshade panels installed &amp; removed when it was determined that the clip location was wrong and had to be re-done. Custom Glass invoice #12255, dated 9/30/08</td>
<td>1.000</td>
<td>$(1,000.00)</td>
<td>0.00%</td>
<td>$(0.00)</td>
</tr>
<tr>
<td>0005</td>
<td>Backcharge for fan rental for stairway ventilation when stair handrail returns were be reworked. Tates invoice 10/3</td>
<td>1.000</td>
<td>$(176.00)</td>
<td>0.00%</td>
<td>$(0.00)</td>
</tr>
</tbody>
</table>

Unit Cost: ($15,750.00)  
Unit Tax: $0.00  
Lump Sum: $0.00  
Lump Tax: $0.00  
0.0% GC markup: $0.00  
Total: ($15,750.00)

The Original Contract Sum was $1,847,000.00  
Net Change by Previously Authorized Requests and Changes $79,485.00  
The Contract Sum Prior to This Change Order was $1,926,485.00  
The Contract Sum Will be Decreased ($15,750.00)  
The New Contract Sum Including This Change Order $1,910,735.00  
The Contract Time Will be Increased 97 days  
The Date of Substantial Completion as of this Change Order Therefore is 2/11/08

Accepted:

Rule Steel  
Petra Incorporated  
LCA Architects, PA

By: Steve Norquist  
By: Todd Coughlin  
By: Steve Christensen

Date:  
Date:  
Date:  

Page 2 of 3
## Change Order Details

**Title:** Settle of Outstanding Liq. Damages  
**Project:** Meridian City Hall  
**To:** Attn: Steve Norquist  
Rule Steel  
21986 Middleton Road  
Caldwell, ID 83605  
Phone: 208-585-3031 Fax: 208-585-2506

**Re:**  
**To:**  
**From:**  
**Number:** 00006  

### Invoice Details

- Backcharge for additional painting & prep work on the stair rail returns that were revised to meet Code. The additional work was done on Rule Steel's request and behalf by Commercial Painting. Commercial Painting Invoice #3391, dated 10/10/08

<table>
<thead>
<tr>
<th>Description</th>
<th>Quantity</th>
<th>Unit</th>
<th>Unit Tax</th>
<th>Amount</th>
<th>Lump Sum</th>
<th>Lump Tax</th>
<th>GC Markup</th>
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</thead>
<tbody>
<tr>
<td>Backcharge</td>
<td>1.00 LS</td>
<td>($2,412.00)</td>
<td>0.00%</td>
<td>$0.00</td>
<td>($2,412.00)</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
</tbody>
</table>

### Financial Summary

- Unit Cost: ($15,750.00)
- Unit Tax: $0.00
- Lump Sum: $0.00
- Lump Tax: $0.00
- 0.0% GC markup: $0.00
- Total: ($15,750.00)

**The Original Contract Sum was** $1,847,000.00  
**Net Change by Previously Authorized Requests and Changes** $79,485.00  
**The Contract Sum Prior to This Change Order was** $1,926,485.00  
**The Contract Sum Will be Decreased** ($15,750.00)  
**The New Contract Sum Including This Change Order** $1,910,735.00  
**The Contract Time Will be Increased** 97 days

**The Date of Substantial Completion as of this Change Order Therefore is** 2/11/08

### Acceptance

- **Rule Steel**  
  By: Steve Norquist  
  Date:  
- **Petra Incorporated**  
  By: Tom Coughlin  
  Date:  
- **LCA Architects, PA**  
  By: Steve Christensen  
  Date:
RULE STEEL - Phase 2

CHANGE ORDER NO 3

CHANGE ORDER ITEMS

1. Settlement of all issued related to Contractors time extension requests and the assessment of liquidated damages for delays in completing the project by the contractual substantial completion date.

Contractor is granted a time extension equal to 97 calendar days for the ASI's -7,8,13,18,23,52,54,RFI-74 Bent Plate and weather delays. The 97 calendar days would extend the contract substantial completion date from October 5, 2007 to January 11, 2008. The 97 calendar days is to be considered full and final settlement of all requests and claims for additional time and costs related to the project. This would include all requests related to weather delays and delays to the original scheduled start date. No time extensions are granted for ASI's 13 & 19, RFI's - 73, 74, 93 & 94.

The Contractor was deemed Substantial Complete as of February 8, 2008. The difference between the new proposed contractual substantial completion date of January 11, 2008 and the actual substantial completion date of February 8, 2008 is 28 calendar days.

The Contractor is to be assessed liquidated damages for the 28 calendar days their work extended beyond the contractual substantial completion date. Per the contract liquidated damages are assessed at a rate of $500/day. The total cost to be assessed against the contractor for the 28 calendar days at $500/Day is $14,000.

For further details reference attached Petra memo to Keith Watts, City of Meridian, dated 11/19/08, Re: Rule Steel - Time Extension & Liquidated Damages - Meridian City Hall.

2. Sunshade Remedial Work - Labor and equipment to bondo & smooth rolls marks and seams in sunshade steel members. Roll marks and seams are normal for structural unless specifically noted as architectural exposed. Rule Steel quote 8/28/08.

3. Backcharge for additional painting work done on sunshade steel after misplaced clips had to be re-located. Commercial Painting invoices #290275, dated 10/1/08 & #290277, dated 10/3/08

4. Backcharge for removing sunshade panels installed & removed when it was determined that the clip location was wrong and had to be re-done. Custom Glass invoice #12255, dated 9/30/08

5. Backcharge for fan rental for stairway ventilation when stair handrail returns were be reworked. Tates invoice 10/3

6. Backcharge for additional painting & prep work for the stair rail returns that were revised to meet code. The additional work was done on Rule Steels request and behalf by Commercial Painting. Commercial Painting invoice #3391, dated 10/10/08

(14,000.00)

(1,105.00)

(1,000.00)

(176.00)

(2,412.00)

(15,750.00)
Date: November 19, 2008

To: Keith Watts, Purchasing Manager, City Of Meridian

From: Tom Coughlin, Project Manager

Re: Rule Steel – Time Extension & Liquidated Damages
Meridian City Hall

As a result of discussions with Rule Steel concerning time extensions for additional work and the assessment of liquidated damages Petra has formulated a recommendation for a full settlement with Rule Steel on these issues. It is our recommendation that Rule Steel be granted a time extension of 97 calendar days and be assessed liquidated damages for a period of 28 calendar days in the amount of $14,000. The methodology used to arrive at this recommendation is summarized below.

Rule Steel would be assessed with liquidated damages as a result of their failure to complete the contract work within the originally scheduled duration. However the originally scheduled duration has been impacted by the numerous changes to the project. Rule Steel has requested time extensions for the various ASI’s and RFI’s issued to-date. Petra Inc. has reviewed the requests and the actual scenarios involving the progress of their work and has prepared the following updated synopsis of the timeline of events concerning this issue.

Rule Steel’s contract indicated a start date of July 16th, 2007 and a substantial completion date of October 5th, 2007. Rule Steel actually started erection on July 30th, 2007 and in Petra’s opinion obtained substantial completion on February 8th, 2008. The substantial completion date is the date that Petra feels the structural steel was completed to a point so as not to impede any critical path follow-on work required to complete and/or dry-in the building. Work on the project by Rule Steel did continue after this date.

The delay in the start of the steel erection was the result of the work on the CMU stair towers not being completed to a point to allow the steel erection to proceed until July 30th. The 14 calendar days lost to due to this delay will need to be credit to the contract duration allowed for the steel erection. It should be noted that the delay was not the fault of the masonry contractor or another contractor but was due to the impact of the changes to the building design relating to the unsuitable material, raising the building and the addition of the basement.

Rule Steel had previously been informed that liquidated damages would be assessed starting November 26th, 2007 if the entire structural steel scope of work was not completed prior to the 26th. The November 26th date stated in Petra’s November 1st letter was an estimated contract completion date based on adjustments for weather days and a time extension for the change order work included in CO#01. As of the November 1st date the project had experienced 12 weather days and Rule Steel had requested a time extension of 27 work days for the ASI/change order work included in CO#01. Converting the 39 work days to calendar days would result in an extension of 53 calendar days. Adding the 53 days to the contractual completion date of October 5th results in a projected completion date of November 25th, 2007.

Since November 1st Rule Steel has requested an additional 44 days for the pending change items included in proposed change order number PCO#02. Outlined below is a summary of the time extensions requested and recommended for the items included in both CO#01 and CO#02:
For the items included in CO #01 (Previously approved with the caveat that any time extension due would be determined at a later date):

- ASI-7 Lower Floor Structure at 1st Floor – Time requested 5 days. OK to recommend to the City.
- ASI-8 Steel Connection Modifications – Time requested 10 days. OK to recommend to the City.
- ASI-18 Add Camber & Revise Moment Connections – Time requested 5 days. OK to recommend to the City.
- ASI-19 Connection Fix for Basement Wall to Low – Time requested 2 days. Not recommended, didn’t impact the progress of the work.
- ASI-23 Stair Tower Support Steel – Time requested 5 days. OK to recommend to the City.

This totals to 25 of the 27 work days requested.

For the items included in CO #02 (Currently pending with Rule Steel):

- ASI-13 Elevator Tube Upgrade – Time requested 10 days. Not recommended, this work was done after the substantial completion date.
- ASI-52 Elevator Penthouse Beams – Time requested 10 days. Recommend 5 days.
- ASI-54 Roof Elevation & Slope @ CMU Wall – Time requested 3 days. Recommend 3 days.
- RFI-73 Sun Shade Connection – Time requested 3 days. Not recommended, did not impact the progress of the work.
- RFI-74 Angle Clips for Support of Wall – Time requested 3 days. Not recommended, this did not impact the progress of the work. As of Friday, 3/7/07 these clips had not been installed.
- Bent Plate @ Grid H (Included with RFI-74) – Add bent plate, shop drawings marked incorrectly. Time requested 5 days. Recommended 5 days to the City.
- RFI-93 Relief Angle @ Stair Towers – Time requested 5 days. Not recommended, did not impact the work. This was for furnishing only.
- RFI-94 Furnish and install two chiller beams. Time requested 5 days. Not recommended, did not impact the work. This was issued and accomplished after the base building work on the critical path was completed.

This totals 13 of the 44 work days requested.

Converting the 13 work days recommended to calendar days results in an extension of 17 days. Extending the schedule another 17 calendar days plus the 16 days lost to weather during the period would result in an additional extension of 33 calendar days and would push the contract completion date out from November 25 to December 28, 2007. Crediting Rule Steel with the 14 calendar days the start of erection was delayed would extend the completion date further to January 11, 2008.

The total time extension, considering both the CO #01, CO #02 items and the weather delays that Petra feels would be fair and responsible to both Rule Steel and the City. Based on this Rule Steel would be liable for liquidated damages for a period of 28 calendar days based on the difference between the new proposed contractual completion date of January 11, 2008 and the actual substantial completion date of February 8, 2008. Per the contract liquidated damages are assessed at a rate of $500/day. The total cost for these 28 days at $500/Day would be $14,000.

Please review this scenario and let me know if this line of reasoning is acceptable to the City. If this is acceptable Petra will propose this to Rule as settlement of the matter of the schedule delays and the time extensions requested for the various delays.
Change Order Request Summary

Project: Meridian City Hall
Date: August 28, 2008
C/O Req. No.: Sixteen

Subcontractor: Rule Steel
Reference: Bondo work on sunshades per Gene Bennett
Description: Labor and equipment to bondo and smooth sunshade roll marks per instructions.

<table>
<thead>
<tr>
<th>Item Description</th>
<th>Quantity</th>
<th>Unit Price</th>
<th>Extended</th>
</tr>
</thead>
<tbody>
<tr>
<td>WF Beam</td>
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<td>$</td>
<td>-</td>
</tr>
<tr>
<td>Plate</td>
<td>$ 0.75</td>
<td>$</td>
<td>-</td>
</tr>
<tr>
<td>Tube</td>
<td>$ 0.75</td>
<td>$</td>
<td>-</td>
</tr>
<tr>
<td>Channel</td>
<td>$ 0.75</td>
<td>$</td>
<td>-</td>
</tr>
<tr>
<td>Anchors</td>
<td>$ 0.75</td>
<td>$</td>
<td>-</td>
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<tr>
<td>Bondo Materials</td>
<td></td>
<td>$ 204.38</td>
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<tr>
<td><strong>Total Mat.</strong></td>
<td></td>
<td><strong>$ 204.38</strong></td>
<td></td>
</tr>
</tbody>
</table>

| Field Hours:          | 54.00    | $ 33.00    | **$ 1,782.00** |
| Detailing:            |          | $ 50.00    | -            |
| Painting Labor:       |          | $ 45.00    | -            |
| **Total Shop**        |          | **$ 1,782.00** |          |

<table>
<thead>
<tr>
<th>Subcontractor/Supplier</th>
<th>Work Description</th>
<th>Quote Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>JAG Equipment</td>
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</tr>
</tbody>
</table>

**Sub Total**          | **$ 944.00** |
**Total Subcontractor/Supplier** | **$ 944.00** |

**Change Order Request Amount** | **$ 2,930.38** |

**Sales Tax 6%** | **$ 12.26** |

**Total Change Order Request - Rounded** | **$ 2,943.00** |

Added time to schedule - working days | 0.0

OR - Perm  Gene B -
FAX TRANSMITTAL

DATE: 8/20/08
PAGES: 5 (INCLUDING THIS COVER PAGE)

FROM: STEVE NOVAK

TO: BENNET COMPANY: PEYNA INC.

MESSAGE:

GEVE -

Here is the cost for
the last Bondo work on the
surrounds for your review. Please
call me if you have any questions.
I appreciate your help on this.

Thank you -

OK - 63
He took 1/2 the cost & 1/2 is
the other 1/2.
Change Order Request Summary

Project: Meridian City Hall  
Date: August 28, 2008  
C/O Req. No.: Sixteen  
Subcontractor: Rule Steel  
Reference: Bondo work on sunshades

Description: Labor and equipment to bondo and smooth sunshade roll marks per instructions.

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Change Order Request Amount  
$2,930.38

Sales Tax 6%  
$12.26

Total Change Order Request - Rounded  
$2,943.00

Added time to schedule - working days  
0.0
<table>
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<tr>
<th>Date</th>
<th>Time</th>
<th>Activity and Notes</th>
<th>Hours</th>
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</thead>
<tbody>
<tr>
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<td>10:30 - 12:30</td>
<td>Meeting at Meridian City Hall</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NASA Eagle to purchase primer's putty</td>
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<tr>
<td></td>
<td></td>
<td>Middlesex to get tools</td>
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<tr>
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<td>24th 7:00 - 5:00</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>25th 7:30 - ½ hr lunch 1:00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>23rd</td>
<td>7:30 - 11:00</td>
<td></td>
<td>3.50</td>
</tr>
<tr>
<td>25th</td>
<td>7:30 - 1 hr lunch 4:00</td>
<td></td>
<td>7.50</td>
</tr>
</tbody>
</table>

**Total**

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<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Activity and Notes</th>
<th>Hours</th>
</tr>
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<tbody>
<tr>
<td></td>
<td></td>
<td>steve Johnson</td>
<td></td>
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<tr>
<td>21st</td>
<td>7:00 - 5:00</td>
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<td>10</td>
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<tr>
<td>22nd</td>
<td>7:30 - ½ hr lunch 1:00</td>
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<tr>
<td>Sat</td>
<td>13th 7:30 - 11:00</td>
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**Total**

28 + 26 = 54 Hours
## Eagle Auto Parts

208 933-8261
311 State St
Eagle 6516

Exp 2 INVOICE 719408 8/21/08 17:18

<table>
<thead>
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<th>Description</th>
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<tr>
<td>PUTTY</td>
<td>5</td>
<td>12.99</td>
<td>64.95 T</td>
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<tr>
<td>56 639A</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>RED FF102</td>
<td>12</td>
<td>5.29</td>
<td>64.98 T</td>
</tr>
<tr>
<td>56 639A</td>
<td></td>
<td></td>
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</tbody>
</table>

Subtotal: $140.93

Tax: 6% Taxable 1

TOTAL DUE: $140.93

CASH

RECEIPT REQUIRED FOR RETURNS

WARRANTY INFORMATION AVAILABLE ON REQUEST

<< CUSTOMER COPY >>

---

Exp 4 INVOICE 719213 8/20/08 11:17

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</thead>
<tbody>
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</tr>
<tr>
<td>GRAY</td>
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</tr>
</tbody>
</table>

Subtotal: $39.11

Tax: 6% Taxable 1

TOTAL DUE: $39.11

CASH

RECEIPT REQUIRED FOR RETURNS

WARRANTY INFORMATION AVAILABLE ON REQUEST

<< CUSTOMER COPY >>
Contract Closing

01-070545-05

02/26/00

RULE STEEL
21986 MIDDLETON RD
CADDLE, ID 83605

P/O 82506
DELIVER TO: NEW CITY HALL
MERIDIAN
PO237551

505-3031

ZT21

Item No. Qty Description Rate Info Unit Ext.
153-0050 1.0 UCLR PROPELLEd MAN LIFT 2G 245.00 735.00 735.00
Rate:
245.00/d 735.00/w 2200.00/28d
Meter:
2.0 6.0-out 2.0-in /HRxx/ 24.65free 25.000 6.00
Returned:
MOM 08/25/00 16:20
37 FOOT LIFT FROM BROWNS

355-0016 14.0 SAC
Sold on: TUE 08/26/00 14:40
R & V OIL 6.00 84.00

---Receipt Summary---

Date Seq Method Ref/P0 Amount RE-RENT GENERAL RESELL
02/26/00 05 Charge 944.00 735.00 94.00

>>>Amt Due this Invoice: 944.00 Pickup/Delivery 125.00
Total Unpaid this Contract: 944.00 Total 944.00

---Summary---

TUE 08/26/00 14:40

To Sales Agent:

DATE

08/26 RULE STEEL

01-070545-05

006445
**PURCHASE ORDER**

**TO** Petra Const. Co.  
**ADDRESS**  
**CITY, STATE, ZIP**

**SHIP TO** Comm. Painting Co.  
**ADDRESS**  
**CITY, STATE, ZIP** Meridian City Hall

<table>
<thead>
<tr>
<th>DATE</th>
<th>DATE REQUIRED</th>
<th>TERMS</th>
<th>HOW SHIPPED</th>
<th>REQ. NO. OR DEPT.</th>
<th>FOR</th>
</tr>
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<tbody>
<tr>
<td>10-1</td>
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<table>
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<tr>
<th>QUANTITY</th>
<th>DESCRIPTION</th>
<th>QUANTITY</th>
<th>DESCRIPTION</th>
<th>QUANTITY</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1st &amp; 2nd Coat on Brackets &amp; Intren. Faces of Exterior Sun Screens</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>On South &amp; South West Sides Paint End To End</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>1st Coat on North West Side</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Weds - 2</td>
<td>15.5 total</td>
<td>335</td>
<td>542.50</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Thurs - 7.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>6</td>
<td>1.5 gal.</td>
<td>25</td>
<td>37.50</td>
<td>580.00</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

**After Moving Shade Brackets by Rule**

**IMPORTANT**

PURCHASE ORDER NUMBER MUST APPEAR ON ALL INVOICES - PACKAGING, ETC.

PLEASE NOTIFY US IMMEDIATELY IF YOU ARE UNABLE TO COMPLETE ORDER BY DATE SPECIFIED.
**PURCHASE ORDER**

**TO:** Petra Const. Co.  
**ADDRESS:**  
**CITY, STATE, ZIP:**

**SHIP TO:** Comm. Painting Co.  
**ADDRESS:**  
**CITY, STATE, ZIP:** Meridian City Hall

**DATE** | **DATE REQUIRED** | **TERMS** | **HOW SHIPPED** | **REQ. NO. OR DEPT.** | **FOR**
---|---|---|---|---|---
10-3-8 | | | | |

<table>
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<th>PRICE</th>
<th>UNIT</th>
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<tbody>
<tr>
<td>2</td>
<td>2nd Coat Sunshades, N.W. Corner</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>2nd Coat North Side Sunshades</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Cover and Protect</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rule Steel change brackets</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pat J.</td>
<td>7-12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mike L.</td>
<td>5 hrs. each</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Steve G.</td>
<td>15 c 35</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**IMPORTANT**

PURCHASE ORDER NUMBER MUST APPEAR ON ALL INVOICES - PACKAGING, ETC.

PLEASE NOTIFY US IMMEDIATELY IF YOU ARE UNABLE TO COMPLETE ORDER BY DATE SPECIFIED.

**PLEASE SEND** COPIES OF YOUR INVOICE WITH ORIGINAL BILL OF LADING.

**PURCHASING AGENT**

Gene Bennett

**ORIGINAL**

B/K Rule
Attached are the invoices for two additional backcharge items totaling $1,176 that can up in billing reviews with the City. I will include them in the final settlement along with the painting backcharges forwarded previously upon approval of the settlement by the owner.

Call if you have any questions.
Thanks
Tom Coughlin
<table>
<thead>
<tr>
<th>BILL TO:</th>
<th>PROJECT:</th>
</tr>
</thead>
<tbody>
<tr>
<td>PETRA, INC.</td>
<td>MERIDIAN CITY HALL - BACK CHARGE</td>
</tr>
<tr>
<td>1097 N. ROSARIO PL</td>
<td>1097 N. ROSARIO PL</td>
</tr>
<tr>
<td>MERIDIAN, ID 83642</td>
<td>MERIDIAN, ID 83642</td>
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</table>

<table>
<thead>
<tr>
<th>DATE</th>
<th>INVOICE NO.</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>09/30/2008</td>
<td>12255</td>
<td>1</td>
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**RECEIVED:**

<table>
<thead>
<tr>
<th>DATE</th>
<th>PAYMENT TO:</th>
</tr>
</thead>
<tbody>
<tr>
<td>OCT 05 2008</td>
<td>CUSTOM GLASS, INC</td>
</tr>
<tr>
<td>254 LOOP STREET</td>
<td>254 LOOP STREET</td>
</tr>
<tr>
<td>CALDWELL, ID 83605-6092</td>
<td>CALDWELL, ID 83605-6092</td>
</tr>
</tbody>
</table>

**REMOVED SKYLIGHTS PREVIOUSLY INSTALLED; DUE TO BAD CLIP LAYOUT BY STEEL FABRICATORS. LABOR AUTHORIZED BY JC 9/16/08**

- **Job Name:** MD
- **Job Number:** 09-06-25
- **Cost Code:** 01-10
- **Authorized by:** 
- **Date Posted:** 
- **By:** 
- **Budget:**
- **Over Budget:**

**ENTERED:**

- **TERMS:**
- **10 EOM**

**PAYMENT TO:**

- **CUSTOM GLASS, INC**
- **254 LOOP STREET**
- **Caldwell, ID 83605-6092**

**All bills are due and payable on the 10th of the month following the invoice date and are past due on the 11th. Past due accounts are subject to a FINANCE CHARGE of 1 1/2% per month on the unpaid balance for an ANNUAL PERCENTAGE RATE of 18%.**
<table>
<thead>
<tr>
<th>#</th>
<th>Part Number</th>
<th>Description</th>
<th>Status</th>
<th>Date</th>
<th>Time</th>
<th>Price</th>
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<tr>
<td>1</td>
<td>3711-E870</td>
<td>FAN, PEDESTAL 30&quot; - 36&quot;</td>
<td>Out</td>
<td>10/10/08</td>
<td>1:30pm</td>
<td>$35.50</td>
</tr>
<tr>
<td>1</td>
<td>3711-E732</td>
<td>FAN, PEDESTAL 30&quot; - 36&quot;</td>
<td>Out</td>
<td>10/10/08</td>
<td>1:30pm</td>
<td>$35.50</td>
</tr>
</tbody>
</table>

Thank you for your Business

POT JTU19082
Back charge to Rule Steel
Ventilation for stairs during flush.

HAUODAIL Removal Job 06-0675

Job Name: [Handwritten]
Job Number: [Handwritten]
Cost Code: [Handwritten]
Authorized by: [Handwritten]
Date Posted: By:
Budget: Over Budget:
Commercial Painting Contractors, Inc.
4403 Challenger Way
Caldwell, ID 83605 RCE #3490
Dunns #11-541-2251
Federal ID # 82-0514299

BILL TO
Rule Steel
21802 Middleton Rd.
Caldwell, Idaho 83605
ATTN.: Steve Norquist

<table>
<thead>
<tr>
<th>P.O. NO.</th>
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<td>Meridian City H...</td>
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<table>
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<tr>
<th>ITEM</th>
<th>DESCRIPTION</th>
<th>Est Amt</th>
<th>Prior...</th>
<th>Prior %</th>
<th>QTY</th>
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<th>Curr %</th>
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<tr>
<td>Job R...</td>
<td>8/20/08: S. Stair prep Labor</td>
<td>140.00</td>
<td></td>
<td>4</td>
<td>35.00</td>
<td>100.00%</td>
<td>100.00%</td>
<td>140.00</td>
<td></td>
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<tr>
<td>Job R...</td>
<td>8/25/08: S. Stair prep Labor</td>
<td>560.00</td>
<td></td>
<td>16</td>
<td>35.00</td>
<td>100.00%</td>
<td>100.00%</td>
<td>560.00</td>
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<tr>
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<td>8/27/08: S. Stair prep Labor</td>
<td>122.50</td>
<td></td>
<td>3.5</td>
<td>35.00</td>
<td>100.00%</td>
<td>100.00%</td>
<td>122.50</td>
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<td>Job R...</td>
<td>8/27/08: S. Stair prep Labor</td>
<td>87.50</td>
<td></td>
<td>3.5</td>
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<td>100.00%</td>
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<td>Job R...</td>
<td>9/3/08: Middle Stair prep Labor</td>
<td>100.00</td>
<td></td>
<td>4</td>
<td>25.00</td>
<td>100.00%</td>
<td>100.00%</td>
<td>100.00</td>
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<tr>
<td>Job R...</td>
<td>9/4/08: Middle Stair prep Labor</td>
<td>192.50</td>
<td></td>
<td>5.5</td>
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<tr>
<td>Job R...</td>
<td>9/15-9/17/08: Middle Stair prep Labor</td>
<td>650.00</td>
<td></td>
<td>26</td>
<td>25.00</td>
<td>100.00%</td>
<td>100.00%</td>
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<tr>
<td>Job R...</td>
<td>9/30/08: Repaint misc. Sunshades Labor</td>
<td>560.00</td>
<td></td>
<td>16</td>
<td>35.00</td>
<td>100.00%</td>
<td>100.00%</td>
<td>560.00</td>
<td></td>
</tr>
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Total $2,412.50

Thank you for your business.
Eugene R. Bennett, being first duly sworn upon oath, deposes and states:

AFFIDAVIT OF EUGENE R. BENNETT DATED SEPTEMBER 20, 2010 IN OPPOSITION TO THE CITY OF MERIDIAN’S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR PARTIAL SUMMARY JUDGMENT RE: LIABILITY
1. I make this Affidavit based upon my own personal knowledge and I am competent to testify to the facts set forth below if called as a witness.

2. I have more than 39 years of experience in the construction industry.

3. I am a licensed Construction Manager in the State of Idaho.¹

4. I am employed by Petra Incorporated ("Petra").

5. I was hired by Petra on September 20, 1999 and have been employed there ever since.

6. My current title is Senior Advisor.

7. I have worked on more than 50 construction projects over the past 10 years.

8. Of those projects, approximately 20 were construction manager projects.

9. I served as project manager on the new Meridian City Hall project ("Project").

10. I am one of the custodians of Petra’s business records.

11. The documents referred to herein are true, correct and complete copies of the documents in Petra’s files or documents produced by the City of Meridian ("City" or "Meridian") during the course of this litigation, which files and documents are kept in the course of Petra’s regularly conducted business activity. It is Petra’s regular practice to make and/or keep such documents.

12. The City claims that because the Petra did not provide a single discrete written report, it should not have received its fee for the Development Strategies Phase. The owner’s criteria was not provided by the City in a single documents. Rather, the Project evolved over

¹ See Exhibit 505 attached to my Affidavit dated September 13, 2010.
time up through August 2008 when the City added the East Parking Lot. The owner’s criteria were developed during this period of time and Petra and LCA responded to the evolving criteria in collaboration with the City. The collaboration efforts were documented in meeting minutes, monthly reports and emails.

13. The City paid Petra its fee with full knowledge it had not received a discrete written report.

14. For the City four years later to claim that it was owed the report and the failure to provide is a breach of the Construction Management Agreement is disingenuous.

15. Petra and the City of Meridian collaborated over time with an evolving owner’s criteria.

16. There was never a time when a single report could have been issued that would have been relevant and not immediately outdated.

17. Through the course of dealings, the development strategies was on-going and the required items in the contract of design, construction, scheduling, budgetary, operational or other problems were delivered to the City in a series of reports, meetings, and other actions.

18. Since this was a phased project over a period of time, there never was one point in time with one set of drawings from which to produce a report on all of the owner’s criteria.

19. Since the City wanted the Project fast tracked, the report developed into a series of reports which were delivered to the City and the work was done.

20. Sequentially, the payment item now questioned by the City occurred in the pay schedule prior to the site preparation phase (demolition) and the preliminary design phase.
21. The handling of the Rule Steel Change Order No. 1 was done correctly and in conformance with 7.2.4 of the Construction Management Agreement.

22. The City’s representatives and Petra’s representatives agreed upon a Substantial Completion Date for the Project of October 15, 2008.

23. The prime contractors with the exception of Rule Steel all achieved substantial completion on time. Although assessed liquidated damages for delays, Rule Steel achieved substantial completion. As noted above, the parties agreed to October 15, 2008 as the Substantial Completion Date.

24. Additionally, I note that in the City’s Motion for Summary Judgment, the City contends that Petra should have tracked its hours differently for Change Order No. 2. The original draft of Change Order No. 2 did not include any claim for reimbursable salary expenses, but were added in the first revision.

25. Petra tracked those hours over and above the negotiated hours, which were due to the City increasing the projects scope, size, and complexity. This was the only way to track the hours. It would have been impossible to track the time spent on each discrete task in the manner the City is now suggesting.

26. The hours tracked in Change Order No. 1 were more detailed because the soil issue was a single development that could be carved out and tracked. The hours in furtherance of Change Order No. 2 were incurred under completely different circumstances.

27. Petra is not seeking compensation for work prior to November 2007.

28. The payroll charts include hours prior to this date in order to show how Petra
arrived at total hours.

29. Additionally, I note that the City in its Motion for Summary Judgment argues that Petra should have received City Council approval of Change Order No. 2 prior to doing the work.

30. This was never the City’s practice with change orders. Change Order No. 1 was approved in September of 2007, months after Petra had completed its work with regard to the soil contamination in May of 2007.

31. I on behalf of Petra ensured that Petra gave timely notice of its intent to seek the fee and felt obligated in good faith to continue working on the Project.

32. I never expected the City to deny the fee request and consequently did not stop work while waiting to hear back from the City.

EUGENE R. BENNETT

SUBSCRIBED AND SWORN to before me this 20th day of September, 2010.

COSHO HEMPHREY, LLP

THOMAS G. WALKER

Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of September, 2010, a true and correct copy
of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, AN IDAHO MUNICIPAL CORPORATION,

Plaintiff,

v.

PETRA, INCORPORATED, AN IDAHO CORPORATION,

Defendant.

Case No. 09-07257

AFFIDAVIT OF THOMAS G. WALKER DATED SEPTEMBER 20, 2010

I, THOMAS G. WALKER, being first duly sworn upon oath, depose and state:
1. I am one of the attorneys of record for the Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. I submit this affidavit in support of Petra’s Opposition to Motion for Leave to File First Amended Complaint and Add Claim for Punitive Damages Pursuant to Idaho Code § 6-1604.

3. I am one of the custodians of records of Cosho Humphrey, LLP, which include memoranda, legal documents, reports, correspondence, emails, records, research and data compilations, in various forms that are kept in the course of Cosho Humphrey, LLP’s regularly conducted business activity, and which are made and maintained as the regular practice of Cosho Humphrey, LLP.

4. Attached hereto as Exhibit “A” is a true and correct copy of relevant excerpts from the transcript of the deposition of Thomas Coughlin dated February 26, 2010.

THOMAS G. WALKER

THOMAS G. WALKER
SUBSCRIBED AND SWORN to before me this 20th day of September, 2010.

PAMELA R. CARSON  
Notary Public for Idaho  
Residing at Eagle, Idaho  
My commission expires: March 31, 2016.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701  

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile  
☐ E-mail:

THOMAS G. WALKER
BE IT REMEMBERED that the deposition of THOMAS R. COUGHLIN was taken by the Plaintiff at the offices of Trout Jones Gledhill Fuhrman, P.A., located at 225 North 9th Street, Suite 820, Boise, Idaho, before Associated Reporting, Inc., by Janet French, a Court Reporter and Notary Public in and for the County of Ada, State of Idaho, on Friday, the 26th day of February, 2010, commencing at the hour of 9:30 a.m. in the above-entitled matter.

APPEARANCES:
For the Plaintiff: TROUT JONES GLEDHILL FUHRMAN, P.A.
By: Kim J. Trout, Esq.
225 North 9th Street, Suite 820
Post Office Box 1097
Boise, Idaho 83701
Telephone: (208) 331-1170
Facsimile: (208) 331-1529
ktrout@idalaw.com

For the Defendant: COSHO HUMPHREY, LLP
By: Thomas G. Walker, Esq.
800 Park Blvd., Suite 790
Post Office Box 9518
Boise, Idaho 83707-9518
Telephone: (208) 344-7811
Facsimile: (208) 338-3290
twalker@cosholaw.com

Also Present: Richard Kluckhohn

Q. Sir, would you state your name for the record and spell the last.
A. Tom Coughlin, C-O-U-G-H-L-I-N.
Q. Mr. Coughlin, have you ever been deposed before?
A. No.
Q. I'm going to ask you a series of questions today and in order for our record to be complete, I need to ask you a couple of preliminary questions. First of all, I'm not meaning to pry at all, Tom, but is there anything about your physical condition as it exists today that would impair your ability to hear or understand and respond to questions I might ask you?
A. No.
Q. All right. If I ask you a question, and you respond to it, can we agree that for this record that
Q. Have you seen some document that is a written change order request from Rule Steel with respect to weather?
A. Yes.

Q. What's that document look like?
A. There were several letters, I believe.

Q. Have all of those been produced?
A. To the best of my knowledge, yes.

Q. All right. And when a request for a change order based on weather is received by Petra, what, if anything, is done with that request?
A. It is evaluated.

Q. And tell me, was an evaluation done by Mr. Bettis?
A. It looked like it, yes.

Q. And looked like it from what? What, if any, evaluation have you seen that was prepared by Mr. Bettis?
A. If I remember correctly, there were some memos or written responses back to Rule, I think, that pertained to those.

Q. Have you seen any other evaluation, other than a memorandum of some kind that was prepared by Mr. Bettis?
A. As far as what Mr. Bettis did?

Q. Okay. When did Mr. Bettis leave Petra's employment?
A. Yes.

Q. Who?
A. Rule Steel.

Q. And who within Petra was responsible for the review of that written change order request?
A. At the time, it would have been Wes Bettis.

Q. Okay. Did Petra keep and maintain a file of any kind with respect to the weather evaluation?
A. After Mr. Bettis left, I picked up the Rule file, and I took that over, yes. And weather was dealt with in the evaluation for the change to Rule for both liquidated damages and a schedule extension, yes.

Q. Okay. So tell me what evaluation, if any, you did.
A. With regards to weather.

Q. Yes, sir.
A. Looked at their request and what they were requesting and when they were requesting it.

Q. Anything else?
A. Compared it to our daily reports to see if they worked on those days.

Q. Okay. Anything else?
A. No.

Q. Okay. So the only evaluation -- or the only data that you used in evaluating weather would have...
been the written requests made by Rule and the daily
reports that were kept and maintained by Petra; is
that correct?

A. I don't believe -- I might have checked
the -- some of the weather data available online,
yeah.

Q. Did you keep any record of that?
A. No.
Q. All right. Did you actually check any
weather data online?
A. I believe I did, yes.
Q. Okay. Can you tell me when?
A. No. It would have been in the period when
we were dealing with Rule's request.
Q. And do I understand that to have been after
Rule's work was complete?
A. The majority of it, probably, yes.
Q. Did you keep any kind of a memoranda of any
kind related to the work you performed in evaluating
Rule's weather request?
A. No. It was recorded in a memo to the City.
Q. All right. And can you tell me what weather
data you looked at?
A. As far as?
Q. Evaluating Rule's request. What weather
data, if any, did you look at?
A. I've told you what I looked at. Online, our
daily reports. What are you --
Q. What did you look at online?
A. Whether it was rain, how much rain, temperatures.
Q. For the days requested?
A. Yes.
Q. Okay. Any other weather data that you
looked at?
A. No.
Q. All right.
A. Is there something specific you're looking
for?
Q. I'm just asking questions about what you
did. Have you told me everything that you have done?
A. Uh-huh.
Q. Okay. Does the term "critical path" have
any meaning for you?
A. Yes.
Q. Tell me what critical path is.
A. With relation to a schedule, it's the
shortest most direct way through the -- from start to
finish.
Q. Okay. Is that definition that you just
provided to me the one that was utilized by Petra in
its evaluation of schedule on this project?
A. I'm not sure I understand your question. As
far as --
Q. Okay. What, if any, definition of critical
path was utilized by Petra in its schedule evaluations
on this project?
A. I'm not sure I can answer that.
Q. Well, is there someone else who is better
qualified to answer that than you?
A. If you're talking about from the beginning
of the project -- I'm not exactly sure what you're
looking for.
Q. All right. I'll narrow it down in terms of
time. That's fair. In the period of time that you
were serving as the project engineer for Petra on the
Meridian City Hall Project, what definition of
critical path was utilized by yourself in the
evaluation of schedule for the Meridian City Hall
Project?
A. The -- are you talking in relation to Rule,
or everyone?
Q. I'm talking in general for the moment.
A. Okay. It's the critical activities that had
to get done for progress to progress, so the project
was completed on time.
Q. All right. Was a critical path schedule
ever prepared by Petra during your tenure as the
project engineer on this project?
A. The schedule was in a maintenance state at
that time, and yes, the superintendent prepared it --
updated it.
Q. Was there ever a schedule prepared that
contained an identification of the critical path by
Petra during your tenure as the project engineer?
A. A new schedule, no. I don't believe so.
There was the maintenance of the schedule they had
produced and the production -- the short -- the look
ahead schedules.
Q. So would I be correct in understanding that
during your tenure as the project engineer, a document
was never created by Petra that contained an
identification of the critical path for the Meridian
City Hall Project?
A. No, you wouldn't.
Q. All right. Tell me where I would find that
document?
A. Documents were produced. There is a long
list of schedules.
Q. Okay. I have looked through every schedule
Richard Bauer, being first duly sworn, deposes and states upon his oath the following:

1. I am the Senior Vice President of Lemley International.
2. My professional training, experience, professional associations and licensing are set forth in my curriculum vitae that was attached to my affidavit dated September 13, 2010.
3. I have been pursuing my work in the engineering and construction industries for over 40 years.

4. I am an expert in the fields of construction, construction management and engineering. I am a licensed Construction Manager in the State of Idaho.

5. Paragraph 1.1 of the Construction Management Agreement states as follows:

"Construction Manager acknowledges and accepts the relationship of trust and confidence established with Owner by this Agreement and that this relationship is a material consideration for Owner in entering into this Agreement. Accordingly, Construction Manager shall, at all times, act in a manner consistent with this relationship. Construction Manager further covenants that Construction Manager will perform its services under this Agreement, in the exercise of ordinary and reasonable care and with the same degree of professional skill, diligence and judgment as is customary among construction managers of similar reputation performing work for projects of a size, scope and complexity similar to the Project. Construction Manager shall, at all times, further the interest of Owner through efficient business administration and management."

6. The relationship established by and the duties and responsibilities described in the foregoing paragraph express the standard commercial relationship that exists between an owner and an agency construction manager not-at-risk.

7. As I testified in my September 13, 2010 affidavit, Petra’s duties and responsibilities were limited by the terms and conditions of the Construction Management Agreement. For instance, Petra’s scope of services under the Construction Management Agreement did not include acting as the City’s agent with regard to the architects. Rather, Petra’s responsibility was to “consult and coordinate with the architect as needed.” See Construction Management Agreement at 3.3. In addition, Petra did not have any inspection or testing responsibilities. Petra’s duty was to observe the Work of the contractors hired directly by
the City. Further, I have concluded from my review of the affidavits and legal memoranda filed by Meridian that the City is attempting to greatly expand the duties and responsibilities Petra undertook as an agency construction manager not-at-risk. Importantly, Petra was only required to act on the City’s behalf with regard to the construction contracts.

8. My opinions expressed in this affidavit and in my September 13, 2010 affidavit are my opinions arrived at through the exercise of my independent professional judgment.

September 17, 2010.

RICHARD BAUER

SUBSCRIBED AND SWORN To before me this 17th day of September, 2010.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 3/31/2016

DATED: September 17, 2010

COSHO HEMPHREY, LLP

By: THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of September, 2010, a true and correct copy
of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☒ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

THOMAS C. WALKER
Petra Incorporated ("Petra") submits this Memorandum in Opposition to the Motion for Summary Judgment filed by the City of Meridian ("Meridian" or "City").

1. **INTRODUCTION**

The City's Motion for Summary Judgment is premised on flawed interpretations of the Construction Management Agreement and factual inaccuracies. Petra respectfully requests that
the Court deny the City’s Motion.

First, the City incorrectly contends that Petra failed to give proper notice of its “claim” for an additional construction management fee (“CM fee”). Not only is the City’s interpretation of the term “claim” contrary to the plain language of the Construction Management Agreement, it contradicts the use of the term in the industry, is at odds with the parties’ common interpretation of the Construction Management Agreement as shown by their course of conduct, and is not in conformance with the definition of “claim” in Idaho Code § 6-902. Further, equitable principles should bar the City from taking this position.

Second, Petra complied with the Construction Management Agreement with respect to its request for reimbursable salary costs. The City is factually incorrect on this issue, ascribes an unreasonable and erroneous interpretation to paragraph 6.2.2 of the Construction Management Agreement, and further is estopped from now taking this position.

Third, the record demonstrates that Petra disclosed its intent to seek an additional CM fee and reimbursable salary expenses prior to providing the additional services. Petra fully complied with its contractual obligations.

2. BACKGROUND

This case turns on a few clear contractual provisions set against a simple factual background. When the City retained Petra as its Construction Manager, the City was contemplating a $12.2 million City Hall building. Petra and the City agreed to Petra’s compensation in three separate places in the Construction Management Agreement. First, the City and Petra agreed in Paragraph 6.1 on a CM fee of $574,000. Second, the City and Petra
agreed in Paragraph 6.2 that if the Project was to change in certain ways—for example, if the Project Budget were to increase—Petra would recoup its salary costs incurred in furtherance of these changes, in addition to its fee. Third, and most importantly, the City and Petra agreed in Paragraph 7 that if Petra’s services were “materially affect[ed]” by changes to the Project, Petra would be entitled to an “equitable adjustment” in its CM fee. The changes listed in Paragraph 7 include a “[s]ignificant change to the Project, including, but not limited to size, quality, complexity, Owner’s schedule, budget or procurement.” This provision is particularly important in light of the fact that these types of agreements are signed at the very earliest stages of a project. It provides a mechanism to compensate the construction manager if the scope of the job initially agreed upon expands and leads to more work than initially contemplated when the parties agreed to the initial fee.

The scenario envisioned by Paragraph 7 is precisely what happened in this case. The Meridian City Council, in their desire to build a state-of-the-art City Hall that would last 200 years, increased the size, quality, complexity, and the budget of the Project. What was initially conceived as a 12.2 million dollar building ended up costing in excess of 20 million dollars, due to the constantly evolving vision of the Meridian City Council. Naturally, Petra sought an “equitable adjustment” in its fee as well as reimbursement for increased salary costs under Paragraph 6.2.2. Petra notified the City of its intent to do so as soon as the scope of the Project had evolved to the point that there was “[s]ignificant change to the Project.” Petra repeatedly disclosed its intent to rely on Section 7 in order to be adequately compensated for its efforts.
As the Court is well aware, the City essentially takes a position in this case that it was unaware of Paragraph 7. The City takes the position that it could dramatically increase the scope, size, and complexity of the Project, but still only owe Petra $574,000. The City takes the position that it can write out of the contract the equitable adjustment it agreed to in Paragraph 7. In other words, the City, in an apparent new sense of thriftiness, believes it can obtain Petra’s services near half-price.

Rather than directly address this simple contractual obligation, the City has thrown up a variety of technical arguments. Here, in the present Motion, the City argues it did not receive timely notice of Petra’s claim. As discussed below, this argument lacks merit.

3. LEGAL ANALYSIS

3.1 Contrary to the City’s argument, Petra complied with all applicable notice requirements.

The City argues Petra failed to give notice of its “claim” within 21 days of the first appearance of the basis for its claim. The City argues such notice was required by the Construction Management Agreement. Based on this faulty premise, the City goes back in time and attempts to locate the very first moment Petra should have known that, due to the increased cost of the Project, it would be entitled to an increase in its CM fee. The City contends at that very first moment, Petra had 21 days to submit a written notice of “claim” to the Office of the City Clerk and the City Attorney’s Office. Because Petra failed to do so, its “claim” is barred. The City is incorrect. The City’s interpretation of the Construction Management Agreement contradicts its plain meaning, is contrary to the use of the term “claim” in the construction industry, is at odds with the parties’ mutual interpretation of the term as evidenced by their
course of conduct, and is not in conformance with the definition of “claim” in Idaho Code § 6-902.1


The City’s argument contradicts the plain and unambiguous meaning of the Construction Management Agreement by including a change order within the meaning of a “claim.” The term “claim” does not encompass a mere change order. Paragraph 8.1 states: “In the event that any claim, dispute or other matter in question between Owner and Construction Manager arising out of or related to this Agreement or the breach hereof (a ‘Claim’), Owner and Construction Manager shall first endeavor to resolve the Claim through direct discussions.” (Emphasis added.)

1 Paragraph 6-902(7) provides: “Claim” means any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under this act as compensation for the negligent or otherwise wrongful act or omission of a governmental entity or its employee when acting within the course or scope of his employment. [Emphasis added.] The City did not refuse to pay Petra’s Change Order No.2 until February 24, 2009. That is the date of the City’s wrongful conduct. Prior to February 24, 2009, the City had requested additional information regarding Change Order No. 2. Neither Petra’s submission of Change Order No. 2, nor the City’s request for additional information was wrongful.
Under the Construction Management Agreement, a claim must be initiated by written notice and the burden of substantiating the claim is on the party making it. The parties shall continue to perform under the Construction Management Agreement pending resolution of the claim. In order to assist the City in evaluating a claim, written notice of the claim must be submitted no later than 21 calendar days “after the event or the first appearance of the circumstances giving rise to the Claim.” Paragraph 8.2 requires claims to be addressed in mediation first and details the mediation process. The term “claim” does not appear anywhere outside of paragraph 8.

As the above provisions demonstrate, the term “claim” applies in the context of a dispute. This is first apparent from the phrase “claim, dispute or other matter in question” being abbreviated as a “Claim.” Under the canon of construction *ejusdem generis*, when a general word or phrase precedes or follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. Consequently, a matter is not a claim until it is disputed. This comports with the standards in the construction industry that a change order is not a claim until it is denied and then pursued.

To borrow another principle of construction, *noscitur a sociis*, “words are known by the company they keep.” *State v. Richards*, 127 Idaho 31, 38, 896 P.2d 357, 364 (Ct. App. 1995). The meaning of the term “claim” is informed by the content of this list, which shows that the meaning of “claim” is related to “dispute” and “matter in question.” This meaning is further evidenced by the rest of paragraph 8. In particular, paragraph 8 requires the parties to continue

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2 Affidavit of Gene Bennett dated April 7, 2010 (“Bennett April 7 Affidavit”) at ¶ 8, Exh. A.
performing their duties under the Construction Management Agreement pending resolution of the claim. And, all “claims” are subject to mediation. The entire thrust of paragraph 8 indicates that a claim arises when the parties are in a dispute implicating rights and obligations under the Construction Management Agreement.

Therefore, the City is incorrect in defining Petra’s Change Order No. 2 as a “claim” for an increased fee and placing it under the purview of paragraph 8 for purposes of the 21-day notice requirement. Rather, Change Order No. 2 was initiated pursuant to paragraphs 6 and 7 of the Construction Management Agreement. It was only when the City denied Petra’s request on February 24, 2009 that Petra had a claim within the meaning of paragraph 8 because it was not until the City denied Petra’s request that the parties had “claim, dispute, or other matter in question.” Then, Petra had an obligation to submit written notice within 21 days, which Petra did.³

The City’s entire notice argument is premised on this fundamentally erroneous interpretation of the Construction Management Agreement. Therefore, the City’s lengthy attempt in pages 6 through 11 of its Memorandum to ascertain the very first moment Petra could sense it may have a basis for an increased CM fee is irrelevant.

Further, the City’s interpretation of the term “claim” is at odds with its use in the industry. As Richard Bauer details in his affidavit, under standards applicable to contractors and

³ Affidavit of Thomas G. Walker dated April 29, 2010 (“Walker April 29 Affidavit”), filed in support of Petra’s Motion for Summary Judgment, at ¶ 5, Exh. A.
construction managers, a change order request does not become a claim until it is denied by the owner.\footnote{Affidavit of Richard Bauer ("Bauer Affidavit") dated Sept. 13, 2010 at ¶ 45.}

Not only is the City's interpretation of the plain and unambiguous terms of the Construction Management Agreement erroneous, it contradicts the common interpretation both parties gave to the term "claim." To the extent the Court considers it ambiguous, whether a change order for an increased CM fee is a claim under paragraph 8, the parties' common interpretation controls. If ambiguous terms in a contract have been interpreted and acted upon by the parties, a court should weigh this common interpretation in interpreting the meaning of the disputed term. \textit{Mountainview Landowners Co-op, Ass'n v. Cool}, 142 Idaho 861, 865, 136 P.3d 332, 336 (2006) ("The conduct of the parties to a contract and their practical interpretation of it is an important factor when there is a dispute over its meaning"); \textit{J.R. Simplot Co. v. Bosen}, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006) (noting the relevance of the "construction placed upon [an ambiguous term] by the contracting parties as shown by their conduct or dealings").

Again, the City is attempting to interpret Change Order No. 2 as a "claim" subject to the provisions of paragraph 8, including the 21-day notice requirement. The City does not mention that it approved Change Order No. 1.\footnote{Affidavit of Gene Bennett dated Sept. 13, 2010 ("Bennett Sept. 13, 2010 Affidavit") at ¶ 111.} Petra submitted Change Order No. 1 for an increase in its CM Fee on September 14, 2007.\footnote{Affidavit of Gene Bennett dated April 7, 2010 ("Bennett April 7, 2010 Affidavit") at Exh. Z.} The basis for the fee request was the discovery and removal of contaminated and unsuitable soils.\footnote{Bennett Sept. 13, 2010 Affidavit at ¶ 111.} The extent of this problem was discovered sometime prior to
March 5, 2007. Under the City’s interpretation of a “claim” under the Construction Management Agreement, Petra would have been required to submit written notice of its CM fee request within 21 days of being informed of the extent of the contaminated and unsuitable soils and realizing that this might be something that may result in an increase in its CM fee. Not only is such an approach illogical, the record is clear that the parties did not treat Petra’s first request for a CM fee increase as a claim under paragraph 8. After Petra submitted its CM fee request in Change Order No.1 on September 14, 2007, the City paid the additional CM fee. No one from the City invoked paragraph 8 and the 21-day notice requirement. No one from the City or Petra referenced paragraph 8. The parties’ common interpretation of how a CM fee request was treated was that paragraphs 6 and 7, not paragraph 8, governed.

Finally, the City’s position is not in conformance with the definition of “claim” in Idaho Code § 6-902. Paragraph 6-902(7) provides: “A claim means any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under this act as compensation for the negligent or otherwise wrongful act or omission of a governmental entity or its employee when acting within the course or scope of his employment.” I.C. 6-902 (7)(emphasis added). The City did not refuse to pay Petra’s Change Order No. 2 until February 24, 2009. That is the date of the City’s wrongful conduct. Prior to February 24, 2009, the City had only requested additional information regarding Change Order

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8 Bennett April 7, 2010 Affidavit at Exh. Z.
9 Bennett Sept. 13, 2010 Affidavit at ¶ 111.
10 Bennett April 7, 2010 Affidavit at Exh. Z.
No. 2. Neither Petra’s submission of Change Order No. 2, nor the City’s requests for additional information was wrongful.

Therefore, the notice requirements of paragraph 8 were not triggered until February 24, 2009, when the City denied Petra’s request for an increased CM fee. Petra complied with the 21-day notice requirement. The City’s Motion for Summary Judgment is premised on this lack-of-timely-notice argument, and consequently should be denied.

2.1 Further, the City is estopped from denying Petra’s CM fee request because Petra allegedly failed to request it in a timely manner.

The City is incorrect in arguing that Petra failed to comply with the Construction Management Agreement and has no right to its earned CM fee. As noted above, the City’s interpretation of the term “claim” is erroneous. Additionally, equitable principles prevent the City from even taking the position that Petra failed to comply with the timeliness requirements of the CMA and is not entitled to its earned CM fee.

The doctrine of quasi-estoppel bars the City from claiming Petra’s request for a CM fee was not timely and should be denied. Quasi-estoppel “has its basis in acceptance of benefits.” Mitchell v. Zilog, 125 Idaho 709, 715, 874 P.2d 520, 526 (1994). This doctrine prevents one party “from asserting to another’s disadvantage a right inconsistent with a position previously taken by him or her.” Id. The doctrine also applies when the party to be estopped has gained an advantage from its first position. Id. For quasi-estoppel to apply, it must be unconscionable for the party to be estopped to “maintain a position inconsistent with one in which he acquiesced in

11 Bennett Sept. 13, 2010 Affidavit ¶ 114.
12 Walker April 29, 2010 Affidavit ¶ 5, Exh. A.
or of which he accepted a benefit.” *Id.* (citing *KTVB, Inc. v. Boise City*, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971)). It is an equitable doctrine based on the principle “that a person, with full knowledge of the facts, shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.” *KTVB*, 94 Idaho at 281, 486 P.2d at 994. Quasi-estoppel is as a “broadly remedial doctrine, often applied ad hoc to specific fact patterns.” *Keesee v. Fetzek*, 111 Idaho 360, 362, 723 P.2d 904, 906 (1986).

A simple factual background demonstrates the applicability of this doctrine. It is undisputed that as of August 2007 the City was aware of Petra’s intent to seek an additional CM fee.13 The City was also aware that Petra had not yet earned this fee request based on the status of the Project at the time.14 The City was aware of Petra’s interpretation of the Construction Management Agreement and how it calculated its CM fee requests, particularly because it had approved Change Order No. 1.15 The City said nothing.16 The City did not take issue with anything about Change Order No. 2 until May 29, 2008, when it requested additional information but did not deny the request.17 More importantly, the City did not deny Petra’s CM fee request until February 24, 2009.18

The key is recognizing that when Petra made clear to the City that it intended to seek an additional CM fee, Petra had not yet earned the fee. The City waited in silence until Petra had provided the services and earned the fee and then denied it. The City accepted the benefit of

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13 Bennett Sept. 13, 2010 Affidavit at ¶ 105.
14 *Id.* at ¶ 105.
15 *Id.* at ¶ 106.
16 *Id.* at ¶ 114-15.
18 Bennett Sept. 13, 2010 Affidavit at ¶ 114.
Petra’s services in bringing the Project to completion. Quasi-estoppel can “arise when a party who has a duty to speak fails to do so and thereby produces an advantage for himself, or a disadvantage for someone else, which is unconscionable.” *Lupis v. Peoples Mortg. Co.*, 107 Idaho 489, 491, 690 P.2d 944, 946 (1984) (emphasis added). The City has pointed repeatedly to language in the Construction Management Agreement indicating that the parties entered into a relationship of “trust and confidence.” But more on point is Paragraph 3.2, Owner’s Duties: “If Owner learns of any . . . errors, omissions, or inconsistencies in the services of Construction Manager, and in the further event that Construction Manager does not have notice of the same, Owner shall inform Construction Manager.”

As evidenced from the City’s current position in this litigation, the City believed Petra was mistaken about its entitlement to an equitable adjustment in its CM fee. Instead of promptly informing Petra of its alleged error and perhaps reaching a negotiated agreement, the City waited until Petra had expended its efforts and money for the benefit of the City and earned the fee in bringing the Project to timely completion. Then the City denied Petra’s request. The bottom line is that whether the duty is created by contract or whether it is the duty of good faith and fair dealing inherent in every contract,\(^{19}\) the City had a duty to promptly speak up if it intended to deny Petra’s CM fee request. The first elements of quasi-estoppel are met.

Additionally, to now allow the City to go back in time and assert that Petra was not timely in asserting its claim, after Petra completed the Project and earned the fee, is unconscionable. If the City disagreed with Petra’s position that it was owed an additional CM fee, then the City should have informed Petra of its disagreement at an earlier time.

fee, it should have raised the issue immediately. Instead, in what can only be considered a deliberate strategy, the City stayed silent until the Project was completed. Obviously, the City now disputes that it owes Petra the additional CM fee. What is unconscionable is that it did not raise this issue promptly, but instead allowed Petra to go forward and finish its work managing the Project. Even more troubling, after waiting months to deny the CM fee request, the City is now asserting the CM fee request is not timely. The unconscionability element of quasi-estoppel met.

Therefore, the doctrine of quasi-estoppel bars the City from asserting that it does not owe Petra an additional CM fee due to the timing of Petra’s request. At a minimum, there is an issue of material fact that precludes summary judgment.

2.2 **Petra complied with paragraph 6.2.2 and is entitled to its claimed reimbursable expenses.**

The City argues that Petra’s alleged failure to “track the number of hours in furtherance of the change” is a condition precedent that excuses the City’s obligation to reimburse Petra. The City is incorrect.

First, as a factual matter, Petra complied with this provision.\(^20\) Exhibit 513 attached to Gene Bennett’s affidavit contains a detailed chart comparing the actual hours spent managing the Project versus the negotiated amount.\(^21\) This chart was provided to the City in October of 2008.\(^22\) Petra in fact did track the hours spent in furtherance of the changes in the Project due to

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\(^{20}\) Bennett April 7, 2010 Affidavit at Exh. Q.
\(^{21}\) *Id.*
\(^{22}\) *Id.*
“size, complexity, and budget.” The May 3, 2010 Revision #1, which was sent to the City’s counsel because the parties were in litigation, provides additional clarity. But, the undisputed fact is that the hours were in fact tracked and submitted to the City, and the documents were received October 3, 2008. Like the Pac-West invoice fraud allegation, the City again seizes on a document in the record, and without taking the time to analyze it, makes an allegation.

Second, as a matter of contract interpretation, the City’s reading of the Construction Management Agreement gives paragraph 6.2.2 a meaning inconsistent with the parties’ intent and impossible to carry out. The City is asking the Court to adopt its interpretation of paragraph 6.2.2 in a vacuum without addressing the contract as a whole in light of the surrounding facts and circumstances.

Paragraph 6.2.2 states:

If the size (i.e. 80,000 square feet), complexity (i.e., four story, surface parking), Owner’s schedule (i.e. six months Preconstruction Phase Services, eighteen months Construction Phase Services), Project Budget (i.e., $12,200,000.00), procurement method (i.e., no long lead time and/or expedited materials), and/or bidding process (i.e., two bid packages, no rebids) materially changes, Owner and Construction Manager agree that the not-to-exceed limits set forth below shall be adjusted up or down accordingly based upon the actual number of hours worked in furtherance of the change by the Project Manager, Project Engineer, Project Superintendent, and Project Foreman.

In interpreting any particular provision of a contract, the “entire agreement must be viewed as a whole” to determine the mutual intent of the parties. *St. Clair v. Krueger*, 115 Idaho
702, 705, 769 P.2d 579, 582 (1989)). "When reasonably practical, contracts are to be interpreted in a manner that makes them reasonable and capable of being carried into effect . . . ." 17A Am. Jur. 2d Contracts § 338. An "interpretation should be adopted which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties." Id.

Paragraph 6.2.2 does not require Petra to supply the level of detail as the City alleges. It would be impossible to correlate each moment of an employee's time spent in furtherance of each of the hundreds of decisions that were made on a daily basis regarding the changes in size, complexity and budget.26 As Petra's expert explains, "the work under [Change Order No. 2] could not be separated from the original contract work."27 Furthermore, "[t]here was no point in the project when Petra or the City could say the project described in the contract was complete and Petra need authorization to move forward on the work in proposed Change Order No. 2."28 Rather, the most reasonable interpretation of paragraph 6.2.2 is that Petra provide its total hours spent over and above the negotiated hours in the contract.29 As noted above, Petra complied with this provision.30

26 Bennett Sept. 20, 2010 Affidavit at ¶ 25.
28 Id.
30 Bennett April 7, 2010 Affidavit at Exh. Q.
2.3 The City is estopped from asserting it never gave approval to Petra before Petra earned its CM fee. The parties modified this aspect of the Construction Management Agreement.

The City also argues that Petra’s claim is barred because it failed to obtain the City’s approval prior to providing the claimed services under Change Order No. 2. This argument is based on a revisionary version of the facts.

As the record reflects, the City never followed this particular timing with regard to change orders. ³¹ For example, Change Order No. 1 was issued in September of 2007 even though the work had already been completed in May of 2007. ³² It is contrary to the City’s conduct to now insist on compliance with this particular provision when it never did during the course of the Project. Without repeating the analysis of waiver, the facts are such that the City waived the right to take this position.

In sum, there was never a practice of approving change orders prior to the work being done. The City and Petra modified this aspect of the Construction Management Agreement. Petra is estopped from now attempting to assert strict compliance with this term as written. At a minimum, there is a genuine issue of material fact that precludes summary judgment.

---

³² Id.
4. CONCLUSION

Petra respectfully requests the Court to deny the City’s Motion for Summary Judgment.


COSHO HUMPHREY, LLP

By:  

THOMAS G. WALKER
Attorneys for Defendant/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 20th day of September, 2010, a true and correct copy of the

within and foregoing document was served upon:

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Boise, Idaho 83701

U.S. Mail
Hand Delivery
Overnight Courier
Facsimile:
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THOMAS G. WALKER
Petra Incorporated submits this Memorandum of Law in support of its opposition to the City of Meridian’s Motion in Limine: Expert Testimony of Jack K. Lemley; and in support of its opposition to the City’s Motion in Limine: Expert Testimony of Bennett, Coughlin, and Frank.
1. Motion in Limine Re: Jack Lemley

The City argues that Jack Lemley’s opinion should be excluded at the trial in this matter because the City contends his opinion is collective or collaborative. The City’s Motion should be denied.

As a matter of background for the Court, Petra retained two experts for this case, Jack Lemley and Richard Bauer. Jack Lemley submitted an affidavit on April 30, 2010 containing his opinion as to the Project and Petra’s compliance with the standard of care. This affidavit is the focus of the City’s present Motion in Limine. Petra also disclosed a report produced by Mr. Lemley’s firm back in June of 2010. On September 13, 2010, Petra filed the Affidavit of Richard Bauer, which references the Lemley Report, but contains Mr. Bauer’s independent analysis and opinions

The City incorrectly characterizes Mr. Lemley’s opinion as collaborative, an assimilation of the Lemley firm’s collective work, and opines that Mr. Lemley is just a “conduit.” But reading his affidavit, Mr. Lemley plainly states:

Considering the foregoing, it is my opinion within a reasonable degree of professional certainty that Petra exercised ordinary and reasonable care with the same degree of professional skill, diligence and judgment as is customary in this community among construction managers performing work for projects of a size, scope and complexity similar to the Project.¹

¹ Affidavit of Jack K. Lemley dated April 30, 2010 at ¶15.
Mr. Lemley also states: "My opinions stated herein are made with reasonable professional
certainty, and I actually hold these professional opinions."2 The City appears to take issue with
the fact that in arriving at his opinions, Mr. Lemley was assisted by various employees of
Lemley International, including Mr. Bauer, in conducting interviews and collecting and
reviewing documents. The City argues "Mr. Lemley’s expert opinion is admittedly, to some
degree, in reliance upon the interviews of various individuals conducted by others as other
individuals review of documents and sites."3

Based on the fact that Mr. Lemley may have relied on other sources to arrive at his
opinion, the City incorrectly deduces the opinion Petra seeks to use is that of a combined entity.
Rather, both of Petra’s experts, Mr. Lemley and Mr. Bauer, hold independent opinions and refer
to a report generated by Mr. Lemley with the assistance of Mr. Bauer and other employees of his
firm. Messrs. Lemley and Bauer’s separate affidavits demonstrate they each hold independent
opinions. Nothing precludes an expert from relying on other sources in arriving at his opinion.

Mr. Lemley, like any expert would in a complex case, relied on a number of sources in
reaching his opinion: treatises, documents, reports, interviews, and so forth. This is expressly
contemplated by the Rule 703, which states in relevant part:

The facts or data in the particular case upon which an expert bases an opinion or
inference may be those perceived by or made known to the expert at or before the
hearing. If of a type reasonably relied upon by experts in the particular field in
forming opinions or inferences upon the subject, the facts or data need not be
admissible in evidence in order for the opinion or inference to be admitted.

2 Id. at 14.
3 Plaintiff’s Memorandum dated September 13, 2010 at p. 2
I.R.E. 703. The Idaho Supreme Court has interpreted this Rule:

The trial court, in its discretion, may allow an expert to render his opinion based in part upon hearsay or other inadmissible evidence, as long as the expert testifies as to the specific basis of his opinion and reaches an opinion through his own independent judgment.

Egbert, 125 Idaho at 680, 873 P.2d at 1334 (quoting Doty v. Bishara, 123 Idaho 329, 848 P.2d 387 (1992)). Nothing prohibits an expert from relying on an interview conducted by someone else, or even a document or report created by someone else. This is commonplace among expert witnesses. This conduct does not convert the expert testimony into the testimony of an “entity,” as the City claims.

Furthermore, nothing prevents an expert from relying on the opinions of other experts, just as an expert can rely on data, reports, treatises, and so forth. This type of reliance does not create a single collaborative opinion. The Idaho Supreme Court has stated “Nothing in Idaho law prevents experts from consulting each other or from holding the same opinion.” Edmunds v. Kraner, 142 Idaho 867, 874, 136 P.3d 338, 345 (2006). In fact, this very objection has been addressed and dismissed by courts in other jurisdictions. “Under Rule 703, an expert’s testimony may be formulated by the use of facts, data and conclusions of other experts.” Asad v. Continental Airlines, Inc., 314 F. Supp. 2d 726, 740 (D. Ohio 2004) (emphasis added) (citing Barris v. Bob’s Drag Chutes & Safety Equip., Inc., 685 F. 2d 94, 102 n. 10 (3rd Cir. 1982)). Provided the expert is not merely repeating the other expert’s opinion, he may testify.

Here, Mr. Lemley is not merely a conduit for another expert or for other testimony. Mr. Bauer is not merely a conduit for another expert. Both have formed their own independent
opinions. Their opinions may be formed in part on interviews conducted by others within Mr. Lemley’s firm. Mr. Bauer and Mr. Lemley may rely on the same reports and are free to agree in their opinions. The City can on cross-examination inquire as to the bases for their opinions. “Trial courts have broad discretion in deciding whether to admit expert testimony.” *Egbert v. Idaho State Ins. Fund*, 125 Idaho 678, 680, 873 P.2d 1332, 1334 (1993). The City has offered no basis for the exclusion of Mr. Lemley (or Mr. Bauer).

2. **Motion in Limine Re: Bennett, Coughlin, and Frank**

The City also requests the Court to issue an order precluding Mr. Bennett, Mr. Coughlin, and Mr. Frank from providing expert testimony at trial in this matter. The Court should deny the City’s request.

The City’s Motion provides an incomplete background. Petra’s deadline to disclose expert witnesses was September 15, 2010. Petra made a full disclosure of Bennett, Coughlin, and Frank (and John Quapp) on September 14, 2010, in compliance with the Court’s Scheduling Order and Rule 26. Each of these individuals is eminently qualified to give expert testimony in this case. Each of them has decades of experience in the construction industry. Nothing prohibits a person from serving both as a fact witness and an expert witness. When appropriate, each of them can not only testify as to whether Petra met the standard of care as defined in the Construction Management Agreement, but with the proper foundation, can also opine as experts on the standard of care in the industry.

---

3. Conclusion

Petra respectfully requests the Court deny both of the City’s Motions.


By:

THOMAS G. WALKER
Attorneys for Defendant/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of September, 2010, a true and correct copy of the

within and foregoing document was served upon:

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Boise, Idaho 83701

By:

THOMAS G. WALKER
The Plaintiff City of Meridian (hereinafter referred to as the “City”), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Memorandum in Opposition to the Motion in Limine to Exclude Testimony and Documents by Meridian’s Experts as filed by the Defendant, Petra Incorporated (hereinafter referred to as “Petra”).

By its present motion, Petra seeks to strike the City’s expert witnesses based on an alleged failure to provide a timely disclosure in accordance with this Court’s scheduling order and Idaho Rule of Civil Procedure 26(b)(4). However, the record belies Petra’s assertion. As Petra must concede, the City did in fact disclose its witnesses timely on or about July 28, 2010. For Petra to assert that the City’s disclosures of its expert witnesses was limited solely to the identification
provided on that date would be to ignore the substantial record present in these proceedings wherein the City’s experts have provided a disclosure of their opinion testimony well prior to the July 28, 2010 deadline date.

Petra’s motion is little more than an effort to obtain relief to which it is neither entitled, nor justified, under the facts and procedural history of this case. Petra’s motion lacks merit and should be summarily dismissed.¹

ARGUMENT

1. Petra’s Motion Should Be Summarily Dismissed For Its Failure To Not Only Certify, But In Fact Actually Engage, In A Good Faith Effort To Confer With The City Regarding Any Discovery Dispute It Believed Existed.

Although couched as a motion in limine, Petra’s motion is in fact a disguised discovery motion. This should be clear given Petra’s submission of its written discovery propounded to the City which sought to impose disclosure obligations over and above those required by Idaho Rule of Civil Procedure 26(b)(4). Thus, to the extent that Petra’s motion seeks to sanction the City via discovery sanctions afforded by I.R.C.P. 37, Petra’s motion should be summarily denied for failure to comply with the meet and confer requirements of Idaho Rule of Civil Procedure 37(a)(2) which clearly and unequivocally imposes the following obligation on any party seeking sanctions for the violation of a discovery order:

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

¹ For reasons wholly inexplicable, Petta has determined to inject the issues in the case of City of McCall v. Payette Lake Recreational Water & Sewer District, Valley County Case No. 2005-352-C into this matter despite the fact that it concerns wholly disparate facts, i.e. a highly contentious case having origins back to at least 2002 and wherein litigation between the parties commenced in 2005. Moreover, it should be noted that the Memorandum Decision cited by Petta is currently under review via a motion for reconsideration. Petta’s inclusion of the City of McCall matter should be wholly disregarded and seen for what it is – nothing more that Petta’s attempt to secure relief to which it has no entitlement whatsoever by cloaking itself in the guise of another party to another proceeding.
Nowhere within Petra's Motion, the Affidavit of Thomas G. Walker, or its Memorandum in Support of its Motion is there any certification that Petra has made any demand for supplementation of any existing discovery request. Nor could it. Petra has failed to comply with the certification requirement of I.R.C.P. 37(a), the necessary precursor to an order thereby, and has failed to secure an order under I.R.C.P. 37(a), the necessary precursor to an order to exclude evidence as a sanction under I.R.C.P. 37(b)(2). As such Petra's motion must be denied.

2. The Facts In The Record Evidence That The City Has Disclosed Its Expert Witnesses and Their Testimony to Petra In Like Manner As Petra Has Disclosed Its Witnesses to the City.

In order to justify the relief it seeks in this matter, Petra has asked that this Court consider a ruling issued in another proceeding, involving another party, and consider only the disclosure filed with the Court by the City on July 28, 2010. However, what Petra wholly fails to disclose, and what is abundantly evident from the record in these proceedings is that the City had already fully disclosed the expert testimony of its expert witnesses well prior to July 28, 2010 disclosure deadline.

As this Court is aware from the briefing related to the City's Motion to Amend as well as the cross motions for summary judgment, the City has presented the Affidavits of Steven J. Amento, Laura Knothe, and Todd Weltner, all of whom have identified their background, their opinions, and the basis for those opinions. If Petra wishes to complain about disclosing expert witness testimony by way of reference to the affidavits of the experts already present in the proceeding, then Petra needs to have its own expert disclosures likewise stricken. As is evident from a review of the expert disclosures provided by Petra, Petra has itself disclosed its experts by way of reference to the
affidavits of those individuals already submitted in these proceedings. See Petra Incorporated’s Disclosure of Expert Witnesses Dated August 12, 2010.2

It is against this backdrop that Petra’s cases fail to support the result that it seeks in these proceedings. For example, in the case of Radmer v. Ford Motor Company, 120 Idaho 86, 813 P.2d 897 (1991), the trial court correctly excluded an expert witness from testifying at trial to a previously undisclosed theory of causation. In this case, Petra has the disclosures of the substance of the expert witnesses that the City intends to call as well as the basis for those opinions. Moreover, Petra is still in the process, as is the City, of conducting expert discovery by way of depositions. Petra’s motion would be appropriately considered at trial if a City witness proffered a new, undisclosed opinion, but it cannot be used as a vehicle to prohibit the testimony of those opinions to which Petra has already been advised by way of the City’s disclosures. See also Clark v. Klien, 137 Idaho 154, 45 P.3d 810 (2002) (trial court erred by allowing previously undisclosed expert to testify at trial); Hopkins v. Duo-Fast Corp., 123 Idaho 205, 846 P.2d 207 (1993) (trial court did not err in permitting expert witness to present previously undisclosed expert testimony at trial where evidence showed that expert opinion was reached recently and not the result of sandbagging by the disclosing party); Perry v. Magic Valley Regional Medical Center, 134 Idaho 46, 995 P.2d 816 (2000) (trial court did not err in excluding video tape that was not produced in discovery despite presence of repeated demands for discovery and supplementation by moving party); Fouche v. Chrysler Motors Corp., 103 Idaho 249, 646 P.2d 1020 (Ct. App. 1982) (trial court did not err in excluding auto mechanic from presenting expert testimony as to accident reconstructionist where he was not qualified to do so, nor designated as an expert witness on such a subject).

2 Moreover, Petra also fails to disclose to this Court that it currently has scheduled the depositions of the City’s expert witnesses and to the extent those depositions have not yet been undertaken, Petra’s motion is severely premature.
The evidence in the record, compared with the disclosures of experts similarly made by Petra, demonstrates that Petra’s motion lacks merit and should be denied in its entirety.

CONCLUSION

For the reasons stated, the City requests that this Court deny Petra’s Motion in Limine to Exclude Testimony and Documents by Meridian’s Experts.

DATED this 20th day of September, 2010.

TROUT • JONES • GLEDHILL • FUHRMAN •
Gourley, P.A.

By:
Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE TESTIMONY AND DOCUMENTS REGARDING MERIDIAN'S CLAIMED DAMAGES

The Plaintiff City of Meridian (hereinafter referred to as the “City”), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Memorandum in Opposition to the Motion in Limine to Exclude Testimony and Documents regarding Meridian’s Claimed Damages as filed by the Defendant, Petra Incorporated (hereinafter referred to as “Petra”).

By its present motion, Petra seeks to strike in its entirety the City’s claim for damages in this matter based solely on the City’s alleged failure to supplement certain discovery responses provided by the City. Moreover, Petra seeks to impose this draconian discovery sanction without even a single demand for supplementation, let alone seeking an order of this Court compelling further
disclosure, as clearly required by the discovery rules before such a motion can even be presented.1 Petra’s motion lacks merit and should be summarily dismissed.

ARGUMENT

1. Petra’s Motion Should be Summarily Dismissed for Its Failure to Not Only Certify, But In Fact Actually Engage, In A Good Faith Effort To Confer With The City Regarding Any Discovery Dispute It Believed Existed.

Petra’s motion should be summarily denied for the failure to comply with the meet and confer requirements of Idaho Rule of Civil Procedure 37(a)(2) which clearly and unequivocally imposes the following obligation on any party seeking sanctions for the violation of a discovery order:

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

Nowhere within Petra’s Motion, the Affidavit of Thomas G. Walker, or its Memorandum in Support of its Motion is there any certification that Petra has made any demand for supplementation of any existing discovery request. Nor could it. Petra has simply served discovery, made no demand for supplementation, filed no motion to compel discovery, and now seeks an order of this Court imposing the most severe sanction afforded a party under Rule 37(b).

In fact, Petra wholly neglects the fact that not only has it failed to certify, and actually conduct a good faith effort to resolve this dispute with the City, Petra has not even filed a motion under I.R.C.P. 37(a) and obtained an order thereby, which is the procedural precursor to the request for the sanction of the exclusion of evidence provided by I.R.C.P. 37(b). It is clear that in order to be entitled to any sanction provided for under I.R.C.P. 37(b)(2), the moving party must demonstrate

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1 Given Petra’s not too subtle citation to a Memorandum Decision entered in the case of City of McCall v. Payette Water & Sewer District, Valley County Case No. 2005-352-C, it is apparent that Petra hopes for this Court to enter similar relief despite the presence of wholly disparate facts, i.e. a highly contentious case having origins back to at least 2002 and a litigation between the parties commenced in 2005. Moreover, it should be noted that the Memorandum Decision cited by Petra is currently under review via a motion for reconsideration. Petra should concern itself more with the facts and circumstances of the case in which it is a party than attempt to thrust a separate unrelated proceeding into this matter.
that “a party ... fails to obey an order made under subdivision (a) of this rule or Rule 35, the court in
which the action is pending may make such orders in regard to the failure as are just ...”. I.R.C.P.
37(b)(2). As the record will reflect, Petra has not moved for an order compelling the City to
supplement its discovery responses nor obtained a Court order with regards to any such matter.

The rules of civil procedure do not contemplate the imposition of such a severe sanction
based on a moving party's own willful refusal to utilize the tools within to resolve a point of
controversy between the parties. Petra has failed to comply with the certification requirement of
I.R.C.P. 37(a), the necessary precursor to an order thereby, and has failed to secure an order under
I.R.C.P. 37(a), the necessary precursor to an order to exclude evidence as a sanction under I.R.C.P.
37(b)(2). As such Petra's motion must be denied.

2. Even If This Court Were To Consider The Substance Of Petra's Motion, The
Facts In The Record Evidence That Petra Is Fully Aware Of The Nature And
Scope Of The City's Damages In This Matter.

As detailed above, Petra's failure to comply with the procedural conditions precedent to
seeking the relief sought by its instant motion prohibit further consideration of Petra's Motion.
However, regardless of this fatal deficiency, Petra's motion is utterly without merit as Petra simply
cannot in good faith assert that it has not received a disclosure of Meridian's evidence of damages.
As counsel for Petra recently conceded at oral argument in this matter, the issues of this case have
been briefed and presented until the cows come home. The City of Meridian has provided in the
record affidavits, and in some cases multiple affidavits from Steven J. Amento, Laura Knothe, Todd
Weltner, Keith Watts, Theodore W. Baird, and David Zaremba. As the Court is now familiar with
these affidavits as a result of the pendency of the parties' cross motions for summary judgment and
the City's motion for summary judgment, these affidavits provided multiple sources of detailed
information of the facts and circumstances upon which the City asserts that the multiple breaches,
errors, and omissions by Petra caused the City damages. Moreover, as Petra must concede these
individuals as well as multiple others, no less than thirteen by last count, are to be deposed by Petra in the next twenty days.

It is simply disingenuous for Petra to argue that it is unaware of the nature and scope of the City's damages. Just as it is disingenuous for Petra to point to the testimony of Steven Amento and Keith Watts as to the dollar value that the City has calculated as to its financial loss as a result of Petra's actions when neither of these individuals have ever been designated to provide such testimony. As the Affidavits from Mr. Amento make clear his purpose is limited solely to expert testimony as to the standard of care expected of a construction manager such as Petra, given Petra's express acceptance of a fiduciary relationship with the City. Likewise, Mr. Watts' Affidavits never once attempt to ascribe a dollar value to the City's loss. Petra cannot identify whatever witness it wants for whatever subject it desires and then complain when that individuals does not testify with regard to a matter he or she has not been designated to testify concerning.

In short, Petra seeks to obtain the very same relief afforded to another party, in another litigation, without even the slightest attempt to demonstrate that it is even remotely similarly situated. Petra's motion is without procedural or substantive basis and must be denied.

CONCLUSION

For the reasons stated, the City requests that this Court deny Petra's Motion in Limine to Exclude Testimony and Documents Regarding Meridian's Claimed Damages.

DATED this 20th day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦
Gourley, P.A.

By: Kim J. Trout
Attorneys for Plaintiff
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

SECOND AMENDED NOTICE OF HEARING RE: PLAINTIFF CITY OF MERIDIAN'S MOTION TO DISMISS (IDAHO TORT CLAIMS ACT)

TO: THE ABOVE NAMED DEFENDANT AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE, that the hearing on Plaintiff's Motion to Dismiss which was scheduled to be heard on Thursday September 16, 2010 will now be heard on Monday September 27, 2010 at the hour of 1:30 p.m. before the Honorable Ronald J. Wilper. The hearing is scheduled at the Ada County Courthouse located at 200 W. Front St., Boise, ID, 83702.
DATED this 21st day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

By: __________

Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

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Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho municipal corporation,

v.

PETRA, INCORPORATED, an Idaho corporation.

Defendant/Counterclaimant

REPLY MEMORANDUM IN SUPPORT OF PETRA'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND DOCUMENTS BY THE CITY'S EXPERTS

Case No. CV OC 09-07257
Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorneys of record, submits this reply in support of its motion in limine to exclude testimony and documents by the City’s experts.

Petra submits that simply referencing the affidavits of the proposed expert witnesses does not comply with Rule 26(b)(4)(A)(I) and the Court’s Scheduling Order. Although an affidavit may serve as a “complete statement of all opinions to be expressed and the basis and reasons therefore,” the affidavits submitted by the City do not meet these requirements. But, Rule 26 also mandates the disclosure of

- the data or other information considered by the witness in forming the opinions;
- any exhibits to be used as a summary of or support for the opinions;
- any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
- the compensation to be paid for the testimony; and
- a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.


In addition, Petra’s Interrogatory No. 16 requested the following information:

- Identify each and every person you expect to call as an expert witness at any hearing or at trial, stating in detail as to each such person: (a) full name, home address, business address and telephone number; (b) educational background; (c) experience in the matter to which he is expected to testify; (d) subject matter on which he is expected to testify; (e) substance of the facts and opinions to which he is expected to testify and a summary of the grounds for each opinion; and (f) manner in which such expert became familiar with the facts of this case.

Neither the affidavits submitted by the City nor its responses to Interrogatory No. 16 comes close to providing the required information regarding its experts.
The City's attempt to equate their inadequate expert witness disclosures with Petra's disclosure is misleading, as even a cursory glance at Petra's Expert Witness Disclosures demonstrate.1 The City has not met the requirements of Rule 26 or the deadlines imposed by the Court's Scheduling Order.2 In addition, the City has not responded fully and completely to Petra's Interrogatory No. 16. Consequently, the City's experts should be excluded from testifying at trial.

In the alternative, since the City has stated the affidavits of Steven J. Amento, Laura Knothe, and Todd Weltner constitute a "complete statement of all opinions to be expressed and the basis and reasons therefore," Petra requests that the Court limit the testimony of these experts to the opinions set forth in their respective affidavits.3 Any opinion beyond the scope of these affidavits would be an undisclosed opinion and would prejudice Petra at trial. Any attempt to have these experts testify regarding matters outside the scope of their affidavits is not permitted by the Idaho Rules of Civil Procedure and would be highly prejudicial to Petra. Idaho law is clear in prohibiting the introduction of undisclosed theories at trial. See, e.g., Clark v. Klein, 137 Idaho 154, 156-59, 45 P.3d 810, 812-15 (2002); Radmer v. Ford Motor Co., 120 Idaho 86, 89-91, 813 P.2d 897, 899-902 (1991). Springing undisclosed expert testimony at trial is barred by

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1 See Petra Incorporated's Disclosures of Expert Witnesses dated August 12, 2010 and September 14, 2010.
2 The City did submit a supplemental response to Petra's first set of interrogatories over a month later that included an attempt at supplying some of the information required by Rule 26. The information provided was untimely under the Court's Scheduling Order. Furthermore, it does not constitute the level of disclosure required by Rule 26.
3 Nothing contained in this untimely supplemental response changes the grounds for this Motion.

In this regard, any attempt by the City in its tardy supplemental response to expand the basis of Amento's, Knothe's, or Weltner's disclosures should not be allowed. The City has ignored this Court's deadlines and should be held to the affidavits.
the rules because the opposing party is not provided an opportunity to adequately prepare to challenge the testimony. Therefore, Amento, Knothe and Weltner should be limited to only testifying as to matters disclosed in their respective affidavits.

Further, the City does not even contest that it has failed to comply with Rule 26 and the Court’s Scheduling Order with regard to MTI, Ray Weatherholt, Neil Anderson, Leo Geiss, Lee Cotton, Jason Neidigh, Mike Simmonds, Steve Turney, and Tim Petshe. The City only attempts to defend the disclosures of Amento, Knothe, and Weltner. Therefore, Petra requests that the court enter an order barring any proffered testimony from these nine persons, whose names were simply listed on “Plaintiff’s Disclosure of Expert Witnesses” submitted July 28, 2010.


COSHO HUMPHREY, LLP

By: ________________
THOMAS G. WALKER
Attorneys for Defendant/Counterclaimant

4 As noted above, the City did submit a supplemental response to Petra’s first set of interrogatories over a month later that included an inadequate attempt to provide some of the information required by Rule 26. The information provided was untimely under the Court’s Scheduling Order. More importantly, the minimal information provided by the City regarding these nine “experts” fails to comply with Rule 26.

REPLY MEMORANDUM IN SUPPORT OF PETRA’S MOTION IN LIMINE
TO EXCLUDE TESTIMONY AND DOCUMENTS BY THE CITY’S EXPERTS
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of September, 2010, a true and correct copy of
the within and foregoing document was served upon:

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THOMAS G. WALKER

REPLY MEMORANDUM IN SUPPORT OF PETRA’S MOTION IN LIMINE
TO EXCLUDE TESTIMONY AND DOCUMENTS BY THE CITY’S EXPERTS
Thomas G. Walker (ISB 1856)
Erika Klein (ISB 5509)
Mackenzie Whatcott (ISB 6774)
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Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho municipal corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant

Case No. CV OC 09-07257

REPLY MEMORANDUM IN SUPPORT OF PETRA'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF DAMAGES

REPLY MEMORANDUM IN SUPPORT OF PETRA'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF DAMAGES

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Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorneys of record, submits this reply in support of its motion in limine to exclude evidence of Petra's claimed damages.

Consistent with its strategy to conceal crucial facts from Petra, the City's response to Petra's motion in limine does not include a single substantive word about the theories, elements or amounts of the City's alleged damages. As of the date of the hearing on Petra's motion, it will be just 65 days before trial and more than 17 months after Meridian filed suit. It is unconscionable that, at this late date, Meridian has not disclosed the critical factual information Petra needs to defend against the City's damages claims despite Petra's extensive discovery efforts. Petra's efforts include interrogatories, requests for admission, requests for production of documents and depositions of Mayor Tammy DeWeerd, Council President Charlie Roundtree, Council Project Liaison Keith Bird, the City's Authorized Representative and Purchasing Agent Keith Watts, City Attorney William Nary, Assistant City Attorney Theodore W. Baird, Jr., and the City's three experts, Steven J. Amento, Laura Knothe and Todd Weiten. Consequently, Petra has not been able to prepare its defense against the City's undisclosed damages theories and is, therefore, severely prejudiced.
To date, the City has not supplemented very simple interrogatories. For example, when asked by Petra to disclose its investigations into its claims and the findings, the City responded in relevant part:

At present, the findings to date indicate that Petra’s conduct, both its actions, and its failures to act, are the cause of substantial, but yet to be quantified damages to the City of Meridian under the legal theories expressed in the Complaint.

In another interrogatory, Petra inquired into the legal and factual basis for the City’s claims, and the City responded:

The body of law comprising contract law as applicable to the facts, and the law of torts as applicable to the facts supports the claims and defenses made by Meridian in this matter. The body of law comprising equitable principles supports the claims and defenses of Meridian in this matter.

Unless the City has not yet quantified its damages or determined what damage theories it intends to advocate at trial, these interrogatory answers are “no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.” I.R.C.P. 26(e). In truth, it is simply not believable that the City has not yet determined the theories, elements or amounts of its alleged damages and identified specifically what Petra did or failed to do that caused the City to suffer damages. The City’s intentional concealment has deprived Petra of the time it needed to respond.

1 A copy of Meridian’s responses to Petra’s First Set of Interrogatories, Requests for Production and Requests for Admission is attached as Exhibit A to the Second Affidavit of Thomas G. Walker, dated August 25, 2010 and attached to Petra’s Motion.

REPLY MEMORANDUM IN SUPPORT OF PETRA’S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF DAMAGES
Further, as noted above, the City has never disclosed, via deposition or affidavit testimony, any significant detail regarding its damage claims. The only possible exceptions are scattered references to Petra’s alleged failure to assess liquidated damages against Rule Steel, and possibly other prime contractors. Unanswered questions include whether the City intends on presenting damages evidence by expert or lay witnesses and whether it is seeking damages arising from the alleged defects, all of which are covered by warranties and which have not resulted in any out-of-pocket costs to the City. And if the City intends to seek damages arising from the alleged failure of Petra to seek liquidated damages, it has not disclosed how it has arrived at the conclusion that each prime contractor should have been held liable for liquidated damages. In other words, how much in liquidated damages does the City feel it was entitled to and how did the City arrive at the amount? The taxpayers of the City of Meridian and Petra have incurred more than $1 million in legal costs and yet the answers to these crucial question are relegated to pure speculation.

The City’s response to Petra’s motion in limine attempts to gloss over the fact that it has failed to comply with its discovery obligations. First, the City contends Petra’s motion in limine is a motion to compel. It is not. The Idaho Rules of Civil Procedure do not require a party to bring a motion to compel. The City’s obligations to supplement under Rule 26 are clear and self-executing.

Second, the City argues that its damages claims and theories are set forth in the affidavits of Steven J. Amento, Laura Knothe, Todd Weltner, Keith Watts, Theodore W. Baird, Jr. and
David Zaremba. Then, inexplicably, the City goes on to state that neither Mr. Amento nor Mr. Watts has been designated to provide testimony on damages. Therefore, Petra is left with the affidavits of Weltner, Knothe, Baird, and Zaremba. It appears that the City intends to rely on these affidavits as meeting its disclosure requirements. This reliance by the City is plainly inadequate. These affidavits largely set forth opinions on Petra's alleged breaches. Again, with the possible exception of liquidated damages, there is nothing in these affidavits that comes close to being an adequate disclosure of the City's damage claims. These experts simply provide various opinions, i.e. "Petra failed to do cost controls;" "Petra failed to guard against defects;" "Petra failed to supervise," etc. The City has an obligation to disclose the theories, elements and amounts of the City's alleged damages and how Petra's alleged breaches caused the damages.

For example, if the City's claims are based upon the allegation that there are an insufficient number of plumbing cleanouts, what did Petra do or fail to do to cause the deficiency and how much was the City damaged? This example is replicated numerous times throughout the Weltner, Baird, and Knothe affidavits. And in the Zaremba affidavit, the City seems to imply that the new City Hall building was foisted upon it unwillingly and through fraudulent representations. Petra cannot discern what evidence of damages, if any, is contained in the Zaremba affidavit.

2 Affidavit of Todd Weltner dated July 2, 2010 at ¶ 23.
Lastly, if the City intends to rely on these affidavits as meeting its expert witness disclosure requirements under Rule 26, then Petra requests that the City be held to these disclosures. Any attempt to have its experts testify regarding the City’s damages outside the scope of these affidavits is not permitted by the Rules and would be highly prejudicial to Petra. Idaho law is clear in prohibiting undisclosed theories to be introduced at trial. See, e.g., Clark v. Klein, 137 Idaho 154, 156-59, 45 P.3d 810, 812-15 (2002); Radmer v. Ford Motor Co., 120 Idaho 86, 89-91, 813 P.2d 897, 899-902 (1991). Springing undisclosed expert testimony at trial is barred by the rules because the opposing party was not given time to adequately prepare to rebut the testimony. The City’s experts, Amento, Knothe and Weltner, should be limited to the testimony disclosed in their affidavits.

Considering the trial date is imminent, and because Petra remains in the dark about the theories, elements and amounts of the City’s alleged damages, the Court would be within its discretion to exclude evidence of the City’s claimed damages at trial. The City’s response to the present motion discloses nothing about its damages claims. The City’s response demonstrates that it continues to “hide-the-ball.” A party is under disclosure obligations during discovery that go beyond simply restating the claims that appear in the complaint.

Petra is not required to bend over backwards to extract a hint from the City about how exactly it was harmed by Petra. Idaho’s Rules of Civil Procedure governing discovery share the same purpose as their federal counterparts. These Rules are “intended to insure ‘proper litigation’ by making the ‘trial less a game of blindman’s bluff and more a fair contest with the
basic issues and facts disclosed to the fullest practicable extent." Scott and Fetzer Co. v. Dile, 643 F.2d 670, 674 (quoting Goldman v. Checker Taxi Co., 325 F.2d 853, 855 (7th Cir. 1963)) (citations omitted).

Considering the foregoing, Petra requests the Court to exclude at trial all testimony and documents regarding Meridian’s claimed damages.


COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of September, 2010, a true and correct copy of
the within and foregoing document was served upon:

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THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CVOC 09 07257

ORDER DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on Defendant Petra’s Motion for Summary Judgment. On Thursday, September 16, 2010, the Court heard oral argument on the Motion for Summary Judgment, along with Plaintiff’s Motion for Leave to file First Amended Complaint to add a claim for punitive damages, and both parties’ multiple Motions to Strike made in conjunction with their respective motions. Kim Trout and Daniel Glynn appeared for the Plaintiff, and Thomas Walker appeared for the Defendant. The Court ruled from the bench denying Meridian’s Motion to Strike certain affidavits submitted by Petra on September 13, 2010, and denying Petra’s Motion to Strike Ted Baird’s April 1, 2010, affidavit. At the conclusion of the hearing, the Court considered the Motion for Leave to Amend to add punitive damages, the Motion for Summary Judgment, and the
remaining Motions to Strike fully under advisement. This Order denies Defendant Petra’s Motion for Summary Judgment.

**BACKGROUND**

In August 2006, the City of Meridian and Petra Incorporated entered into a Construction Management Agreement (CMA) under which Petra assumed the role of Construction Manager for Meridan’s City Hall. In sum, the city alleges Petra was negligent in its duties and breached its duties under the CMA. In response, Petra counterclaims that Meridian breached the CMA and the covenant of good faith and fair dealing. Petra also alleges breach of an implied-in-fact contract and breach of an implied-in-law contract.

**SUMMARY JUDGMENT STANDARD**

Idaho Rule of Civil Procedure 56(c) provides that summary judgment is “rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” See also First Sec. Bank of Idaho, N.A. v. Murphy, 131 Idaho 787, 790, (1998). An adverse party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); see Rhodehouse v. Stutts, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). The affidavits either supporting or opposing the motion must set forth facts that would be admissible in evidence and show that the affiant is competent to testify. Id.

To withstand a motion for summary judgment, the non-moving party’s case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue of material fact. Zimmerman v. Volkswagon of America, Inc., 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). Generally, liberal construction of the facts in favor of the non-moving
party requires the court to draw all reasonable factual inferences in favor of the non-moving party. See Williams v. Blakley, 114 Idaho 323, 324 (1988). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, the motion should be denied. Friel v. Boise City Housing Authority, 126 Idaho 484, 486 (1994).

However, when the Court sits as the trier of fact, rather than a jury, summary judgment may be appropriate despite the possibility of conflicting inferences, because the court alone will be responsible for resolving such conflicting inferences. Riverside Development Co. v. Ritchie, 103 Idaho 515, 519 (1982); see also Cameron v. Neal, 130 Idaho 898, 900 (1997). In such an instance, "the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." Blackmon v. Zufelt, 108 Idaho 469, 470 (Ct. App. 1985) (citing Riverside Development Co., 103 Idaho at 519).

**PETRA'S MOTION FOR SUMMARY JUDGMENT**

Petra moves the Court for summary judgment on the basis of fifteen (15) claims. These claims are supported by a statement of undisputed facts, a memorandum of law, and multiple affidavits. In response, Meridian filed a memorandum of law and multiple affidavits in opposition. As the trier of fact in this case, the Court is free to arrive at the most probable inferences to be drawn from the undisputed facts found in these documents.

Many of Petra’s claims state that it performed its responsibilities under the Construction Management Agreement (CMA) with the applicable standard of care and that “professionals hired by Meridian and [Meridian’s] own building inspectors” agree that Petra fulfilled its contractual duties. Petra's Motion for Summary Judgment at 1-2. However, those claims are disputed by Meridian. The parties present dueling expert affidavit testimony as to the standard of care. See Affidavit of Jack Lemley at ¶ 15; Affidavit of Steven Amento at ¶ 47. Lay affidavit testimony presented by the parties as
to the completion of certain duties under the CMA is equally conflicted. The Court finds there
remains a genuine issue of material fact as to whether Petra performed its responsibilities with the
applicable industry standard of care.

Petra also asserts that “the course of performance of dealing by the parties amended and
supplemented” the written CMA. *Petra’s Motion* at 2. To illustrate this claim, Petra states that its fees
for the management of the Soil Removal Change Order #1 and the East Parking Lot projects were
each 4.7%, therefore, its fee above what was initially negotiated under the CMA should be 4.7%.

Meridian argues the fee was fixed and that CMA ¶ 7 required Petra to seek approval from Meridian
before performing any work that would incur additional fees if Petra expected to be paid an amount
above what was initially negotiated under the CMA. After hearing oral argument on this and related
motions, and after reviewing extensive affidavit testimony on this issue, the Court finds there remains
a genuine issue of material fact as to how Petra’s fee was to be determined.

Petra’s final six (6) claims relate to its counter-claims and alternative theories of recovery in
this case. After studying all the evidence, and drawing the reasonable inferences it is allowed under
Idaho law, the Court is persuaded that genuine issues of material fact remain concerning the claims
made by Petra in its Motion for Summary Judgment, thus, Petra’s Motion for Summary Judgment is
DENIED.

IT IS SO ORDERED.

Dated this 24th day of September, 2010

Ronald J. Wilber
DISTRICT JUDGE
CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 27th day of September, 2010, I caused a true and correct copy of the foregoing ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT TO ADD A CLAIM FOR PUNITIVE DAMAGES to be served by the method indicated below, and addressed to the following:

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J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By INGA JOHNSON
Deputy Clerk
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho
Corporation,

Defendant.

Case No. CVOC 09 07257

ORDER DENYING PLAINTIFF’S
MOTION FOR LEAVE TO
FILE A FIRST AMENDED
COMPLAINT TO ADD A
CLAIM FOR PUNITIVE
DAMAGES

This matter came before the Court on Plaintiff Meridian’s Motion for Leave to File a First
Amended Complaint to add a claim for punitive damages. On Thursday, September 16, 2010, the
Court heard oral argument on the Motion for Leave to Amend, along with Defendant Petra’s Motion
for Summary Judgment, and both parties’ multiple Motions to Strike made in conjunction with their
respective motions. Kim Trout and Daniel Glynn appeared for the Plaintiff, and Thomas Walker
appeared for the Defendant. The Court ruled from the bench denying Meridian’s Motion to Strike
certain affidavits submitted by Petra on September 13, 2010, and denying Petra’s Motion to Strike
Ted Baird’s April 1, 2010, affidavit. At the conclusion of the hearing, the Court considered the
Motion for Leave to Amend to add punitive damages, the Motion for Summary Judgment, and the
remaining Motions to Strike fully under advisement. This Order denies Plaintiff Meridian’s Motion for Leave to Amend to add punitive damages.

**MOTION FOR LEAVE TO AMEND TO ADD PUNITIVE DAMAGES STANDARD**

The Idaho Rules of Civil Procedure authorize the Court to allow a party to amend their pleadings when required in the interest of justice. I.R.C.P. 15(a). Idaho Courts have held “that ‘great liberality should be exercised in permitting amendments to pleadings in furtherance of justice between the parties’ and that this matter is entrusted to the sound discretion of the trial court.” *Chadderdon v. King*, 104 Idaho 406, 408–09, 659 P.2d 160, 162–63 (Ct. App. 1983). However, leave to amend in order to add a claim for punitive damages is guided by a different standard.

Under Idaho law, punitive damages are available for a party’s oppressive, fraudulent, malicious, or outrageous conduct. I.C. § 6-1604(1) (2010). Courts shall allow a party to amend its pleadings in order to seek punitive damages if the Court concludes, after weighing the evidence, that the moving party has established a reasonable likelihood of proving, by clear and convincing evidence, facts at trial sufficient to support an award of punitive damages. I.C. § 6-1604(1)(2). Under this statute, the court acts as a gatekeeper. It must weigh the evidence and grant the motion only if it concludes that the moving party has met its burden. Idaho Code § 6-1604(2). The determination of whether a plaintiff has established a reasonable likelihood of proving a claim for punitive damages is within the sound discretion of the trial court. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 423, 95 P.3d 34, 41 (2004). In making this determination, the Court must consider only the record as a whole. *See generally Arnold v. Diet Center, Inc.*, 113 Idaho 581, 583, 746 P.2d 1040, 1042 (Ct. App. 1987).
“Punitive damages are not favored in the law and should be awarded in only the most unusual and compelling circumstances.” Manning v. Twin Falls Clinic & Hosp., 122 Idaho 47, 52, 830 P.2d 1185, 1190 (1992); Cheney v. Palos Verdes Inv. Corp., 104 Idaho 897, 905, 665 P.2d 661, 669 (1983); Gunter v. Murphy’s Lounge, LLC, 141 Idaho 16, 29, 105 P.3d 676, 689 (2005). Although punitive damages are generally not available for an ordinary breach of contract claim, they are available if the moving party can show the intersection of a bad act (i.e. the breach) and a bad state of mind. General Auto Parts Co. v. Genuine Parts Co., 132 Idaho 849, 853, 979 P.2d 1207, 1211 (1999); Meyers v. Workmen’s Auto Ins. Co, 140 Idaho 495, 502-03, 95 P.3d 977, 984-85 (2004). Therefore, in this instance, Meridian must provide the court with evidence that the defendant acted wrongfully and with a culpable state of mind. Myers, 140 Idaho at 503, 95 P.3d at 985. Specifically, the evidence must demonstrate that the Petra’s conduct was an extreme deviation from the standards of reasonable conduct, and its conduct was performed with an appreciation of its likely effects. Id.

MERIDIAN’S MOTION FOR LEAVE TO AMEND TO ADD PUNITIVE DAMAGES

Meridian asserts that Petra willfully breached the Construction Management Agreement (CMA) that dictated the parties’ contractual responsibilities. Specifically, Meridian asserts that the words “trust and confidence” as used in the CMA elevated Petra to a fiduciary status; that Petra made multiple, specific affirmative representations to Meridian as to its expected fee under the CMA and that Petra knew the representations were false when it made them; that Petra made these representations both in open, public meetings and in private meetings between the parties; and that Petra expected Meridian to rely on these false representations. Meridian directs the Court to CMA wording and extensive affidavit testimony in support of the above recited claims, and Meridian

ORDER DENYING PLAINTIFF’S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT TO ADD A CLAIM FOR PUNITIVE DAMAGES - Page 3

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asserts that this combination of facts combined with Petra’s duty to act in “trust and confidence” warrants a claim for punitive damages in this case.

The term fiduciary is a broad one and courts have consistently refrained from defining it in such a way so as to exclude future applications of the term. 37 AM. JUR. 2D Fraud and Deceit § 32 (2010). Fiduciary implies that one party is in a dominant position to the other and that the servient party reposes trust in the dominant party. Idaho First Nat’l Bank v. Bliss Valley Foods, 121 Idaho 266, 278, 824 P.2d 841, 853 (1991). In order to find a fiduciary duty, “facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.” Id. The Idaho Supreme Court has used the words “trust and confidence” to indicate the existence of a fiduciary duty. Hines v. Hines, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997); High Valley Concrete v. Sargent, 149 Idaho 423, 428, 234 P.3d 747, 752 (2010).

The CMA § 1.1 states: “Construction Manager acknowledges and accepts the relationship of trust and confidence established by this Agreement and that this relationship is a material consideration for Owner in entering into this Agreement.” In Meridian’s moving documents and during the September 16, 2010, hearing, Mr. Trout argued that Meridian’s understanding of the CMA terminology is that Petra did have the duty to act as a fiduciary on behalf of Meridian. Mr. Walker replied that had Petra understood this language to create a fiduciary duty it would not have agreed to the CMA. Based on the Idaho Supreme Court’s application of the words “trust and confidence,” and based on the trust Meridian placed in Petra to manage their City Hall project, it is likely that Petra stands in the position as a fiduciary to Meridian. However, even if Petra does stand
as a fiduciary to Meridian, the Court is not persuaded that Meridian has presented sufficient
evidence to warrant addition of a claim of punitive damages.

An addition of a claim for punitive damages may be appropriate when, after weighing the
evidence presented, the Court determines a party has a reasonable likelihood of proving oppressive,
fraudulent, malicious, or outrageous conduct by clear and convincing evidence. I.C. § 6-1604(1)(2).
Additionally, because this is a contract case, Idaho caselaw requires the Court to evaluate the
evidence for a bad act coupled with bad intent and that it represents an extreme deviation from the
standards of reasonable conduct in like situations. Meyers v. Workmen’s Auto., 140 Idaho 495
(2004). In this instance, the Court has exhaustively reviewed the affidavit testimony and supporting
exhibits. While the Court finds that there are disagreements and misunderstandings between the
parties as to many of their respective responsibilities under the CMA, and that such disagreements
and misunderstandings have led to the current claims for breach of contract, the Court is not
persuaded that the evidence found in the record is sufficient to provide Meridian a reasonable
likelihood of proving the fraudulent and outrageous behavior that evidences a bad act and bad intent
required by the caselaw and the statute. Therefore, Meridian’s Motion for leave to file a First
Amended Complaint to add a claim for punitive damages is DENIED.

IT IS SO ORDERED.

Dated this 24th day of September, 2010.

Ronald J. Winburn
DISTRICT JUDGE
CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 27th day of September, 2010, I caused a true and correct copy of the foregoing ORDER DENYING PLAINTIFF’S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT TO ADD A CLAIM FOR PUNITIVE DAMAGES to be served by the method indicated below, and addressed to the following:

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J. DAVID NAVARRO  
Clerk of the District Court  
Ada County, Idaho  

By INGA JOHNSON  
Deputy Clerk
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN,
an Idaho Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED,
an Idaho Corporation,

Defendant.

Case No. CVOC 09 07257

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF’S AND DEFENDANT’S MOTIONS TO STRIKE

This matter came before the Court on both parties’ multiple Motions to Strike made in connection with Plaintiff Meridian’s Motion for Leave to Amend to Add Punitive Damages and Defendant Petra’s Motion for Summary Judgment. In this Order the Court first addresses Meridian’s Motions to Strike all or portions of certain affidavits submitted in support of Defendant Petra’s Motion for Summary Judgment. Next, the Court addresses Petra’s Motions to Strike all or portions of certain Affidavits submitted either in support of Plaintiff Meridian’s Motion for Leave to Amend or in opposition to Petra’s Motion for Summary Judgment. The Court heard oral argument on these motions on Thursday, September 16, 2010. Kim Trout and Daniel Glynn appeared for Plaintiff Meridian. Thomas Walker appeared for Defendant Petra.
The Court issued its ruling from the bench denying two Motions to Strike. Holding that as to the affidavits of Richard Bauer, Eugene Bennett, Tom Coughlin, and Jerry Frank filed by Petra on September 13, 2010, they were timely filed according to an altered schedule previously instructed by the Court, and as to an April 1, 2010, affidavit of Theodore Baird filed one day late by Meridian that it was excusable neglect causing no prejudice and was not untimely filed with any attempt to gain an unfair advantage.

The Court considered the remaining Motions to Strike fully under advisement.

**ADMISSIBILITY OF AFFIDAVITS**


Affidavits submitted to support or oppose summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P. 56(e).

In consideration of summary judgment, or otherwise, affidavits of expert witnesses are allowed under Idaho Rule of Evidence 702 if "scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue." *Id.* When determining the admissibility of an expert's opinion, the focus of the trial court's inquiry is on the principles and methodology used and not the conclusions they generate. *Weeks v. E. Idaho Health*
Services, 143 Idaho 834, 838, 153 P.3d 1180, 1184 (2007). Affidavits containing the opinions of lay
witnesses may also be considered by the trier-of-fact; however, when the determination of an issue
requires expert knowledge, a lay opinion is not sufficient to raise a genuine issue of material fact
(1999).

MERIDIAN'S MOTIONS TO STRIKE

Meridian seeks to strike the affidavits of Jack Lemley, Eugene Bennett, Tom Coughlin, and
Jerry Frank either in their entirety or portions thereof. For the purposes of these motions, Petra
submits Mr. Lemley as an expert witness, Mr. Bennett, Mr. Coughlin, and Mr. Frank are submitted
as lay witnesses.

The Court finds that the April 30, 2010, Lemley affidavit is admissible expert witness
evidence. “The facts or data in the particular case upon which an expert bases his opinion or
inference may be those perceived by or made known to the expert at or before the hearing.” I.R.E.
703. In this case, a proper foundation is laid for use of Lemley as an expert witness. See Exh. A
Affidavit of Jack Lemley. In making his conclusions, Lemley relied upon “interviews conducted by
[he] and Mr. Bauer and upon our review of the pertinent documents, which [Lemley and Bauer]
have discussed in detail.” Affidavit at 2. His opinions are also based on his “knowledge of the
prevailing standards of care applicable to construction managers as well as [his] own experience and
expertise in the area.” Id. The Court finds these are appropriate methods for creation of opinions for
a person with Lemley’s expertise, therefore, Meridian’s Motion to Strike the affidavit of Lemley is
DENIED.
The Court finds the affidavits of Bennett, Coughlin, and Frank are admissible lay witness opinions. Therefore, their testimony is limited to "those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope [given to expert witnesses]." I.R.E. 701. When the determination of an issue requires expert knowledge, a lay opinion is not sufficient to raise a genuine issue of material fact preventing summary judgment. Puckett v. Oakfabco Inc., 132 Idaho at 823.

The Court finds portions of Bennett's May 5, 2010, affidavit exceed the scope allowed a lay witness and, therefore, Meridian's Motion to Strike is GRANTED as to the following paragraphs of that affidavit as they might relate to the Court's evaluation of Petra's Motion for Summary Judgment: 10, 14, 19, 27, 134, 148, and 151. For the same reason, Meridian's Motion to Strike is GRANTED as to the following paragraphs of Bennett's April 7, 2010 affidavit submitted in opposition to Meridian's Motion for leave to amend to add punitive damages: 104, 107, 109, 110, 116, 121, 127, and 128.

The Court finds that paragraph 7 of Coughlin's May 5, 2010, affidavit exceeds the scope allowed a lay witness and, therefore, Meridian's Motion to Strike paragraph 7 is GRANTED as it might relate to the Court's evaluation of Petra's Motion for Summary Judgment.

The Court finds that paragraph 8 of Frank's May 4, 2010, affidavit exceeds the scope allowed a lay witness and, therefore, Meridian's Motion to Strike paragraph 8 is GRANTED as it might relate to the Court's evaluation of Petra's Motion for Summary Judgment. For the same
reason, Meridian’s Motion to Strike is GRANTED as to paragraph 12 of Frank’s April 7, 2010 affidavit submitted in opposition to Meridian’s Motion for leave to amend to add punitive damages.

PETRA’S MOTIONS TO STRIKE

Petra seeks to strike portions of eleven (11) affidavits as they relate to support of Meridian’s opposition to Petra’s Motion for Summary Judgment. Additionally, Petra seeks to strike portions of three (3) of those affidavits as they relate to support of Meridian’s Motion for Leave to Amend to add punitive damages. The Court addresses each of these motions below.

The Court finds the July 2, 2010, affidavit of Steven Amento, a construction manager retained as an expert by Meridian, is admissible expert witness testimony. However, Petra’s Motion to Strike is GRANTED as to paragraphs 7, 24, and 44 on the grounds that they state impermissible legal conclusions and lack foundation.

The Court finds the July 6, 2010, affidavit of Ted Baird, Meridian Asst. City Attorney, is admissible lay witness testimony. However, Petra’s Motion to Strike is GRANTED as to the following paragraphs of that affidavit on the grounds of lack of personal knowledge or that they are impermissibly conclusory: 2(e), 19, 21, 29, 30, and 33.

The Court finds the July 6, 2010, affidavit of Laura Knothe, an engineer retained by Meridian to assist with construction and warranty issues, is admissible expert witness testimony. However, Petra’s Motion to Strike paragraph 4 of the affidavit is GRANTED as Knothe’s reference to abandonment is impermissibly conclusory and made without personal knowledge.

The Court finds the July 6, 2010, affidavit of Franklin Lee, an attorney hired by Meridian to help create the Construction Management Agreement, as admissible lay witness testimony.
However, Petra's Motion to Strike paragraphs 2, and 4-13 is GRANTED on the grounds that they state impermissible legal conclusions.

The Court finds the affidavits of Keith Watts, Meridian's Purchasing Agent, are admissible lay witness opinions. However, Petra's Motion to Strike is GRANTED as to the following paragraphs of Watts' May 24, 2010, affidavit as impermissibly speculative, asserting legal conclusions, or falling outside the scope of his personal knowledge: 13, 21, 22, 25, 33, and 38. For the same reasons, Petra's Motion to Strike is GRANTED as to the following paragraphs of Watts' September 28, 2009, affidavit: 6, 7, and 8.

The Court finds the affidavits of Todd Weltner, a general contractor retained as an expert by Meridian, are admissible expert witness testimony. However, Petra's Motion to Strike is GRANTED as to paragraph 42 of Weltner's May 24, 2010, affidavit as impermissibly conclusory. For the same reason, Petra's Motion to Strike is GRANTED as to paragraph 15 of Weltner's July 6, 2010, affidavit.

Petra seeks to strike portions of the following three (3) affidavits as they relate to both Meridian's opposition to Petra's Motion for Summary Judgment and Meridian's Motion for Leave to Amend to add punitive damages.

The Court finds Ted Baird's April 1, 2010, affidavit is admissible due to Baird's capacity as Meridian Asst. City Attorney. The Court similarly finds Ted Baird's August 30, 2010, affidavit is admissible. Therefore, Petra's Motions toStrike portions of both of these Baird affidavits is DENIED.

Finally, the Court finds the August 30, 2010, affidavit of David Zaremba, a Meridian City Councilman, is admissible lay witness testimony. Zaremba's role as councilman provides him the
foundation and personal knowledge to speak on behalf of City in regards to its actions at the April 3, 2007, meeting between Meridian and Petra. Therefore, Petra's Motion to Strike Zaremba's affidavit is DENIED.

IT IS SO ORDERED.

Dated this 24th day of September, 2010.

Ronald J. Wilper
DISTRICT JUDGE
CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 27th day of September, 2010, I caused a true and correct copy of the foregoing ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO STRIKE to be served by the method indicated below, and addressed to the following:

Kim J. Trout
TROUT JONES GLEDHILL FUHRMAN GOURLEY, PA
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PO Box 1097
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Fax: (208) 331-1529

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( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By  \\
Deputy Clerk

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S AND DEFENDANT'S MOTIONS TO STRIKE - Page 8 006534
The City of Meridian (hereinafter referred to as the “City”) submits this Memorandum in Support of its Motion for Summary Judgment against the Defendant Petra, Incorporated (hereinafter referred to as “Petra”) with respect to all claims asserted by way of its Counterclaim against the City.

A. PETRA'S CLAIM IS BARRED BY THE EXPRESS NOTICE OF CLAIM PROVISIONS OF THE CMA.

In response to the City's Motion for Summary Judgment based on Petra's failure to provide written notice to the City as required by the express provisions of Section 8 of the Construction Management Agreement (hereinafter referred to as “CMA”), it must be noted that Petra admits that it did not provide any written notice to the City until, at the earliest, after February 24, 2009. In so doing, the record stands unrefuted that commencing in January of 2007, Petra began submitting to the City cost estimates which reflected increased “Total Project Costs,” but did not reflect any
increased cost to Petra’s construction management fee of $574,000. In all subsequent reiterations of the cost estimate from Petra presented to the City from January 2007 through July 2007, Petra admits that project costs increased but its representation as to the construction management fee remained constant. It is against this now unrefuted evidence in the record that the appropriateness of the City's request for summary judgment becomes evident.

Acknowledging that Section 8 of the CMA requires the submission of written notice with respect to any claim, Petra asserts that this Court can ignore these indisputable facts because a “claim” does not exist until the City denies Petra’s request for additional compensation. Thus, under Petra’s argument, it could toll any claim it possessed against the City simply by never presenting the claim to the City to consider in the first place. Under Petra’s interpretation of the language of Section 8, and exactly as Petra did in this matter, Petra believes it is entitled to represent that its construction management fee will not change despite increases in the costs of construction, obtain the City’s assent to complete the work called for under the CMA, and then afterward insist that the City pay it additional compensation for the work performed.

Petra is correct that “the interpretation of a contract begins with the language of the contract itself.” Cristo Viene Pentecostal Church v. Paz, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). However, what Petra overlooks is that it is also axiomatic that “[i]n construing a contract, an interpretation should be avoided that would render meaningless any particular provision in the contract.” Star Phoenix Mining Company v. Heda Mining Company, 130 Idaho 223, 233, P.2d 542, 552 (1997). According to Petra, a claim does not exist until Petra says it does (i.e. submits a claim), an interpretation which not only is absurd and renders the notice provision meaningless, but is also contrary to the express purposes of a notice provision such as this one.

While Petra's arguments are focused on contract interpretation, one should not overlook that Petra was under a duty to not only comply with the notice provisions of the CMA, but also the
Idaho Tort Claims Act, I.C. § 50-201 et seq. While the issues pertaining to notice under the ITCA are presented in the City’s Motion to Dismiss pursuant to the Idaho Tort Claims Act, it is worth noting that one of the express purposes of the notice requirement under the ITCA, which the City asserts is likewise applicable to the analysis of Section 8 of the CMA, is “to save needless expense and litigation by providing an opportunity for amicable resolution of the differences between parties…”


Petra failed to present a proper and timely notice to the City at a time when it knew, or should have reasonably discovered, it believed it had a claim against the City for an increase in the construction management fee given the increased estimated costs of construction that it was actively generating. One can only imagine how much expense might have been saved, how much litigation would have actually been required, had Petra simply submitted written notice as early as January, or as late as July 2007, that it intended to seek an increase in its construction management fee based on the increased construction costs that it was calculating. Unfortunately, supposition is all that can be had on the matter, because Petra failed to submit any written notice until after it had performed based on its prior representations as to the amount of the construction management fee. Petra cannot twist the express language of Section 8 into absurdity in order to provide it with a remedy in these proceedings that it failed to preserve appropriately.

Because the terms of the CMA are express and unambiguous, and because the interpretation provided by Petra renders the language of the CMA concerning the presentment of claims meaningless, Petra’s attempt to bolster its interpretation with purported evidence of industry usage and course of dealing must be rejected. Only when a contract term is ambiguous may extrinsic evidence be considered. _See International Engineering Co., Inc. v. Daum Industries, Inc._, 102 Idaho 363, 365, 630 P.2d 155, 157 (1981). Evidence of the parties conduct or course of dealing is admissible only for the purposes of determining the intent of parties with respect to an ambiguous term. _J.R._
Simplot Co. v Bosen, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006). Petra’s opposition memorandum is replete with its admission that Section 8 is “clear,” “plain,” and “unambiguous.” After recognizing the unambiguous nature of these terms, Petra cannot now seek to introduce extrinsic evidence of course of dealing, course of performance, or industry usage to bolster its clearly strained interpretation of those terms.

The provisions of the CMA clearly and unambiguously required written notice upon the occurrence of the event or the first appearance of the circumstances giving rise to a claim, and Petra wholly failed to timely comply with this requirement. Its failure to do so bars the assertion of its claims in this matter. See Absher Construction Co. v. Kent School District No. 415, 890 P.2d 1071 (Wa. Ct. App. 1995) (where contract provided a procedure for claims for extra work, which provisions are mandatory, contractor failure to follow these procedures results in waiver of contractor’s claim); Johnson v. County of Spokane, 78 P.3d 161, 169 (2003) (holding that “actual notice is not an exception to contract compliance” concerning notification procedures).

B. PETRA’S CLAIM FOR ESTOPPEL AGAINST THE CITY MUST BE REJECTED.

In a great ironic twist, after having submitted multiple cost estimates reflecting that, despite increasing costs of construction, Petra would not seek an increase in its construction management fee and then seeking an increased fee after obtaining the City’s assent to project costs, Petra now asserts that it is the City which should be estopped. As such, Petra’s claim for estoppel should be rejected out of hand as it is Petra, not the City, which has taken an inconsistent position with regard to the express terms of the CMA. What the City “knew” was that Petra would not be seeking an increased construction management fee, despite the increased project costs. What Petra knew was apparently to the contrary, i.e. that it would be seeking an increased fee. Estoppel, either equitable or quasi-estoppel, is simply unavailable on these facts.

Petra's claim for estoppel is without merit, and cannot be asserted against the City.

C. PETRA'S CLAIM UNDER SECTION 6.2.2 IS BARRED FOR FAILING TO COMPLY WITH THE CMA.

The City is also entitled to summary judgment as against Petra's claims based on its failure to comply with the clear, unambiguous provisions of the CMA requiring that for any request to adjust the construction management fee based on "material changes" that Petra's request include "the actual number of hours worked in furtherance of the change." CMA § 6.2.2. Petra seeks to evade the application of this provision based on its assertion, from its expert, that Petra could not separate the original work from the work in furtherance of the change and that such a requirement was not reasonable.

Unfortunately for Petra, Gene Bennett, Petra's Senior Advisor, admitted in his deposition testimony directly contrary to the assertion of Petra's "expert" Richard Bauer. Mr. Bennett testified as follows in the course of his deposition:

Q. And as of February 12th, 2007, you, as the construction manager, were clearly aware that there were going to be changes in costs for the masonry, correct?
A. We were aware of that, yes.
Q. All right. And I would be correct in understanding that had you chosen to track the time of all Petra employees as it related to those changes, you could have issued an order as of February 12th, 2007, for all Petra employees to track their time in furtherance of those changes, couldn't you?
A. Why would we?
Q. I wasn't asking you why, sir. I asked you whether you could have done that had you chosen to do so?
A. I guess I don't understand the necessity of it.
Q. That wasn't my question either. My question was a very simple question. Had you chosen to do so, you could have tracked all of the time of every Petra employee in furtherance of the change related to mechanical, electrical and plumbing, couldn’t you?
A. We could have, but I didn’t see a necessity for it.
Q. All right. And that would be true, i.e., Petra could have tracked all of its time related to any given change had it chosen to do so; isn’t that a fact?
A. If we had seen the necessity for it, we could have.


Thus, Petra cannot seek to create a genuine issue of material fact by way of expert testimony which is directly contrary to the testimony of Petra’s own representative provided under oath during the course of his deposition. Mr. Bauer’s affidavit in this regard is just as much of a “sham affidavit” as if it had been provided by Mr. Bennett himself. See Matter of Estate of Keeven, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ct. App. 1994) (sham affidavit which contradicts prior testimony should not be considered on summary judgment). See also, Tolmie Falls, Inc. v. J.R. Simplot Co., 124 Idaho 607, 610, 862 P.2d 299, 302 (1993). Moreover, as noted above, the testimony of Mr. Bauer as to what was “reasonably expected” under the contract should be disregarded in view of the fact that the terms upon which Mr. Bauer purports to opine are clear, plain and unambiguous.

Section 6.2.2 required that Petra track the actual hours worked in furtherance of any change upon which it would base an increase in its construction management fee and Petra admitted that it could have, but chose not to track such hours. Under the indisputable evidence, Petra’s arguments must be rejected and the City’s Motion for Summary Judgment on the basis of Section 6.2.2 of the CMA must be granted.

CONCLUSION

Whether considered under the express terms of the CMA, or the provisions of the ITCA, the undisputed evidence in the record reveals that Petra failed to provide the required notice, and substantiate its purported claim against the City. Summary Judgment in favor of the City is
appropriate and the Court should grant the City's Motion for Partial Summary Judgment regarding Petra's Counterclaims.

DATED this 27th day of September, 2010.

TROUT JONES GLEDHILL FUHRMAN GOURLEY, P.A.

By: Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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Kim J. Trout
The City of Meridian (hereinafter referred to as the "City") submits this Reply Memorandum in Support of its Motion for Partial Summary Judgment against the Defendant Petra, Incorporated (hereinafter referred to as "Petra") seeking an order finding Petra in material breach of the Construction Management Agreement (hereinafter referred to as the "CMA").

A. Petra Owed, and Breached, its Fiduciary Duty to the City in Discharging its Duties as a Construction Manager.

The City has moved for summary judgment with respect to a finding that Petra has materially breached the terms of the CMA based upon the multiple failures of Petra to fulfill its contractually imposed duties. Perhaps the most significant of these duties, and the duty by which all other obligations that Petra owed the City must be viewed, is the fiduciary duty that Petra owed to the City in the performance of its duties as construction manager under the CMA.

Once again, the language of the CMA is clear and unambiguous:
Construction Manager acknowledges and accepts the relationship of trust and confidence established with Owner by this Agreement and that this relationship is a material consideration for Owner in entering into this agreement. Accordingly, Construction Manager shall, at all times, act in a manner consistent with this relationship. Construction Manager further covenants that Construction Manager will perform its services under this Agreement, in the exercise of ordinary and reasonable care and with the same degree of professional skill, diligence and judgment as is customary among construction managers of similar reputation performing work for projects of a size, scope and complexity similar to the Project. Construction Manager shall, at all times, further the interest of Owner through efficient business administration and management.


Incredibly, despite the presence of clear and express language imposing upon Petra its acceptance of “the relationship of trust and confidence,” that Petra’s acceptance was “a material consideration” for the City, and that Petra was to “further the interest” of the City, Petra responds that it never intended to enter into a fiduciary relationship. However, extrinsic evidence of the parties’ intention is inadmissible where the terms are express, clear and unambiguous. Only when a contract term is ambiguous may extrinsic evidence be considered. See International Engineering Co., Inc. v. Daum Industries, Inc., 102 Idaho 363, 365, 630 P.2d 155, 157 (1981). Evidence of the parties conduct or course of dealing is admissible only for the purposes of determining the intent of the parties with respect to an ambiguous term. J.R. Simplot Co. v. Bosen, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006).

Nothing could be clearer than the express recognition that the City relied upon Petra’s acceptance of a relationship of “trust and confidence.” As the Idaho Supreme Court recently recognized, “[t]he term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him.” High Valley Concrete, LLC v. Sargent, 149 Idaho 423, 234 P.3d 747 (2010), quoting, Idaho First National Bank v. Bliss Valley Foods, Inc.,121 Idaho 266, 278, 824 P.2d 841, 853 (1991). See also Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 386, 210 P.3d 63, 71 (2009) (recognizing that an action in
constructive fraud exists when there has been a breach of a duty arising from a relationship of trust and confidence, as in a fiduciary duty.”); See also Mitchell v. Barendregt, 120 Idaho 837, 844, 820 P.2d 707, 714 (Ct. App. 1991) (holding that mere contractual relationship and duty of good faith is not sufficient “to establish a relationship of trust and confidence from which the law will impose fiduciary obligations.”) (emphasis added))

Thus, it is without question that the express acceptance of a duty of “trust and confidence” can be construed as nothing other than the acceptance of a fiduciary relationship between the parties. Petra owed a fiduciary relationship, the City materially relied upon Petra’s acceptance of this relationship between the parties, and Petra cannot now seek to evade its duties to perform in accordance with this fiduciary relationship through the use of extrinsic self-serving evidence that the imposition of this duty meant nothing more than an arms-length relationship.

B. Petra Breached its Fiduciary Duty to Provide the City With Written Reports as Required by Section 4.2 of the CMA

Seeking to evade its fiduciary responsibility to the City, and justifying its failure to comply with the express provisions with regard to the CMA, Petra repeatedly asserts as to each of the grounds upon which the City seeks summary judgment that: (1) the City failed to undertake an act; or (2) the City waived Petra’s requirement to act. Unfortunately for Petra, neither of these attempts to evade the responsibility for its failure to comply with the express contract terms, to the City’s detriment and damage, has merit.

With respect to the requirement of Section 4.2, which requires that Petra submits to the City a written report detailing its understanding of the City’s desires, Petra admits it did not provide such a report but argues that because the City did not deliver to Petra an “Owner’s Criteria,” Petra was no longer required to submit a written report. However, Petra’s argument is belied by the fact that Petra was under an express duty, fiduciary in nature, to “do all things, or, when appropriate require Architect and each Contractor to do all things necessary, appropriate or convenient to achieve the
end result desired by Owner." CMA § 4.1. Thus, it is not enough for Petra to simply say the City did not provide it with the Owner's Criteria without explaining why it failed to ensure that it received such from the City. As noted in the City's moving papers, Petra's written report was a crucial document which would have identified "any design, construction, scheduling, budgetary, and operational or other problems or recommendations." CMA § 4.2. It is not mere speculation, it is recognizable fact given the protracted nature of this litigation and the numerous defects that arose during the construction of the project, that the lack of this written report had a profound, detrimental impact upon the City. An injury, to which Petra added insult, by nonetheless charging for the completion of the written report it never submitted. Aff. Kim J. Trout ¶ 7 (Sept. 1, 2010).

Moreover, Petra cannot simply acknowledge its own failure, blame the City for Petra's failure to act consistently with the fiduciary obligations it accepted and then declare "waiver." "Waiver is a voluntary, intentional relinquishment of a known right or advantage." Brand S. Corp. v. King, 102 Idaho 731, 733-34, 639 P.2d 429, 431-32 (1981). Most importantly however, "waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive." Medical Services Group, Inc. v. Boise Lodge No. 310, 126 Idaho 90, 878 P.2d 789 (Ct.App. 1994).

Additionally, Petra's waiver arguments ignore the fact that Section 10.17 of the CMA expressly provides that "[a]ny waivers hereunder must be in writing. No waiver of right or remedy in the event of default hereunder shall constitute a waiver of such right or remedy in the event of a subsequent default." CMA § 10.17. See Absher Construction Co. v. Kent School District No. 415, 890 P.2d 1071 (Wa. Ct. App. 1995) (county would not be found to have waived contractual requirements where, among other evidence, construction agreement required that waiver be in writing). See also, Johnson v. County of Spokane, 78 P.3d 161, 169 (2003) (mere fact that a political subdivision continues to engage a public works contractor despite the presence of substantial disagreement between the owner and contractor does not equate with a finding of waiver.)
Petra concedes that it did not provide the written report required by Section 4.2 and as the evidence present in these proceedings convincingly demonstrates, such failure, has caused substantial damage to the City. Summary Judgment as to Petra's breach of Section 4.2 of the CMA is appropriate.

C. Petra Breached its Fiduciary Duty to Provide the City With Written Reports as Required by Section 4.6 & 4.7 of the CMA

As was the case with justifying its failure to act consistent with its fiduciary relationship with the City pursuant to Section 4.2 of the CMA, Petra once again blames the City for its own failures, asserts that the City waived Petra's obligations, and that its failure did not constitute a breach of the CMA. As was the case with regard to Section 4.2, Petra's arguments are without merit and summary judgment in favor of the City is appropriate.

First, the City has established in the record that Petra, as one example, failed to administer the contract with Rule Steel consistent with its contractual, and fiduciary, duties. The fact that Petra wishes to ignore the evidence placed in the record, or chose not to refute it, does not mean that the City has failed to establish such breaches. These examples are summarized at pages 7-8 of Petra's original memorandum in support of the instant motion and will not be restated here. However, it is sufficient for these purposes to point out that while Petra offers the self-serving statements of Mr. Coughlin that Rule Steel requested additional time, it has presented no evidence from Rule Steel itself or that the City was made aware of these requests for additional time. As noted by the City, the only notation to this affect is a post-approval modification to a change order. The City has asserted that there is no evidence to support the allegation of Petra, Petra has responded solely with the self-serving statements of its principals. Such argument does not create a genuine issue of material fact sufficient to avoid the entry of summary judgment.

Second, as noted above there is no clear and unequivocal evidence in the record establishing that the City waived Petra's fiduciary duty with regard to the administration of the prime contracts.
Contrary to the assertions of Petra, the Idaho Supreme Court case of Obray v. Mitchell, 98 Idaho 533, 567 P.2d 1284 (1977) does not address an analogous situation which should be applied in these proceedings. In Obray, the Court affirmed the application of waiver to prevent an owner's assertion that it was not liable for contract "extras" performed without owner executed purchase orders where the evidence established that for the duration of the contract the owner had consistently paid for contract "extras" without such purchase orders. Petra can show no likewise waiver of conduct by the City in its administration of the prime contracts. To the contrary, given the unilateral modification to Rule Steel related purchase orders, it is apparent that if anything is established by Petra's course of conduct, it is a pattern of silence, unilateral modification, and exclusion of the City's knowledge of the true state of affairs.

The evidence in the record establishes, at least as far as Rule Steel, that absent the breach of Petra's fiduciary duties under the CMA generally, and Section 4.6 & 4.7 specifically, the City would be entitled to liquidated damages from Rule Steel. Thus, the record establishes not only a further breach of the CMA, but the materiality of the breach and the damages flowing therefrom. Summary Judgment as to Section 4.6 & 4.7 of the CMA is appropriate.

D. Petra Materially Breached its Fiduciary Duty to the City Under the CMA by Failing to Protect the City from Defective or Deficient Work.

Petra does not challenge the evidence presented in the Affidavit and deposition testimony of Steven Amento, Laura Knothe, Todd Weltner, and the Affidavit of Neil O. Anderson regarding the numerous defects in materials and workmanship as it relates to the construction of the Meridian City Hall. Rather, Petra's response is that "whatever defects the City allegedly discovered fall within the warranties" and, essentially, that these warranty issues were the City's problem. However, this position again wholly ignores Petra's fiduciary relationship with the City as well as Petra's express contractual duty to "determine that the work is being performed in accordance with the requirements of the Contract Documents ... keep the Owner informed of the progress of the Work,"
and will guard the owner against defects and deficiencies in the Work.” AIA A201/CMa – 1992 §4.6.2. The presence of defects conclusively demonstrates the breach of Petra’s duties under this provision, its breach of its fiduciary duty to the City with regard to all duties imposed upon it by the CMA, and the materiality of this breach. As a result, this Court should grant the City’s Motion for Summary Judgment as to Section 4.6.2 of the AIA A201/CMa – 1992 which was expressly incorporated into the CMA.

CONCLUSION

The foregoing establishes that the CMA imposed upon Petra multiple fiduciary duties in furtherance of obligation its to “act in a manner consistent” with the “relationship of trust and confidence.” These duties included, but were not limited to, the provision of a final written report under Section 4.2, the administration of the contract under Section 4.7, and the assurance of an issuance of a certificate of substantial completion under Section 9. The indisputable evidence is that Petra did not fulfill a single one of these duties under the CMA and that the City did not waive a single one of these provisions. Petra’s clear failure to comply with the express provisions of the CMA constitutes a material breach of the CMA as a matter of law and summary judgment in favor of the City as to Petra’s Liability should be granted.

DATED this 27th day of September, 2010.

Trout Jones Gledhill Fuhrman
Gourley, P.A.

By

Kim J. Trout
Attorneys for Plaintiff
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September, 2010, a true and correct copy of
the above and foregoing document was forwarded addressed as follows in the manner stated below:

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Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

NOTICE OF DEPOSITION OF RICHARD BAUER (DUCES TECUM)

PLEASE TAKE NOTICE that Plaintiff, The City of Meridian, by and through its counsel of record, Trout Jones Gledhill Fuhrman Gourley, P.A., will take the testimony, on oral examination, of Richard Bauer. The deposition will be taken before an officer qualified to administer oaths on the 10th day of November, 2010 at the hour of 9:00 a.m. of said day, and thereafter from day to day as the taking of said deposition may be adjourned, at the offices of Trout Jones Gledhill Fuhrman Gourley, P.A., located at 225 N. 9th St., Ste. 820, Boise, ID 83702. This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure. You are hereby invited to appear and take part in the examination of the witness as is advisable and proper.
YOU ARE FURTHER COMMANDED, pursuant to Rule 26(b)(4)(b) and Rule 34 of the Idaho Rules of Civil Procedure, to bring to the place above-named for the taking of said deposition and to have available for copying and inspection the any and document, picture, voice recording, video recording, in any way related to the Meridian City Hall Project, or in any way related to the claims and defenses of Petra Incorporated in the above referenced lawsuit, including but not limited to:

1. All documents provided to you from Petra, Incorporated or from Cosho Humphrey for this matter;
2. All documents utilized by you in the rendering of your opinion in this matter, which is stated in your affidavit dated April 30, 2010;
3. Personal notes of any employee of Lemley International who assisted you in this matter;
4. Work notes, in electronic or other form, of any employee of Lemley International who assisted you in this matter;
5. All notes, in electronic or other form, taken by any employee of Lemley International who assisted you in this matter;
6. Meeting notes maintained by Lemley International in this matter;
7. Calendars' appointments of any employee of Lemley International who assisted you in this matter;
8. All communication between any employee of Lemley International and any person related to this matter;

NOTICE OF DEPOSITION OF RICHARD BAUER (DUCES TECUM)
Page - 2

1 "Documents" means the original, all copies and drafts of papers and writings of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memoranda, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" shall reference the New Meridian City Hall Project, which is the subject matter of this litigation.

3 The term "Employee" when used in reference to Lemley International includes, but is not limited to, Jack Bauer and "various other employees of Lemley International" as stated in your affidavit dated April 30, 2010.

4 Calendars includes, but is not limited to, desk calendars, electronicaly maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.
9. All communication between any employee of Lemley International and any employee of Petra, Incorporated or any employee of Cosho Humphrey;
10. All recordings, either voice or video, you have possession of related to this matter;
11. All photographs related to this matter;
12. All billing records related to this matter;
13. All draft memos, reports, or other documents, prepared by you or your office related to this matter;
14. Any and all agreements entered into between Petra Incorporated and Lemley International related to this matter; and
15. Any and all agreements entered into between Lemley International and Cosho Humphrey related to this matter.

DATED this 29th day of September, 2010.

Trout • Jones • Gledhill • Fuhrman •
Gourley, P.A.

Kim J. Trout
Attorney for Plaintiff

---

6 “Communication” means any and all written or oral communication, including but not limited to, inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings held.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, or trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

Associated Reporting, Inc.
1618 W. Jefferson St.
Boise, ID 83702-5110
Fax: (208) 343-4002

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

NOTICE OF DEPOSITION OF KEITH PINKERTON (DUCES TECUM)

PLEASE TAKE NOTICE that Plaintiff, The City of Meridian, by and through its counsel of record, Trout Jones Gledhill Fuhrman Gourley, P.A., will take the testimony, on oral examination, of Keith Pinkerton. The deposition will be taken before an officer qualified to administer oaths on the 21st day of October, 2010 at the hour of 9:00 a.m. of said day, and thereafter from day to day as the taking of said deposition may be adjourned, at the offices of Trout Jones Gledhill Fuhrman Gourley, P.A., located at 225 N. 9th St., Ste. 820, Boise, ID 83702. This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure. You are hereby invited to appear and take part in the examination of the witness as is advisable and proper.
YOU ARE FURTHER COMMANDED, pursuant to Rule 26(b)(4)(b) and Rule 34 of the Idaho Rules of Civil Procedure, to bring to the place above-named for the taking of said deposition and to have available for copying and inspection any document, picture, voice recording, video recording, in any way related to the Meridian City Hall Project, or in any way related to the claims and defenses of Petra Incorporated and in any way related to the alleged “damages suffered by Petra…” in the above referenced lawsuit, including but not limited to:

1. All documents\(^1\) provided to you from Petra, Incorporated or from Cosho Humphrey for this matter\(^2\). This request shall include, but not be limited to, the following specific documents:
   a. Tax returns;
   b. General ledgers;
   c. Bookkeeping documents;
   d. Source documents for accounting records;
   e. Bank statements;
   f. Credit card statements;
   g. Checks;
   h. Check registers;
   i. Bank deposit records;
   j. Payroll records;
   k. Accounts receivable reports;
   l. Accounts payable reports;
   m. All audited or reviewed financial statement;

2. All documents utilized by you in the rendering of your opinion in this matter;

3. Personal notes of you and any employee\(^3\) of Hooper Cornell who assisted you in this matter;

\(^1\) “Documents” means the original, all copies and drafts of papers and writings of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memoranda, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

\(^2\) “This matter” shall reference the New Meridian City Hall Project, which is the subject matter of this litigation.

\(^3\) The term “Employee” when used in reference to Hooper Cornell includes any employee of Hooper Cornell that assisted you in any way to the work performed.
4. Work notes, in electronic or other form, of you and any employee of Hooper Cornell who assisted you in this matter;
5. All notes, in electronic or other form, taken by you or any employee of Hooper Cornell who assisted you in this matter;
6. Meeting notes maintained by you and Hooper Cornell in this matter;
7. Calendars\(^4\) and appointments of you and any employee of Hooper Cornell who assisted you in this matter;\(^5\)
8. All communication\(^6\) between any employee of Hooper Cornell and any person\(^7\) related to this matter;
9. All communication between any employee of Hooper Cornell and any employee of Petra Incorporated or any employee of Cosho Humphrey;
10. All recordings, either voice or video, you have possession of related to this matter;
11. All billing records related to this matter;
12. All draft memos, reports, or other documents, prepared by you or your office related to this matter;
13. Any and all agreements entered into between Petra Incorporated and Hooper Cornell related to this matter; and
14. Any and all agreements entered into between Hooper Cornell and Cosho Humphrey related to this matter.

DATED this 29\(^{th}\) day of September, 2010.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦
Gourley, P.A.

[Signature]

Kim J. Trout
Attorney for Plaintiff

---

\(^4\) Calendars includes, but is not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

\(^5\) This request is specific for the calendar appointments related to this matter.

\(^6\) “Communication” means any and all written or oral communication, including but not limited to, inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings held.

\(^7\) “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, or trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
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1618 W. Jefferson St.
Boise, ID 83702-5110
Fax: (208) 343-4002

Hand Delivered  
U.S. Mail  
Fax  
Fed. Express  
Email

Kim J. Trout

NOTICE OF DEPOSITION OF KEITH PINKERTON (DUCES TECUM)
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

CASE NO. CV OC 09-7257

NOTICE OF CONTINUED DEPOSITION OF JACK K. LEMLEY (DUCES TECUM)

PLEASE TAKE NOTICE that Plaintiff, The City of Meridian., by and through its counsel of record, Trout Jones Gledhill Fuhrman Gourley, P.A., will take the continued testimony, on oral examination, of Jack Lemley. The deposition will be taken before an officer qualified to administer oaths on the 9th day of November, 2010 at the hour of 9:00 a.m. of said day, and thereafter from day to day as the taking of said deposition may be adjourned, at the offices of Trout Jones Gledhill Fuhrman Gourley, P.A., located at 225 N. 9th St., Ste. 820, Boise, ID 83702. This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure. You are hereby invited to appear and take part in the examination of the witness as is advisable and proper.
YOU ARE FURTHER COMMANDED, pursuant to Rule 26(b)(4)(b) and Rule 34 of the Idaho Rules of Civil Procedure, to bring to the place above-named for the taking of said deposition and to have available for copying and inspection the any and document, picture, voice recording, video recording, in any way related to the Meridian City Hall Project, or in any way related to the claims and defenses of Petra Incorporated in the above referenced lawsuit, including but not limited to:

1. All documents provided to you from Petra, Incorporated or from Cosho Humphrey for this matter;
2. All documents utilized by you in the rendering of your opinion in this matter, which is stated in your affidavit dated April 30, 2010;
3. Personal notes of any employee of Lemley International who assisted you in this matter;
4. Work notes, in electronic or other form, of any employee of Lemley International who assisted you in this matter;
5. All notes, in electronic or other form, taken by any employee of Lemley International who assisted you in this matter;
6. Meeting notes maintained by Lemley International in this matter;
7. Calendars' appointments of any employee of Lemley International who assisted you in this matter;
8. All communication between any employee of Lemley International and any person related to this matter;

1 “Documents” means the original, all copies and drafts of papers and writings of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memoranda, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memos), telephone conversations and conferences, telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 “This matter” shall reference the New Meridian City Hall Project, which is the subject matter of this litigation.

3 The term “Employee” when used in reference to Lemley International includes, but is not limited to, Jack Bauer and “various other employees of Lemley International” as stated in your affidavit dated April 30, 2010.

4 Calendars includes, but is not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

NOTICE OF CONTINUED DEPOSITION OF JACK K. LEMLEY (DUCES TECUM)
Page - 2
9. All communication between any employee of Lemley International and any employee of Petra, Incorporated or any employee of Cosho Humphrey;
10. All recordings, either voice or video, you have possession of related to this matter;
11. All photographs related to this matter;
12. All billing records related to this matter;
13. All draft memos, reports, or other documents, prepared by you or your office related to this matter;
14. Any and all agreements entered into between Petra Incorporated and Lemley International related to this matter; and
15. Any and all agreements entered into between Lemley International and Cosho Humphrey related to this matter.

DATED this 29th day of September, 2010.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦
Gourley, P.A.

Kim J. Trout
Attorney for Plaintiff

---

6 "Communication" means any and all written or oral communication, including but not limited to, inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings held.

7 "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, or trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered
U.S. Mail [X]
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Fed. Express
Email

Associated Reporting, Inc.
1618 W. Jefferson St.
Boise, ID 83702-5110
Fax: (208) 343-4002

Hand Delivered
U.S. Mail
Fax [X]
Fed. Express
Email

Kim J. Trout

NOTICE OF CONTINUED DEPOSITION OF JACK K. LEMLEY (DUCES TECUM)
Page - 4
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

NOTICE OF DEPOSITION OF DENNIS REINSTEIN (DUCES TECUM)

PLEASE TAKE NOTICE that Plaintiff, The City of Meridian., by and through its counsel of record, Trout Jones Gledhill Fuhrman Gourley, P.A., will take the testimony, on oral examination, of Dennis Reinstei. The deposition will be taken before an officer qualified to administer oaths on the 27th day of October, 2010 at the hour of 9:00 a.m. of said day, and thereafter from day to day as the taking of said deposition may be adjourned, at the offices of Trout Jones Gledhill Fuhrman Gourley, P.A., located at 225 N. 9th St., Ste. 820, Boise, ID 83702. This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure. You are hereby invited to appear and take part in the examination of the witness as is advisable and proper.
YOU ARE FURTHER COMMANDED, pursuant to Rule 26(b)(4)(b) and Rule 34 of the Idaho Rules of Civil Procedure, to bring to the place above-named for the taking of said deposition and to have available for copying and inspection any document, picture, voice recording, video recording, in any way related to the Meridian City Hall Project, or in any way related to the claims and defenses of Petra Incorporated and in any way related to the alleged “damages suffered by Petra…” in the above referenced lawsuit, including but not limited to:

1. All documents\(^1\) provided to you from Petra, Incorporated or from Cosho Humphrey for this matter\(^2\). This request shall include, but not be limited to, the following specific documents:
   a. Tax returns;
   b. General ledgers;
   c. Bookkeeping documents;
   d. Source documents for accounting records;
   e. Bank statements;
   f. Credit card statements;
   g. Checks;
   h. Check registers;
   i. Bank deposit records;
   j. Payroll records;
   k. Accounts receivable reports;
   l. Accounts payable reports;
   m. All audited or reviewed financial statement;

2. All documents utilized by you in the rendering of your opinion in this matter;

3. Personal notes of you and any employee\(^3\) of Hooper Cornell who assisted you in this matter;

\(^1\) “Documents” means the original, all copies and drafts of papers and writings of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memoranda, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

\(^2\) “This matter” shall reference the New Meridian City Hall Project, which is the subject matter of this litigation.

\(^3\) The term “Employee” when used in reference to Hooper Cornell includes any employee of Hooper Cornell that assisted you in any way to the work performed.
4. Work notes, in electronic or other form, of you and any employee of Hooper Cornell who assisted you in this matter;
5. All notes, in electronic or other form, taken by you or any employee of Hooper Cornell who assisted you in this matter;
6. Meeting notes maintained by you and Hooper Cornell in this matter;
7. Calendars\(^4\) and appointments of you and any employee of Hooper Cornell who assisted you in this matter;\(^5\)
8. All communication\(^6\) between any employee of Hooper Cornell and any person\(^7\) related to this matter;
9. All communication between any employee of Hooper Cornell and any employee of Petra Incorporated or any employee of Cosho Humphrey;
10. All recordings, either voice or video, you have possession of related to this matter;
11. All billing records related to this matter;
12. All draft memos, reports, or other documents, prepared by you or your office related to this matter;
13. Any and all agreements entered into between Petra Incorporated and Hooper Cornell related to this matter; and
14. Any and all agreements entered into between Hooper Cornell and Cosho Humphrey related to this matter.

DATED this 29\(^{th}\) day of September, 2010.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦
Gourley, P.A.

[Signature]
Kim J. Trout
Attorney for Plaintiff

---

\(^4\) Calendars includes, but is not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

\(^5\) This request is specific for the calendar appointments related to this matter.

\(^6\) "Communication" means any and all written or oral communication, including but not limited to, inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings held.

\(^7\) "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, or trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

NOTICE OF DEPOSITION OF DENNIS REINSTEIN (*DUCES TECUM*)
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September, 2010, a true and correct copy of
the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  Hand Delivered  □
MacKenzie Whatcott  U.S. Mail  X
COSHO HUMPHREY, LLP  Fax  □
800 Park Blvd., Ste. 790  Fed. Express  □
P.O. Box 9518  Email  □
Boise, ID 83707-9518
Fax: (208) 639-5609

Associated Reporting, Inc.  Hand Delivered  □
1618 W. Jefferson St.  U.S. Mail  □
Boise, ID 83702-5110  Fax  X
Fax: (208) 343-4002  Fed. Express  □
Email  □

Kim J. Trout

NOTICE OF DEPOSITION OF DENNIS REINSTEIN (DUCES TECUM)
Page - 4

006565
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Pursuant to the Idaho Rules of Civil Procedure, notice is hereby given by the undersigned party that a copy of Plaintiff the City of Meridian’s Fifth Set of Requests for Production of Documents to Defendant Petra Incorporated Dated September 29, 2010 was served upon the following by U.S. Mail at:

Thomas G. Walker
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Twalker@CoshoLaw.com

NOTICE OF SERVICE
Page - 1
DATED this 29th day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By: ~
Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

Kim J. Trout

NOTICE OF SERVICE
Page - 2
ORDER DENYING PLAINTIFF’S MOTION TO DISMISS (IDAHO TORT CLAIMS ACT)

Plaintiff, City of Meridian’s Motion to Dismiss (Idaho Tort Claims Act) came before this Court on September 27, 2010. The Court having considered the motion, affidavits, memoranda and counsels’ oral arguments and good cause appearing therefor;
IT IS ORDERED as follows:

The City of Meridian's Motion to Dismiss (Idaho Tort Claims Act is DENIED.

DATED: September 29, 2010

RONALD J. WILPER
District Judge
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20 day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

Thomas G. Walker, Esq.
Cosho Humphrey, LLP
800 Park Blvd.,
Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518

[Signature]

ORDER DENYING PLAINTIFF MOTION
TO DISMISS (IDAHO TORT CLAIMS ACT)
623326.doc

Page 3
ORDER DENYING PLAINTIFF'S MOTION IN LIMINE RE: EXPERT TESTIMONY OF BENNETT, COUGHLIN AND FRANK

Plaintiff, City of Meridian's Motion in Limine Regarding Expert Testimony of Eugene Bennett, Thomas Coughlin and Jerald Frank, came before this Court on September 27, 2010. The Court having considered the motion, affidavits, memoranda and counsels' oral arguments...
and good cause appearing therefor;

IT IS ORDERED as follows:

The City of Meridian’s Motion in Limine Regarding Expert Testimony of Eugene Bennett, Thomas Coughlin and Jerald Frank is DENIED.

DATED: September 24, 2010

RONALD J. WIFE
District Judge
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 30th day of September, 2010, a true and correct copy
of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho  83701

Thomas G. Walker, Esq.
Cosho Humphrey, LLP
800 Park Blvd.,
Suite 790
P.O. Box 9518
Boise, Idaho  83707-9518

U.S. Mail
Hand Delivery
Overnight Courier
Facsimile:
E-mail:

U.S. Mail
Hand Delivery
Overnight Courier
Facsimile:
E-mail:

J. DAVID NAVARRO
INGA JOHNSON
THOMAS G. WALKER
ORDER DENYING PLAINTIFF'S MOTION IN LIMINE RE: EXPERT TESTIMONY OF JACK K. LEMLEY

Plaintiff, City of Meridian’s Motion in Limine Regarding Expert Testimony of Jack K. Lemley came before this Court on September 27, 2010. The Court having considered the motion, affidavits, memoranda and counsels’ oral arguments and good cause appearing therefor;
IT IS ORDERED as follows:

The City of Meridian's Motion in Limine Regarding Expert Testimony of Jack K. Lemley is DENIED.

DATED: September 29, 2010

RONALD J. WILFER
District Judge
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 30th day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

Thomas G. Walker, Esq.
Cosho Humphrey, LLP
800 Park Blvd.,
Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518

ORDER DENYING PLAINTIFF MOTION IN LIMINE:
RE: EXPERT TESTIMONY OF JACK K. LEMLEY
623328.doc
PETRA INCORPORATED'S NOTICE OF WITHDRAWAL OF PETRA'S SECOND DISCLOSURE OF EXPERT WITNESSES DATED SEPTEMBER 14, 2010

Petra Incorporated ("Petra"), by and through its attorneys of record, Thomas G. Walker of the firm of Cosho Humphrey, LLP, notifies this Court and counsel for the City of Meridian, that it withdraws its Second Disclosure of Expert Witnesses dated September 14, 2010 and
further advises, that it will not by relying on Jerald Frank, Eugene Bennett, Thomas Coughlin or John Quapp as expert witnesses at trial.


COSHO HUMPHREY, LLP

By: THOMAS G. WALKER
Attorneys for Petra Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 4th day of October, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF MERIDIAN, DUCES TECUM, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – CLAIMS OTHER THAN DAMAGES

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEYS OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated (“Petra”), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon
oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Theodore W. Baird, Jr. ("Baird"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the allegations by the City set forth in paragraphs 4 through 21 of the City’s Complaint filed on April 16, 2009, and as claimed in paragraphs 4 through 19, 23, 26 through 28, 31 through 37, 40 through 47, 50 through 52, and 55 of the City’s proposed First Amended Complaint. According to the City’s designation, Baird is the person most knowledgeable regarding: (1) the facts the City claims support Petra’s alleged breach of contract, (2) the facts the City claims support Petra’s alleged breach of the covenant of good faith and fair dealing, (3) the facts the City claims support Petra’s alleged unjust enrichment, (4) the facts the City claims support Petra’s alleged fraud and fraud in the inducement, (5) the facts the City claims support Petra’s alleged constructive fraud, (6) the facts the City claims support Petra’s alleged gross negligence, and (7) the facts the City claims support Petra’s alleged oppressive, malicious, fraudulent or outrageous conduct.

The primary objective of the Rule 30(b)(6) deposition is to inquire of Baird who may testify regarding the foregoing matters at trial.

The deposition will be taken on **October 21, 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.

The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video
means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires Baird to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian’s claims described above.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 8, 2010.

COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 8th day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, Duces Tecum, was served upon:

Kim J. Trout, Esq.
Daniel L. Glynn, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF MERIDIAN, DUCES TECUM, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) - DAMAGES

TO: PLAINIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEYS OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon
oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Steven J. Amento ("Amento"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the damages that the City has allegedly suffered as claimed in paragraph 22 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 20, 24, 38, 48, 53, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Amento is the person most knowledgeable regarding: (1) each element of damage, (2) the amount of damage arising with respect to each element, (3) the method of calculating the amount of damage arising with respect to each element, (4) the assumptions underlying the calculation of the amount of damage arising with respect to each element, and (5) the cause or causes of the damage arising with respect to each element. Further, according to the City, Amento is the most knowledgeable person regarding the unjust enrichment claim set forth in paragraph 29 of the City's proposed First Amended Complaint, including (1) each element of unjust enrichment, (2) the amount of unjust enrichment arising with respect to each element, (3) the method of calculating the amount of unjust enrichment arising with respect to each element, (4) the assumptions underlying the calculation of the amount of unjust enrichment arising with respect to each element, and (5) the cause or causes of the unjust enrichment arising with respect to each element. The primary objective of the Rule 30(b)(6) deposition is to inquire of Amento who may testify regarding the foregoing matters at trial.

The deposition will be taken on October 25, 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.
The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires Amento to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims of damages and unjust enrichment.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 8, 2010. 

COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 8th day of October, 2010, a true and correct copy of the
within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.
Daniel L. Glynn, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho  83701

[Marked: U.S. Mail, Hand Delivery, Overnight Courier, Facsimile, E-mail]

THOMAS G. WALKER
COMES NOW the Plaintiff City of Meridian, by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and, pursuant to Idaho Appellate Rule 12, hereby moves this Court to enter an order approving permission to appeal the Court's Order denying Plaintiff's Motion to Dismiss Defendant's Counterclaim pursuant to the Idaho Tort Claims Act entered September 29, 2010. This motion is supported by Plaintiff's Memorandum in Support filed contemporaneously herewith and the papers and pleadings on record in this matter.

Oral argument is requested.
DATED this 14th day of October, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By: Daniel Loras Glynn
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

Daniel Loras Glynn
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

STATE OF IDAHO )
) ss
County of ADA )

DANIEL LORAS GLYNN, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

2. I am a member of the law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., representing the Plaintiff in this matter, and I make the following statements based upon my own personal knowledge.
3. Attached hereto as Exhibit “A,” and fully incorporated herein by this reference, is a true and correct copy of the transcript of the September 27, 2010 Hearing, wherein the Court provided its reasoning for the denial of Plaintiff’s Motion to Dismiss.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

TROUT • JONES • GLEDHILL • FUHRMAN •
GOURLEY, PA

By:
Daniel Loras Glynn

Subscribed and sworn to before me this 14th day of October, 2010.

KATRINA D. THOMAS
NOTARY PUBLIC
STATE OF IDAHO

Notary Public, State of Idaho
Residing at: Boise, ID
My commission expires: 5/6/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  Hand Delivered
MacKenzie Whatcott     U.S. Mail
COSHO HUMPHREY, LLP     Fax
800 Park Blvd., Suite 790     Email
P.O. Box 9518               
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Daniel Loras Glynn

AFFIDAVIT OF DANIEL LORAS GLYNN IN SUPPORT OF PLAINTIFF’S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12 - 2
EXHIBIT A
The case law specifically requires that once a party has, quote, knowledge of facts which
would put a reasonably prudent person on inquiry notice, it triggers the 180-day period.
That's a direct quote from McQuillen versus the City of Ammon at 113 Idaho 719, page 722.

Now, when you put that into the context of our case, Judge, the question is: When would a reasonably prudent person in Petra's position know of facts giving rise to their claim? And the answer is, on or about January 15, 2007.

The benefit of having this hearing in near proximity to our last hearing, Judge, is that the court has the benefit of having seen Petra's cost estimate, the first of which was submitted on January 15 of 2007 and which was approximately $3 million greater than the amounts stated in the construction management agreement.

Now, since we all know and have known from the day that Petra filed its counterclaim in this matter that their claim is based in principle part on the increased cost of this project, it isn't necessarily when a reasonably prudent person would have known. It's when Petra in its fiduciary capacity as a construction expert providing a cost estimate to the city, which
claims their fee is based as a percentage of cost, knew or should have known.

And there's little doubt that January 15 of 2007 is the first key date for the court to consider, and as it states in the McQuillen versus City of Ammon case, that's the date that triggers the 180-day requirement.

If you forget about that date, if you forget about February 12, the second cost estimate, if you forget about April 3, the third cost estimate, and you forget about July 12, 2007, the fourth cost estimate, you could look to a second unequivocal date, which is November 5, 2007 where Petra submits, quote/unquote, it's notice of change order for an increase in their fee.

If you ignored the first four dates, you can't ignore November 5, and the 180-day period would start there. And contrary to the position that I expect Mr. Walker to take, which is the same one he espoused at the prior hearing, we didn't know we had a claim until the city denied payment. Well, that's not what the case law says, and it's not what the statute says.

And in fact, in Mitchell versus Bingham Memorial Hospital, which we cited to the court at...
The first point is, Petra is going to assert that a counterclaim for the construction manager's fee was going to be based on a percentage of total time. We must have given the notice within that period of time. And that's clearly not the purpose of the statute. And in fact, the purpose of the statute as stated in the Pounds decision is exactly why in this circumstance with this set of facts the act has to be strictly enforced.

In order to serve the primary purpose of the act and to quote, save needless expense and litigation by providing an opportunity for amicable resolution of the differences between the parties, then notice must be given and it must be given early.

And under this set of circumstances, I find it either disingenuous or impossible to believe that if as stated in the multiple affidavits submitted to the court and the multiple pleadings submitted to the court, Petra knew from the time they signed this contract that their fee was going to be based on a percentage of total cost, which is what the mantra has been from day one. It's always been 4.7 percent of the cost.

If in fact that's true, then on January 15, 2007 they knew they had a claim for an increase in the amount of their fee, and the 180-day notice provision was triggered, and they must have given the notice within that period of time.

I'll address two additional points. The first point is, Petra is going to assert that while the federal statute says a counterclaim is sufficient notice, and therefore, the state ought to follow the federal rule.

Well, unfortunately we have to give due deference to the legislature who is presumed to know what it is doing and what the state of the law is, and at the time they passed 5219 and the Idaho Tort Claims Act, the federal statute was in existence and allowed by statute a counterclaim to be sufficient to comply. And the Idaho legislature chose not to follow the federal format.

And as a result, we have case law in our state, the Knudsen decision, Knudsen versus Agee at 128 Idaho 776, which specifically says the court would not look to a federal court interpretation of a federal statute -- in that case a wiretap statute -- for the creation of a discovery exception where a similar state statute does not expressly contain such an exception.

We have an identical situation here, and the filing of the counterclaim simply doesn't meet the standard, and there's a good reason.

The good reason is, the same principle espoused in the Pounds decision that identifies the whole purpose for giving a notice and giving it early. Give the parties a fair opportunity to resolve this, give the city an opportunity to begin their investigation not in 2009 but in 2007, specifically in January of 2007 when they should have given notice of the increase in fee to begin with under their fiduciary responsibility to the city.

It's for those reasons, Your Honor, that we respectfully ask that the court apply as the Supreme Court has the tort claims notice in 5219 to dismiss all of Petra's claims with prejudice. Thank you.

THE COURT: Thank you very much, Mr. Trout. Mr. Walker?

MR. WALKER: Thank you, Your Honor. Well, here we are, Your Honor, more than 17 months of litigating this case and after the parties have incurred more than a million dollars in costs and fees, Meridian asserts it was not sufficiently put on notice of Petra's damages claim against the city because it failed to file a claim under Idaho Code Section 50-219 and 6-901 and the following subsections.

Well, first of all, Your Honor, the counterclaim for the construction manager's fee and the reimbursable expenses seeks specific performance of the construction management agreement, not money damages.

So Petra's counterclaim in that regard does not fall within the purview of the Idaho Tort Claims Act. Now, admittedly, Your Honor, Petra's claims for lost past and future earnings and lost business and investment opportunities are a claim for damages, but as I'll point out in a minute,
Your Honor, Petra substantially complied with the Idaho Tort Claims Act in any event. Now, back to the equitable adjustment language in paragraph 7 of the construction management agreement. That paragraph provides that a change shall entitle the construction manager to an equitable adjustment in the schedule of performance, the construction manager's fees, and/or the not-to-exceed limits for reimbursable expenses. So the essence, Your Honor, of Petra's claim is equitable in nature and not one for money damages.

And as I mentioned, so the bottom line with respect to the request for the construction manager's fee and the expenses are simply a request that the court specifically enforce the contract.

Now, in this regard, Idaho Code Section 50-219 states that, "All claims for damages against the city must be filed as prescribed by Chapter 9, Title 6 Idaho Code." Idaho Code Section 6-904 provides that, "A claim means any written demand to recover money damages from a governmental entity or its employee, which any person is legally entitled to recover under this act as compensation for the negligent or otherwise wrongful act or omission of the governmental entity or its employee."

So putting the equitable adjustment language in the equitable remedy aside, let's look at Petra's substantial compliance with the Idaho Torts Claims Act.

As Mr. Trout mentioned in his argument, Petra's position is that the claim didn't arise until change order number 2 was denied on February 24, 2009. So at the outset, it's necessary for us to determine what constitutes a claim in this case.

And there are four sources, Your Honor, that lead us to the determination that change order number 2 was not a claim until it was denied.

The first source is the construction management agreement itself. The second source is the custom and practice in the construction industry. The third source is the party's course of dealing during the project period, and the fourth source is the definition of claim contained in the Idaho Tort Claims Act itself.

Now, regarding the construction management agreement, paragraph 8.1 of the agreement states, and I quote: "In the event that any claim, dispute, or other matter in question between the owner and construction manager arising out of or related to this agreement or breach hereof ('a claim'), owner and construction manager shall first endeavor to resolve the claim through direct discussions."

So, Your Honor, applying the canon of construction used ejusdem generis, which means, as the court knows, of the same class, and more particularly it means when a general word or phrase proceeds or follows a list of specifics, the general word or phrase will be interpreted to include only those items of the same type as those listed.

And the second legal principle of construction, noscitur a sociis, which means that words are known by the company they keep, and we've cited the court to Idaho Supreme Court case State versus Richards with regard to that. These two canons of construction confirm that a matter is not a claim under the construction management agreement until it is disputed.

Now, regarding the construction or the

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www.etucker.net
contractor change order -- and there was some 150
of them -- was treated as a claim subject to
mediation.

Now, finally moving to the statute,
Your Honor, the fourth source. The definition of
claim is contained in Idaho Code Section 6-902,
and it reads, and I've already alluded to part of
this: "Claim means any written demand to recover
money damages from a governmental entity or its
employee, which any person is legally entitled to
recover under this act as compensation for the
negligent or otherwise wrongful act or omission of
the governmental entity or its employees when
acting within the course and scope of his
employment."

It's clear, Your Honor, that neither
Petra's submission of change order number 2, nor
the city's request for additional information
which took place prior to February 24, 2009, was
wrongful. It's simply the matter of dealing with
the change order in the ordinary course.

So, Your Honor, our position is that
the claim arose on February 24, 2009, the date
that Meridian refused to pay the change order.
And the time for filing the notice under the Idaho
statutes began to run on that date.

So focusing on that date, then Petra
substantially complied with the notice
requirements under the Idaho statutes, and that
position is supported by my March 16, 2009 letter
to Bill Nary, the city attorney, requesting
mediation. And that was sent certainly within 180
days. That was sent within 20 days of the change
order was denied and the claim arose.

In addition to that, Petra filed and
served its answer and counterclaim on May 6, 2009,
which is also within the 120-day -- or 180-day
period, setting forth its damages claims and its
claims with respect to the construction management
fee and reimbursable expenses.

Now, additionally, and this is germane
to the cases cited in our briefing, there were
substantial communications between Mr. Trout and I
regarding this matter early on in the case and
certainly before the 180 days expired.

And finally, Your Honor, Petra filed
and served its first amended answer and
counterclaim on August 21, 2009, which was also
within the 180-day period that expired on
August 23 of 2009. So all three of those events
occurred, those events of notice occurred, prior
to the expiration of the 180 days.

Now, in looking at the purpose of the
statute, the Court of Appeals in Cox versus City
of Sandpoint, which we've cited in our briefing,
the court explained, and I quote: "The primary
function of notice under the Idaho Tort Claims Act
is to put the government entity on notice that a
claim against it is being prosecuted and thus
apprise it of the need to preserve evidence and
perhaps prepare a defense."

There's no suggestion here at this
point, Your Honor, that Meridian was not able to
preserve evidence and prepare a defense. There's
no suggestion that Meridian was blind-sided by
Petra's claims and not afforded the opportunity to
address each and every one of them outside of
litigation.

On the contrary, Your Honor. While my
request for mediation made on behalf of Petra was
pending, the city brought this matter into court
by filing its complaint on April 16, 2009. And
they did this, the city did this, not notwithstanding
the requirement in the construction management
agreement that, quote, all claims shall be subject
to mediation as a condition precedent to the
institution of legal or equitable proceedings by
either party. Requests for mediation shall be
filed in writing with the other party to this
agreement. And it required that it be filed
within 21 days, and we complied with that by my
letter of March 16, 2009 which was served on the
city attorney Bill Nary on March 16.

And, Your Honor, despite the
requirement that the city mediate and despite our
request for mediation, the city refused to
mediate.

In addition, the notice requirements of
the Idaho Tort Claims Act do not apply to
counterclaims in our judgment, Your Honor,
particularly compulsory counterclaims that are
filed within the 180-day period. Now, there's no
published opinion in Idaho holding that the notice
requirements of the Idaho Tort Claims Act apply to
counterclaims. However, other jurisdictions and
notably Oregon, our sister state, have addressed
this issue, and they've answered that a
counterclaim satisfies the acts requirements.

In the Oregon case, Urban Renewal
Agency of the City of Coos Bay versus Lacky, 275
THE COURT: It's a contract-based cause of action, not a tort. And with respect to the counterclaims alleging negligence, and so forth, in seeking and containing a prayer for relief seeking damages sounding in tort, your contention is that your cause of action didn't accrue until February of '09 when your claim was denied or when your requests for additional moneys for change order number 2 was actually denied, and that would trigger your cause of action sounding in tort.

And then your letter of the 16th of March constituted compliance with the Tort Claim Act.

MR. WALKER: Correct, and also compliance with the construction management agreement.

THE COURT: And in any event, if the court were to follow the authority that you've cited, the persuasive authority that you have cited from the state of Oregon, a compulsory counterclaim wouldn't be subject to the Tort Claim Act in any event.

MR. WALKER: Or it would satisfy the notice requirements, Your Honor.

THE COURT: Right. And that was filed on May 6.

MR. WALKER: May 6 the first one and they have to satisfy the conditions precedent to any kind of claim for specific performance under any interpretation of contract law.

And let's take a look at what the specific provision is. This is in section 7. This is the, quote/unquote, equitable adjustment section that was just cited to you by Petra, and it says: "Prior to providing any additional services, the construction manager shall notify the owner of the proposed change in services and receive the owner's approval for the change."

There was no evidence in this case that that was complied with with respect to section 7. None, zero, no evidence.

And there is no evidence that can be created today to show compliance with that specific condition precedent.

THE COURT: Well, Mr. Trout, as I understood the purpose of the hearing, your motion to dismiss was premised on your contention that Petra failed to comply with the Tort Claim Act. What you're arguing here is that they failed -- that really their claims, their contract claims, should be dismissed based on their failure to satisfy this condition precedent contained in the contract.
MR. TROUT: It's actually two-fold. Since counsel raised the argument in terms of the nature of the claim that was being made, what I'm saying is, the notice that would be required is a notice within 180 days of the date that they begin providing additional services. That's the basis for their claim: We provided additional services under the contract. We're entitled to be paid whether you call it an equitable adjustment or whether you call it what they're calling it, which is 4.7 percent of the increase in cost.

Either one of those things was known by Petra well in advance of February of 2009 either by way of this section of the agreement or by way of the contention that they have continually made to this court that we're entitled to an increase in our fee based on 4.7 percent of the actual construction cost.

So the question then becomes: Did they wait until February of 2009 to begin providing the additional service? I don't think so. Exhibit 2, which is the claim, notice of claim, and the document that they submit to the city saying, "This is why you should pay us more money," starts accumulating their time for, quote/unquote, 25 hours charged to Wes Bettis, the project manager.

Now, when should a reasonably prudent construction manager, charged with a fiduciary duty to this city, be on notice of facts giving rise to the claim? Well, when they begin providing the additional service if section 7 is the basis upon which they want to do it or when they know of an increase in cost, which was January 15 of 2007. Neither of those dates is in February of 2009. Can't get there from here. The facts don't support their position.

And so whether you call this some kind of equitable claim, which still seeks money damages, or whether you call it a breach of contract claim, which still seeks money damages, the fundamental question is, if you're going to seek money from the city, you go back to the city of Ammon case and say, "When does a reasonably prudent person in their position have notice of facts which would give rise to the claim?"

Those are the two dates, January 15 or the day they began providing additional services, even though they didn't meet that condition of the contract. They knew they were providing additional services. And therefore, there's no basis to argue that the date moves forward to 2009, some seven months after -- seven months, Judge, after October 15, 2008 when they say the project was complete.

It defies credibility for Petra to argue that they had no knowledge until seven months after.

THE COURT: Mr. Trout, do me a favor and leave that up, will you? I want to hear from Mr. Walker on this issue, if you don't mind.

MR. TROUT: I will. Happy to leave that up.

I think the next thing for the court to recognize is what they're suggesting to the court in very plain language is that the, quote/unquote, four items, custom and practice, course of dealing, section 8.1, all constitute what are called waivers, all waivers.

And the language that I would like the court to focus on is specifically in our memorandum, and it consists of two items. Number 1 -- and of course, the passage of time, which is I think the big point that counsel wanted to make. And all you have to do to answer that question to your satisfaction is look to how the Supreme Court of Idaho answered that question to its satisfaction in the Udell decision.

They said: "In our view, the sovereign immunity protected by the act, speaking of the Tort Claims Act, should not be dissipated by ad hoc waivers."

Now, each of the items, that each of those four items are specifically ad hoc waivers that Petra would like the court to adopt as exceptions to the rule. And that's clearly not the case in Idaho, and it clearly can't be the case in Idaho. It is answered by the Udell decision. It's also answered in another way by another decision of the state. Kelso Irwin, PA versus the State Insurance Fund, 134 Idaho 130, in which the court, Supreme Court, uniformly stated: "It has been long recognized that the general rule is that equitable estoppel may not be invoked against a government or public agency functioning in the governmental capacity."

There's absolutely no doubt, none, that the provision of notice under 5219 and the Idaho Tort Claims Act to -- not the city attorney, not me, not anybody except the city clerk who is
City of Meridian v. Petra Inc. 9/27/2010

charged as the recipient of the appropriate notice
1 can be anything other than compliance with the
2 act.
3 
4 There is no substantial compliance, and
5 no case cited by Petra that says substantial
6 compliance means I can talk to the city attorney
7 in a meeting. I can talk to Mr. Trout who is
8 representing them. I can send a letter to the
9 city attorney.
10 
11 You won't find a single case in Idaho
12 that says anything other than an appropriate
13 notice sent to the clerk of the municipal entity
14 within 180 days of the date the claim was made
15 aware of by the claimant is anything but
16 compliant.
17 
18 And under that set of circumstances,
19 all four of the items cited by Petra as excuses,
20 custom and trade, which is, by the way, a legal
21 opinion by Mr. Bauer and not one that is subject
22 to the court's deference, some kind of notice
23 issued under section 8.1 which specifically says, it
24 doesn't define claim as just a claim for money
25 damages. It says, "or other matter in question
26 arising out of or related to this agreement." And
27 then it says not "and," but it says, "or the
28 breach hereof."

breach hereof."
1 
2 Under that set of circumstances and the
3 contractual definition of claim, was this a matter
4 in question? Well, it's a matter in question if
5 prior to providing any additional service the
6 construction manager shall notify of the proposed
7 change. And under section 8.1, which I'll point
8 out to the court, it isn't 180 days, Judge. It's
9 the 21.
10 
11 THE COURT: Well, let me ask you this.
12 Given the provision in the contract that requires
13 any dispute over any claim to be submitted for
14 discussion -- right? -- it seems to me that that
15 might allow the city to continue with the
16 discussion of this claim and this dispute for a
17 lengthy period of time, perhaps for 181 days, and
18 then say, "Discussion is over, we're not paying."
19 
20 And then come back and say, "Sorry.
21 You didn't comply with the Tort Claim Act. You
22 can't sue us either."
23 
24 MR. TROUT: There's no provision in the
25 statute that talks about, quote/unquote, wrongful
26 inducement by the city. There's no provision in
27 the case law that talks about some kind of
28 wrongful inducement by any city. There's no

January 15 of 2007 or it's got to be based upon
1 the date they started providing the additional
2 services and the notice was required to the owner
3 then.
4 
5 One last item.
6 THE COURT: Go ahead, and then I'll have one
7 question.
8 
9 MR. TROUT: The last item is this. It
10 addresses the point that was being made about the
11 passage of time. And I'll give you two pieces,
12 Judge. The first is, the Udell case specifically
13 deals with the passage of time: "If the state is
14 immune from liability because of a failure of the
15 claimant to comply with the notice requirements of
16 the Tort Claims Act, the immunity may be raised at
17 any time."
18 
19 No question about that. That's a
20 specific finding.
21 THE COURT: Because it is jurisdictional.
22 MR. TROUT: That's because it's
23 jurisdictional. And secondarily, I would ask the
24 court to turn its attention, because I thought
25 Petra might raise this issue to a case called
26 Trees, just like the ones that stand with leaves,
27 versus Kersey, which is at 56 P.2d Third 765. It

Page 25

Page 26

Page 27

Page 28

7 (Pages 25 to 28)
THE COURT: And the question I had for you, Mr. Trout, was, I usually see the defense of failure to comply with the Tort Claim Act, the notice requirement of the Tort Claim Act, in a pure tort setting. And here it appears that the allegation here is sounding in breach of contract as opposed to tort.

And you look at the language of the Tort Claim Act itself which talks about, hey, any claim, we're not talking just about tort claims. We're talking about breach of contract, failure to pay a bill is, even though that's a contract-based cause action, it doesn't make any difference. Any

Mr. Walker, I wanted to give you another opportunity to respond, because Mr. Trout has been kind enough to put on the big screen here in the courtroom page 16 of the contract and the part that he has highlighted which reads: "Prior to providing any additional services, the construction manager, Petra in this case, shall notify the owner or the city of the proposed change in services and receive owner's approval for the change."

How would you respond to that? Failure of condition precedent.

MR. WALKER: Contrary to Mr. Trout's representation, there are affidavit testimony that we have submitted in support of our various motions which indicate that the notice was provided to the city prior to rendering any additional services. The court can review those affidavits. And so the condition precedent was met.

And in addition, it's important to point out and we point this out in our briefing is that paragraph 7 does not include the requirement that the notice be in writing, and that was intentional, and the argument is in our briefing with regard to that.
And the reason for that, Your Honor, is that this was a complex project where literally many, many decisions, maybe as many 50 or 100 decisions were made on a daily basis, including changes in Petra's responsibility as a construction manager.

So specifically, because it would have been impossible to build the building, if we had to give written notice every time there was going to be some additional service, the project would have never been built.

Secondly, with regard to either a change order is a claim or it's not. The city can't have it both ways. Well, regardless of what date we use, if you use July 30, 2007 as the date when Petra should have -- we don't agree with that but should have become aware -- Petra filed its official notice on November 5, 2007, which is within 180 days of July 30, '07.

And in addition, if November 5, 2007 is the operative date, Petra filed its change order number 2 on April 8, 2008, which is five months down the road, less than 180 days, Your Honor.

So irrespective of what the city's position is with regard to the start date, we think that it's clear that the start date is February 24. And our argument with respect to the definition of claim is not a waiver argument.

It's a definitional argument. The claim is defined in the construction management agreement. It's defined in the custom and practice of the industry. It is defined in the statute which is important, and it is defined by the party's course of dealing.

With regard to providing service to the city clerk, the court will review the cases that we cited in our brief. For example, the Cox versus Sandpoint, the notice was substantively met by letters to the city, just addressed to the city, and billings to the city.

And in this case, it's peculiar because my folks, the Petra representatives, in particular Gene Bennett, and I believe this is in one of his affidavits, attempted to contact and discuss this matter with Keith Watts after Mr. Trout was engaged. And I received an email from Mr. Trout instructing that all communications should go through Mr. Trout and not directly to the city.

And so we followed that rule which was reasonable, I suppose, under the circumstances, and all of the communications from and after March 16, 2009 were sent through Mr. Trout.

With regard to the wrongful act as defined in the statute, our position, and we've briefed this, Your Honor, is that the city breached the construction management agreement when it denied change order number 2, in which it didn't deny part of it. It just says, "We're not going to pay you, irrespective of the additional services that you have rendered."

Thank you, Your Honor.

THE COURT: Thank you.

MR. WALKER: Do you want to hear on these other two motions in limine that Petra has filed?

THE COURT: Hang on just a second.

Mr. Trout?

MR. TROUT: Well, one last point.

THE COURT: And I'm going to give you the final word, because I think it's fair enough, Mr. Trout, that it's your motion, and I think it's only fair that the person who brings the motion gets the final word.

I asked Mr. Walker to address something that I thought was appropriate to address, so I want to give you the final word. If you have rebuttal with respect to that last argument that Mr. Walker made.

MR. TROUT: I do. I've now heard it not less than four times in the hearings in this case, and I think it's time we put to bed what the real answer to the question is. I keep hearing that it's not a waiver argument, but in fact it has to act as a waiver. Otherwise, there can't be compliance because the notice was never served on the city clerk as required by law.

And specifically section 10.17 says: "This is the entire agreement between the parties with respect to the matters covered herein, supersedes all prior written and oral. Any waivers hereunder must be in writing."

All of this discussion about affidavits saying, "We changed this, we changed that, we changed our duties under the contract," none are in writing, and there's no waiver of the Idaho Tort Claims Act and its requirements in writing.

Thank you, Judge.

THE COURT: Thank you. Hang on just a second.

I have a question, Mr. Walker. The March 16, 2009 demand --
MR. WALKER: Yes, Your Honor.

THE COURT: -- that you made. To whom was that directed precisely?

MR. WALKER: William Nary, the city attorney. At the time I knew that the city was represented by the city attorney. And under the professional code of professional responsibility, I sent a letter to the city attorney, and we've cited that in our brief, Your Honor.

THE COURT: Thank you.

Here is my ruling on this motion to dismiss the Petra counterclaims against the City of Meridian, based on the contention that the claimant Petra failed to comply with the notice requirement of the Idaho Tort Claim Act.

I'm going to deny the motion based on this analysis. The cause of action didn't accrue fully until February 24, 2009 when the claim was denied. That is when Petra was reasonably put on notice that it had a claim.

Although the act specifies that notice under the Tort Claim Act has to be given to the secretary or the clerk of the agency involved in this case, the entity, the city, was represented by counsel, and notice was given to the city attorney of record on March 16, 2009.

I find that the provisions of the Tort Claim Act do cover all of the counterclaims, including the contract claims. Notice was complied with on March 16, 2009. Therefore, the motion to dismiss on the grounds stated is denied.

And at this point, I'm ready to hear the arguments on the two motions in limine, two motions filed by each side. MR. WALKER: I don't think the city has filed any motions in limine. MR. TROUT: Yes, we did.

THE COURT: Yeah. The city -- MR. WALKER: We didn't get them if they were filed. MR. TROUT: The Lemley affidavit, right?

MR. WALKER: That's fine, Your Honor.

THE COURT: But in the meantime, I'll hear your argument on your two motions in limine.

MR. WALKER: Okay, Your Honor. Thank you. I'll go ahead and start with the motion in limine to exclude evidence of the city's damages.

As the court knows from our prior argument to date, the city filed its complaint on April 16, 2009. And in its compliant, it seeks damages for Petra's breach of contract.

Now we're just 65 days before trial, 17 months after the complaint was filed, and Meridian has not disclosed the critical factual information regarding its damages that Petra needs to defend against those claims.

And this is despite Petra's expansive discovery efforts, which included taking the depositions of Mayor Tammy de Weerd, the counsel president Charlie Roundtree, the city council liaison Keith Bird, Keith Watts, the city's authorized representative under the construction management agreement and the city's purchasing agent. Your Honor, we also deposed three of the city's experts: Steven Amento, Laura Knothe, and Todd Weltner.

Now, importantly, the city has not disclosed any experts who may testify regarding damages, and none of the deponents that we took
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| depositions of identify the city's damages theories or amounts. | claims. And the city's response was: "The body of law comprising contract law as applicable to the facts and the law of torts, applicable to the facts supports the claims and defenses made by Meridian in this matter. The body of law comprising equitable principles supports the claims of defenses of Meridian in this matter."
| And as the court knows, in order to defend against any damage claim, the defendant and in this case Petra needs to know first each element of alleged damage; second, the amount of the alleged damage arising with respect to each such element; third, the method of calculating the amount of the alleged damage with respect to each element; fourth, the assumptions underlying the calculation of the amount of the alleged damage arising with respect to each element; and fifth and importantly, the cause or the cause of the alleged damage. Now, the city's opposition brief states, and I quote: "Petra simply cannot in good-faith assert that it did not receive the disclosure of Meridian's evidence of damages." However, consistent with the strategy so far during discovery, the city's responsive brief doesn't cite a single reference to the record where either the court or Petra can find the theories, the amounts, how the amounts of damage were calculated. And the reason for that, Your Honor, is that there is no evidence in the record. THE COURT: Well, precisely what were their responses to those questions when you made requests for admission or -- well, I suppose when you made your interrogatory, when you asked your question by way of interrogatory and you at some point said, "How much do you claim we owe you and how did you calculate that, and what's your theory here?"
| And your contention is that there was never a response that would allow you to know enough about their claims, their claim or claims, that you could give to your expert to be ready to refute that. MR. WALKER: Let me give you the answers. We asked them to identify their damage claim. The city responded in their response to our interrogatory: "At present the findings to date indicate that Petra's conduct, both its actions and it's failures to act are the cause of substantial but yet to be quantified damages to the City of Meridian under the legal theories expressed in the complaint." We asked another interrogatory regarding legal and factual bases for the city's | your reasonable discovery request by ever saying how much they wanted and specifically factually that was based on, that they should be precluded now from putting on any evidence that would support any specific claim for damages. And without a specific claim for damages, there's no way that you could be prepared to meet that? MR. WALKER: That's correct, Your Honor, because we would have to have expert testimony. The deadline for our disclosure of experts has past. And in any event, we're just literally 60 days before trial, and we don't know what we did wrong or if we did anything wrong; what damage did it cause and in what amount and how did they calculate it. We don't have the answers to any of those questions. Briefly then, Your Honor, I'll move on to the experts, and this is again a question of nondisclosure on the part of the City of Meridian. As the court knows, its scheduling order required the city to disclose its experts on or before July 28, 2010. It says the disclosure be made in compliance with Rule 26(b)(4), and the court is aware of the standards under 26(b)(4). |
THE COURT: Now, you concede that out of the 12 experts, three of them complied.

MR. WALKER: Essentially. Not completely but essentially.

THE COURT: But there's nine others that you want me to say --

MR. WALKER: They're out. And because we don't -- we didn't have any information except on July 28 we received by fax a list of 12 names.

And recently they supplemented their discovery responses. However, the supplements did not meet the requirements of either Rule 26(b)(4) or respond to our interrogatory with regard to expert witness disclosures.

And specifically I've cited in our briefing our interrogatory dealing with the request of disclosure as to expert witnesses, and it's very precise. It asks for some additional information in addition to 26(b)(4). And as we've cited in our briefing, the Idaho Supreme Court in Schmechel versus Dille has held that Rule 26(e) unambiguously imposes a continuing duty to supplement responses to discovery with respect to the substance and subject matter of the expert's testimony where initial responses have been rejected, modified, expanded, or otherwise altered in some state.

And at this late date, Your Honor, it's simply unreasonable to assume that we can properly prepare, number one, to take the deposition of these nine experts and certainly to prepare cross examination for trial.

Thank you, Your Honor.

THE COURT: Thank you, counsel.

And I'll hear your opposition argument to the two motions in limine filed by Petra, Mr. Trout.

MR. TROUT: Thank you, Judge.

This is nothing more than a disguised effort on Petra to fail to comply with the Idaho Rules of Civil Procedure. Judge, you're aware that any requests under Rule 37(a) has to be met with a certification by counsel to meet and confer.

There's no affidavit. There's no document. There's no letter. There's no effort with respect to meet and confer as required under 37(a)(2): "The motion must include a certification that the movant has in good-faith conferred or attempted to confer with a party not making the disclosure in an effort to secure the disclosure without court action."

Petra wants to bypass the meet and confer requirement entirely and ask the court to enter an order without having complied with 37(a)(2), and on that basis alone, Judge, you are free and in fact should deny the motion.

Secondarily, if I might, if I might approach, Judge.

THE COURT: All right.

MR. TROUT: I'm handing you what is a copy of the May 6 Petra Incorporated first request for discovery. And I'm going to ask the court to direct its attention to the instructions submitted by Petra with respect to that request, and that is, "Including supplementing answers and responses from time to time but not later than 30 days after receipt of the additional information or documents and in no event later than 45 days before trial."

Petra's motion today is premature, and I'll represent to the court that each of the parties that we have listed, including the affidavits, were all supplemented within 30 days of our obtaining the information.

And finally I'll conclude. To say that Petra is not prepared to depose these people is unequivocally wrong. If I might approach?

This is a deposition schedule, which I'm handing to the court, copy to counsel, in which every single one of these people have been discussed, and we have agreed to dates for deposition for every single one of these individuals, including Mr. Geiss, Mr. Cotton, Mr. Neidigh, Mr. Wetherholt, Mr. Anderson. A continued deposition of Laura Knothe who has been deposed once but whose deposition wasn't completed. Mike Simmonds, Tim Petsche, Todd Weltner, which is a continuation of his deposition which was taken once but not completed. Steve Amento whose deposition has been taken but not yet completed. Ted Baird whose deposition has been taken but not yet completed.

And so every one of the people that we've identified is currently subject to a discovery date and deposition agreed to between counsel with respect to the information that they have in this matter.

THE COURT: How many days before trial are we today?

MR. TROUT: Judge, I haven't done the
MR. TROUT: Correct. So according to the request made by Petra, the requests made in this motion is, A, premature; and B, barred by failure to provide a certification to the court as required under Rule 37.

THE COURT: Let me ask you this question, we got to point this in the arguments today. If I were to ask you today, Mr. Trout, if you could tell the court today -- and I'm not asking if you can say what the city would settle for or something like that. But do you have a precise figure on how much money you claim that the city is entitled to?

MR. TROUT: I have one precise figure, and I have some estimates. The one precise figure is calculated as we sit here in order to comply with Petra's failure to collect liquidated damages, and it approximates $1.2 million.

And there are additional damages being calculated as we sit here in order to comply with the discovery request and the deadlines set. I will tell you that we have had continuing discussions about the 30(b)(6) deponent that Petra has requested of us for a damages calculation, and we're going to name at least two individuals as the 30(b)(6) representatives to be deposed. They're included in this list of deponents.

And so that discovery is underway as well, in compliance with the timeframes set forth in Petra's discovery response.

THE COURT: All right. I guess that's all.

MR. TROUT: Thank you, sir.

THE COURT: Go ahead, counsel.

MR. WALKER: Thank you, Your Honor. With regard to the no effort to meet and confer, I filed an affidavit in opposition to the motion to dismiss under the Tort Claims Act. It's dated September 15. And Exhibit O to that affidavit is a letter that I wrote to Mr. Trout, a detailed letter pointing out the deficient answers. It is dated June 12, 2009, more than a year ago.

The response I received to that was on June 16, 2009 from Mr. Trout's assistant, Kevin Kluckhorn. And Kevin writes: "Tom, Kim forwarded your June 12, 2009 letter to me regarding the discovery responses. We are currently preparing for a trial set to begin on Monday, June 22, 2009, and lasts five to ten days. "We will be unavailable to meet and confer by that deadline you requested, and we will respond just as soon as you're able to meet after that trial."

Never heard another word from them. But as we argue in our brief, our motion in limine is not a motion to compel.

MR. WALKER: And with regard to the depositions we're going to name at least two individuals as 26(b)(4) disclosures for one or two of the experts.

But right now we have to go into those depositions essentially blind. We're not sure what they're going to testify about. However, if they had responded to our interrogatory number 16 dated June 12, 2009, actually dated May 6, 2009, and had complied with Rule 26(b)(4), we would be able to prepare to take those depositions.

Mr. Trout also mentioned that on this list, that there are damages experts. I don't see them, Your Honor, but I certainly would be interested to know who they are. Thank you.

THE COURT: All right. Let me tell you what I'm going to do on these two motions in limine filed by Petra.

The first request for discovery that was served by Petra on Meridian on or about May 7, 2009, actually dated May 6, 2009, requests these answers in any event no later than 45 days before trial.

I'm not going to grant the motion to exclude testimony by the nine experts until and unless 45 days before trial the expert opinions are not received. It could be that perhaps the 26(b)(4) disclosures for one or two of the witnesses will be served in response to this.
discovery request 45 days before trial, and others
won't be disclosed by then.
To the extent that any of these named
experts fail to have their opinions and the basis
of their opinions, and so forth, by 45 days before
trial, they'll be excluded. But I'm going to give
Meridian until 45 days before trial to comply with
discovery request, which does contain the
demand to have these opinions disclosed in any
event no later than 45 days before trial.
There is no requirement on a motion in
limine to exclude evidence to show that one of the
parties brought a motion to compel anyway. And in
any event, this isn't a motion to compel. And the
meet and confer provision of Rule 37 of the Idaho
Rules of Civil Procedure does not apply otherwise
in motions to compel.
On the other hand, I will order the
parties to meet and confer about two issues. One,
and most importantly, the testimony that has been
sought or rather the answers to interrogatories,
and so forth, that have been aimed at obtaining
information from the City of Meridian to support
their claim for damages, and to do that within
absolutely no later than 30 days before trial, to

THE COURT: And then the three other fellows.
MR. TROUT: I don't know if this will come
up or not, Judge, but hopefully it will. Let me
direct the court's attention first to the issue of
Mr. Bennett and Mr. Coughlin and Mr. Frank.
This document that I've placed up on
the screen, for purposes of the record, Judge, is
the memorandum in opposition to plaintiff's motion
to strike the affidavits of Bennett, Coughlin,
Frank, and Lemley that was filed by Petra.
The representation made to the court
was, with regard to Bennett, Frank, and Coughlin,
that are not designated as experts and were all
disclosed as fact experts in Petra's discovery
responses August 21, 2009. They have not been
retained as experts.
And the fundamental problem we have is,
pursuant to the court's order, as you'll recall
back in June, we asked for the opportunity to
conclude the depositions of Mr. Bennett and
Mr. Coughlin in response to the motion for summary
judgment. We did conclude those depositions based
upon our understanding they were fact witnesses
and they were not expert witnesses.
And now on September 15, I believe, of 2010, they have been designated as expert witnesses, and as such, with those depositions concluded, we're now precluded from continuing taking their depositions unless we're allowed leave of the court to redepose them now with respect to some expert opinion that is yet to be disclosed. They've simply been disclosed as experts.

And it's on that basis that we think we're prejudiced, and we ask the court to exclude them as expert witnesses in this matter.

Now, with respect to Mr. Lemley, and I'll switch to the next motion because this is the one -- and I apologize for this little glitch -- the basis for excluding Mr. Lemley as an expert is that he is not acting as the expert.

THE COURT: Right. He consulted with these other folks, and he is just restating the opinions that these other individuals have expressed to him.

MR. TROUT: More importantly, he is not acting as the expert. This is an excerpt from page 2 of 12 of the Lemley international report, and I'm going to direct the court's attention to the very last paragraph. It's the one that is the crux of the supposed opinion, and it doesn't say, "This is my opinion."

This says, In Lemley, Lt's, Lemley International's opinion, Petra exercised the care, skill, and judgment, et cetera.

So our basis for the exclusion of Mr. Lemley is, A, he is not a licensed construction manager; B, this isn't his opinion. It's the opinion of an entity, and under Rule 702, experts are required to be witnesses. An entity cannot be a witness, and as such, Judge, Mr. Lemley is, A, not qualified; B, relying on others; and C, not stating a personal opinion but stating an opinion of an entity which cannot be qualified as an expert witness under Rule 702.

THE COURT: Thank you.

And, Mr. Trout, I just want to make it clear for the record, a moment ago when I made a statement regarding my understanding of the reasons underlying your motion to exclude Jack Lemley as an expert, that was the court not offering an opinion or making a finding of fact, it was just me saying this to let you know that this is how far that -- what I anticipate that you're going to argue. So I just wanted to say that for the record.

MR. WALKER: Understood, Judge. Thank you.

THE COURT: Thank you.

Mr. Walker, I'll hear your opposition to Mr. Trout's motions in limine.

MR. WALKER: Thank you, Your Honor. Well, curiously Mr. Trout put up the report that was prepared by Mr. Lemley and Mr. Bauer to disclose experts as well as the staff at Lemley International. What he didn't put up was Jack Lemley's affidavit which clearly states that it's his opinion to a reasonable degree of professional certainty that Petra's work complied with the applicable standard of care and that the court has that affidavit that has been in the record since way last spring.

So that Mr. Lemley, irrespective of what the report says, did find or did reach an independent judgment that Petra's work conformed to the applicable standard of care as well as the other things that he states in his affidavit.

With regard to Bennett, Coughlin, and Frank, the court knows and has already said, we didn't disclose them until December 15. And primarily they're rebuttal experts.

And with regard to the content of their opinions, those are fully set forth in the disclosure that conforms to the requirements of Rule 24(b)(6) -- or excuse me, 26(b)(4).

And so we think that for purposes of trial, these gentlemen who have extensive decades long experience in the construction industry can give an opinion with respect to whether or not Petra conformed its work to the standard of care.

Thank you, Your Honor.

THE COURT: Thank you.

MR. TROUT: Nothing further, Judge.

THE COURT: All right. I'm going to deny Mr. Walker, I'll hear your opposition to Mr. Trout's motions in limine.

MR. WALKER: Thank you, Your Honor. Well understood, Judge. Thank you.
which were the interviews that he conducted, he
and another gentleman conducted with other
individuals who were familiar with the facts and
circumstances of the case, and that those were the
types of sources of information that experts in
this field rely upon to form expert opinions.

So I'm going to deny the motion with
respect to Jack Lemley as an expert, and I'm going
to deny the motion with respect to the other three
individuals, Coughlin --

MR. TROUT: If I might assist, Judge,

Bennett and Frank.

THE COURT: Thank you, Coughlin, Bennett,
and Frank. These individuals were disclosed as
lay witnesses, fact witnesses, as opposed to
expert witnesses, until the day before the
expiration of the deadline for disclosure of
expert witnesses. On the day before the deadline
for disclosure of expert witnesses, they were
designated as expert witnesses.

To the extent that this may
prejudice -- the fact that they weren't named as
expert witnesses at the time, as I understand it
that Meridian already took their depositions, I'm
going to grant Meridian the opportunity if they

wish to take the depositions of those three
individuals to clear up any matters involving
their expertise.

I wouldn't anticipate those would be
lengthy -- well, I won't say. I don't know how
long those could take. But anyway, if Meridian
believes that there is a need to retake the
depositions of any or all of those three now
expert witnesses, they may do so, but in any event
no later than 45 days before trial.

MR. TROUT: Thank you, Judge.

THE COURT: And, Mr. Walker, you prepare the
order with respect to those two motions in limine.

MR. WALKER: Yes, Your Honor.

THE COURT: Folks, do we have something else
steed up next week?

MR. WALKER: On Monday, Your Honor.

THE COURT: Good. It wouldn't be Monday
without a hearing on one of these matters, so I
appreciate that. Anything else, folks?

MR. WALKER: That's it, sir.

THE COURT: Thank you. The court will be in
recess until 4 p.m.

(Proceedings concluded.)

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho
Corporation,

Defendant.

Case No. CV OC 09-7257

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR ORDER
APPROVING PERMISSION TO APPEAL
FROM AN INTERLOCUTORY ORDER
PURSUANT TO IDAHO APPELLATE
RULE 12

COMES NOW the Plaintiff City of Meridian ("Plaintiff" or "City"), by and through its
counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and hereby submits
the following Memorandum in Support of Plaintiff's Motion for Order Approving Permission to
Appeal from an Interlocutory Order, Pursuant to Idaho Appellate Rule 12.

I. INTRODUCTION

As the Court is well aware, this litigation arises out of a dispute between the City and
Defendant Petra, Incorporated ("Defendant" or "Petra") concerning the construction of the
Meridian City Hall Building, located in Ada County, Idaho. Of significance to the City's present
motion is Petra's Counterclaim, which was filed on May 7, 2009, without satisfying the notice
requirements to the City pursuant to the Idaho Tort Claims Act ("ITCA") and Idaho Code § 50-219. Accordingly, the City has moved to dismiss Petra's counterclaims for its failure to provide the required notice to the City. Naturally, Petra opposed the City's Motion to Dismiss and, on September 29, 2010, the Court entered its order denying the City's motion. As a result, pursuant to Idaho Appellate Rule 12, the City seeks an order granting the City permission to immediately appeal from the September 29, 2010 interlocutory order.

II. ARGUMENT

In denying the City's Motion to Dismiss, the Court determined that (1) Petra's claims against the City did not "accrue" for purposes of the ITCA until Petra's request for Change Order 2 was denied, and (2) Petra's letter to the City's attorney, not the city clerk or secretary, was sufficient to meet the requirements of ITCA and Section 50-219. Gfynn Affidavit, Ex. A, September 27, 2010 Hearing Transcript pp. 37-38. The legal issues of (1) when a claim arises for purposes of providing notice to a city under ITCA and Section 50-219 and (2) whether notice of a claim against a city must be provided to the city clerk or secretary are controlling questions of law as to which there is substantial ground for difference of opinion. Given that the answer to these questions will significantly and unmistakably impact the trial proceedings, an immediate appeal from the Order Denying the City's Motion to Dismiss would materially advance the orderly and efficient resolution of this litigation.

Idaho Appellate Rule 12 gives the Court discretion to grant permission to appeal an interlocutory order of a district court, "which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order ... may materially advance the orderly resolution of the litigation." Id. The Idaho Supreme Court has stated that the intent of Rule 12 is to provide an immediate appeal from an interlocutory order if there are substantial legal issues of great

In this case, the standards set forth in Rule 12 are met. The Court's Order denying Plaintiff's Motion to Dismiss involves: (1) controlling questions of law; (2) there is substantial ground for difference of opinion as to the Court's Order; and (3) an appeal would materially advance the orderly resolution of the litigation. In addition, both intents of the Rule, as stated by the Supreme Court, will be served by an appeal at this juncture because legal questions of first impression are present, as are substantial issues of great public interest.

A. **The Court's Order Involves Controlling Questions of Law.**

In denying the City's motion, the Court held that (1) Petra's claims against the City did not arise until the City denied Petra's request for a Change Order on February 24, 2009 and (2) that the notice provisions of Idaho Code § 50-219 and the ITCA were satisfied with a letter to the City's attorney and not the City Clerk or Secretary. *Glynn Affidavit*, Ex. A. Both of these points of law are controlling, and should either of them be reversed, Petra's counterclaims would be dismissed before proceeding to trial.

B. **There Are Substantial Grounds for Difference of Opinion as to the Court's Order, and Whether Petra's Letter to the City's Attorney Was Sufficient to Meet the Requirements of the ITCA and Section 50-219 Which Are Questions of First Impression in Idaho.**

Suffice it to say, without repeating all of City's arguments set forth in its Memorandum in Support, Reply Memorandum in Support of its Motion to Dismiss and at oral argument, substantial grounds exist for a difference of opinion as to the Court's Order. In denying the City's Motion to Dismiss, the Court specifically held that "[t]he cause of action didn't accrue fully until February 24, 2009 when the claim was denied." *Glynn Affidavit*, Ex. A, *September 27, 2010 Hearing Transcript* p. 37. "That is when Petra was reasonably put on notice that it had a claim." *Id.* The Court further stated that "[a]lthough the act specifies that notice under the Tort Claim Act has to be given to the
secretary or clerk of the agency involved in this case, the entity, the city, was represented by counsel, and notice was given to the city through their attorney of record on March 16, 2009.” Glyn Affidavit, Ex. A, September 27, 2010 Hearing Transcript pp. 37-38.

In making the above determinations, the Court disregarded Idaho case law on point and the plain language of the ITCA supporting the opposite conclusion. Thus, in addition to the fact that controlling authority exists supporting the City’s position, an immediate appeal would also satisfy one of the intents of Rule 12 because the Idaho Supreme Court has not yet addressed whether notice to a city attorney satisfies the notice requirements of the ITCA.

1. For Purposes of the ITCA, a Claim Arises as soon as Petra Should Have Reasonably Discovered its Claim Against the City.

Idaho Code § 6-906 requires that all claims against a political subdivision “shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.” Id. (emphasis added). “The statute does not begin running when a person fully understands the mechanism of the injury and the government’s role, but rather when he or she is aware of such facts that would cause a reasonably prudent person to inquire further into the circumstances surrounding the incident.” Mallory v. City of Montpelier, 126 Idaho 446, 448, 885 P.2d 1162, 1164 (Ct. App. 1994). “[I]t is clear that failure to comply with the notice requirement bars a suit regardless of how legitimate it might be.” Driggers v. Grafe, 148 Idaho 295, 297, 221 P.2d 521, 523 (Ct. App. 2009).

It is evident from the record present in these proceedings that Petra knew, or reasonably should have discovered, the existence of its claims against the City as early as January and as late as July of 2007. Once again this Court must be mindful that Petra’s claim for damages is premised upon the increase in the cost of the Meridian City Hall Project. Accordingly, as Petra’s claim for damages is premised upon the increase in cost, its claim for damages arose, or reasonably should have been known, upon Petra’s first notice of the fact that the cost of construction exceeded the
$12.2 Million identified in the CMA. As the Idaho Supreme Court recognized in *Mitchell v. Bingham Memorial Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997), “a claimant is not required to know all the facts and details of a claim because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement.” See also *Magnuson Properties Partnership v. City of Coeur d'Alene*, 138 Idaho 166, 59 P.3d 971 (2002) (stating that “the 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time.”).

As set forth in detail in the City’s Memorandum in Support of Motion for Summary Judgment filed on September 1, 2010, as early as January of 2007 Petra began representing to the City that the estimated cost of construction was in excess of $12.2 Million ($16,867,220) and, more importantly, represented that Petra’s construction management fee would remain unchanged regardless. (City’s Memorandum in Support of Summary Judgment, pages 5-12)

Rather than present its claim for an increase in its construction management fee based on the increase in cost at that time as required by the CMA’s express terms as well as the ITCA, Petra did nothing. A pattern of silence that it continued in the subsequent representations to the City occurring in February, April, and July of 2007. For this reason, the importance of a timely presentation of a claim, under either the ITCA or the CMA, is evident. Had Petra disclosed in January of 2007, or at anytime thereafter through July 2007, that it would seek a construction management fee in excess of that previously agreed, both parties would have been able to timely address, and potentially resolve, at least one issue of the dispute between the parties that would ultimately arise two years later.

As Petra rightly concedes, this is precisely the purpose to which the ITCA is aimed. (Petra Opposition to the City’s Motion to Dismiss, page 10.) One of the primary purposes of the ITCA is “to save needless expense and litigation by providing an opportunity for amicable resolution of the
differences between parties...”  *Pounds v. Denison*, 120 Idaho 425, 426-27, 816 P.2d 982, 983-84 (1991). Petra failed to present a proper and timely notice to the City at a time when it knew, or should have reasonably discovered, it believed it had a claim against the City for an increase in the construction management fee given the increased estimated costs of construction that it was actively generating. Therefore, a controlling question of law exists whether Petra’s claims arose before receiving a denial of its requested change order by the City.

2. **Notice of a Claim for Purpose of the ITCA is Required to be Given to the Clerk or Secretary for the Political Subdivision.**

In the event that Petra is not deemed to have discovered its claim against the City until February 24, 2009, Petra still failed to provide notice as required by the ITCA.

Idaho Code § 6-906 states:

All claims against a political subdivision [subdivision] arising under the provisions of this act and all claims against an employee of a political subdivision for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

*Id.* (emphasis added). Contrary to the plain language of Section 6-906, Petra failed to provide notice to the City Clerk or Secretary. “If the statutory language is unambiguous, we merely apply the statute as written.” *Lopez v. State*, 136 Idaho 174, 178, 30 P.3d 952, 956 (2001).

Interpretation of a statute by the Idaho judiciary can involve textual and contextual analysis, both of which are guided by a series of long-held maxims. We begin with examination of the literal words of the statute. If we conclude that this language is clear and unambiguous, we will simply apply the statute as written.

*State v. Folsom*, 139 Idaho 627, 630, 84 P.3d 563, 566 (Ct. App. 2003).

Again, “the literal words of the statute provide the best guide to legislative intent, and therefore, the interpretation of a statute must begin with the literal words of the statute.” *State v. Doe*, 147 Idaho 362, 328, 208 P.3d 730, 732 (2009). “The Court gives the words of a statute their plain, usual, and ordinary meaning.” *Id.*

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12 - 6
Here, the statute requires that notice of a claim against a political subdivision, a municipality in this case, must be filed with the “clerk or secretary of the political subdivision” I.C. § 6-906. That language is not ambiguous or confusing. Moreover, the authority is clear that the literal words in the statute provide the best guide when applying and interpreting any given statute. Section 6-906 does not state any representative or employee of the political subdivision, it states the clerk or secretary. If the legislature had intended for the notice to be effective when given to any employee, representative, agent or attorney for the political subdivision, “the statute could easily have been worded to accomplish that purpose.” See Jacobsen v. City of Rathdrum, 115 Idaho 266, 766 P.2d 736 (1988); see also State v. Hagarman Water Right Owners, Inc., 130 Idaho 727, 947 P.2d 400 (1997).

“[I]t is clear that failure to comply with the notice requirement bars a suit regardless of how legitimate it might be.” Driggers v. Grafe, 148 Idaho 295, 297, 221 P.2d 521, 523 (Ct. App. 2009). Petra admits that it did not provide notice to the City Clerk or Secretary. Instead, Petra provided an untimely letter regarding mediation to the City Attorney. Clearly, this action does not meet the requirements of the ITCA, as established by the literal words chosen by the legislature. Therefore, a controlling question of law exists whether a party can deliver notice to the attorney for a political subdivision, which is also a matter of first impression in Idaho.

C. An Immediate Appeal Will Advance the Orderly Resolution of This Litigation, and the Controlling Questions of Law at Issue Are of Great Public Interest.

Given the fact that should either of the Court’s rulings on the controlling questions of law be reversed the result will necessarily affect the orderly resolution of this litigation, allowing Petra’s counterclaims to proceed unnecessarily to trial will significantly impact the outcome, length, and expense of the pending litigation and upcoming trial.

In addition, to satisfying the third requirement of promoting the orderly resolution of the litigation, an immediate appeal will also meet the intent of Rule 12 because these issues involve a great public interest by potentially saving the taxpayers of the City of Meridian the additional time...
and expense of a longer and more complicated trial. In addition, both Petra and the City will have many employees spending time in trial, which time could be significantly less if Petra’s counterclaims are deemed to be barred. Thus, in this case, an appeal concerning the controlling questions of law will determine whether Petra’s counterclaims proceed to trial, which determination will necessarily affect both a great public interest and the orderly resolution of this litigation.

III. CONCLUSION

For the reasons set forth above, the City respectfully request that this Court grant it permission to appeal the Order denying the City’s Motion to Dismiss Petra’s Counterclaim to the Idaho Supreme Court.

DATED this 13th day of October, 2010.

TROUT • JONES • GLEDHILL • FUHRMAN • GOURLEY, P.A.

Daniel Lorain Glynn
Attorneys for Plaintiff
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

Daniel Loras Glynn
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

NOTICE OF HEARING RE: PLAINTIFF’S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12

PLEASE TAKE NOTICE, That the undersigned, attorneys for the City of Meridian, ("Meridian"), the Plaintiff in the above-entitled matter, will bring before the Honorable Ronald J. Wilper of the above-entitled Court, for hearing at the Ada County Courthouse, 200 West Front Street, Boise, Idaho 83702, on Monday, the 15th day of November, 2010, at the hour of 11:00 a.m. or as soon thereafter as counsel can be heard, Plaintiff’s Motion for Order Approving Permission to Appeal from an Interlocutory Order Pursuant to Idaho Appellate Rule 12.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  Hand Delivered
MacKenzie Whatcott  U.S. Mail
COSHO HUMPHREY, LLP  Fax
800 Park Blvd., Ste. 790  Fed. Express
P.O. Box 9518  Email
Boise, ID 83707-9518
Fax: (208) 639-5609

Daniel Loras Glyn
Attorneys for Plaintiff
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD

Case No. CV OC 0907257

NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF THOMAS J. SOUTH

Thomas G. Walker (ISB No. 1856)
Erika K. Klein (ISB 5509)
Mackenzie Whatcott (ISB No. 6774)
Matthew B. Schelstrate (ISB No. 8276)
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell Phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: twalker@cosholaw.com; eklein@cosholaw.com; mwhatcott@cosholaw.com; mschelstrate@cosholaw.com

Attorneys for Defendant/Counterclaimant, Petra Incorporated
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Thomas J. South, on Thursday the 11thday of November, 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents\(^1\) provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;\(^2\)

2. All documents utilized by you in the rendering of your opinion in this matter;

---

\(^1\) "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

\(^2\) "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;³

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars⁴ appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;⁵

9. All communications⁶ between you and any employee, consultant or agent of you and any person related to this matter⁷;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

³ The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

⁴ Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

⁵ This request is specific for the calendar appointments related to this matter.

⁶ “Communications” mean any and all written or oral communications, including but not limited to inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

⁷ “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. All agreements entered into between the City of Meridian and you related to this matter; and

16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of October, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

AMENDED NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF MERIDIAN, DUCES TECUM, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – CLAIMS OTHER THAN DAMAGES

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEYS OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated (“Petra”), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon
oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Theodore W. Baird, Jr. ("Baird"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the allegations by the City set forth in paragraphs 4 through 21 of the City’s Complaint filed on April 16, 2009, and as claimed in paragraphs 4 through 19, 23, 26 through 28, 31 through 37, 40 through 47, 50 through 52, and 55 of the City’s proposed First Amended Complaint. According to the City’s designation, Baird is the person most knowledgeable regarding: (1) the facts the City claims support Petra’s alleged breach of contract, (2) the facts the City claims support Petra’s alleged breach of the covenant of good faith and fair dealing, (3) the facts the City claims support Petra’s alleged unjust enrichment, (4) the facts the City claims support Petra’s alleged fraud and fraud in the inducement, (5) the facts the City claims support Petra’s alleged constructive fraud, (6) the facts the City claims support Petra’s alleged gross negligence, and (7) the facts the City claims support Petra’s alleged oppressive, malicious, fraudulent or outrageous conduct.

The primary objective of the Rule 30(b)(6) deposition is to inquire of Baird who may testify regarding the foregoing matters at trial.

The deposition will be taken on Friday, November 5, 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.

The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video
means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires Baird to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims described above.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.
Daniel L. Glynn, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

[Signature]

THOMAS G. WALKER

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile:
☐ E-mail:
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

           Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

           Defendant/Counterclaimant.

Case No. CV OC 0907257

AMENDED NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF MERIDIAN, DUCES TECUM, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – DAMAGES

TO:  PLAINIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEYS OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon

[Address and contact information]
oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Steven J. Amento ("Amento"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the damages that the City has allegedly suffered as claimed in paragraph 22 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 20, 24, 38, 48, 53, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Amento is the person most knowledgeable regarding: (1) each element of damage, (2) the amount of damage arising with respect to each element, (3) the method of calculating the amount of damage arising with respect to each element, (4) the assumptions underlying the calculation of the amount of damage arising with respect to each element, and (5) the cause or causes of the damage arising with respect to each element. Further, according to the City, Amento is the most knowledgeable person regarding the unjust enrichment claim set forth in paragraph 29 of the City's proposed First Amended Complaint, including (1) each element of unjust enrichment, (2) the amount of unjust enrichment arising with respect to each element, (3) the method of calculating the amount of unjust enrichment arising with respect to each element, (4) the assumptions underlying the calculation of the amount of unjust enrichment arising with respect to each element, and (5) the cause or causes of the unjust enrichment arising with respect to each element. The primary objective of the Rule 30(b)(6) deposition is to inquire of Amento who may testify regarding the foregoing matters at trial.

The deposition will be taken on Thursday, November 4, 2010 beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.
The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires Amento to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims of damages and unjust enrichment.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 20, 2010. 

COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of October, 2010, a true and correct copy of the
within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.
Daniel L. Glynn, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

AMENDED NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF MIKE SIMMONDS

TO:  PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Mike Simmonds, on Wednesday the 27th day of October 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents1 provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;2

2. All documents utilized by you in the rendering of your opinion in this matter;

---

1 "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

AMENDED NOTICE OF TAKING AUDIO VIDEO DEPOSITION DUCES TECUM OF MIKE SIMMONDS
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. All agreements entered into between the City of Meridian and you related to this matter; and

16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of October, 2010, a true and correct copy of the
within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
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☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

AMENDED NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF LEO GEISS

TO: PLAIN r THF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD

Thomas G. Walker (ISB No. 1856)
Erika K. Klein (ISB No. 5509)
Mackenzie Whatcott (ISB No. 6774)
Matthew B. Schelstrate (ISB No. 8276)
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518

Direct Phone: (208) 639-5607
Cell Phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: twalker@cosholaw.com; eklein@cosholaw.com;
mwhatcott@cosholaw.com; mschelstrate@cosholaw.com

Attorneys for Defendant/Counterclaimant, Petra Incorporated
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Leo Geiss, on Thursday the 28th day of October 2010, beginning at the hour of 11:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;

2. All documents utilized by you in the rendering of your opinion in this matter;

1 "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, documents, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or in-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of October, 2010, a true and correct copy of
the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

AMENDED NOTICE OF TAKING THE CONTINUED AUDIO-VIDEO DEPOSITION DUCES TECUM OF LAURA KNOTHE

TO:  PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the continued testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Laura Knothe, on Wednesday the 3rd day of November, 2010, beginning at the hour of 1:00 p.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;

---

1 "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.
2. All documents utilized by you in the rendering of your opinion in this matter;

3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

---

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. Copies of all drafts of your July 6, 2010 affidavit;

16. All agreements entered into between the City of Meridian and you related to this matter; and

17. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Pacific Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of October, 2010, a true and correct copy of
the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

AMENDED NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF NEIL ANDERSON

TO: PLAINIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Neil Anderson, on Monday the 25th day of October 2010, beginning at the hour of 1:00 p.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;

2. All documents utilized by you in the rendering of your opinion in this matter;

---

1 "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2 "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;³

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars⁴ appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;⁵

9. All communications⁶ between you and any employee, consultant or agent of you and any person related to this matter⁷;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

³ The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

⁴ Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

⁵ This request is specific for the calendar appointments related to this matter.

⁶ “Communications” mean any and all written or oral communications, including but not limited to inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

⁷ “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.


COSHO HUMPHREY, LLP

[Signature]
THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of October, 2010, a true and correct copy of
the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Daniel Glynn
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile:
☐ E-mail:

THOMAS G. WALKER

AMENDED NOTICE OF TAKING AUDIO VIDEO DEPOSITION DUCES TECUM OF
NEIL ANDERSON
618557_2
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

SECOND AMENDED NOTICE OF TAKING THE CONTINUED AUDIO-VIDEO DEPOSITION DUCES TECUM
OF LAURA KNOTHE

TO: PLAINIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the continued testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Laura Knothe, on Friday the 5th day of November, 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents\(^1\) provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;\(^2\)

---

\(^1\) "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memorandum of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

\(^2\) "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.
2. All documents utilized by you in the rendering of your opinion in this matter;

3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;³

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars⁴ appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;⁵

9. All communications⁶ between you and any employee, consultant or agent of you and any person related to this matter⁷;

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³ The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

⁴ Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

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⁷ “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. Copies of all drafts of your July 6, 2010 affidavit;

16. All agreements entered into between the City of Meridian and you related to this matter; and

17. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.


COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of October, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

THOMAS G. WALKER

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile:
☐ E-mail:

SECOND AMENDED NOTICE OF TAKING THE CONTINUED AUDIO VIDEO DEPOSITION DUCE

TECUM

OF LAURA KNOTHE

618569_3

Page 5

006656
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

AMENDED NOTICE OF TAKING AUDIO-VIDEO DEPOSITION DUCES TECUM OF JASON NEIDIGH

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEY OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Jason Neidigh, on Monday the 25th day of October 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;

2. All documents utilized by you in the rendering of your opinion in this matter;

---

1 "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

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3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;

9. All communications between you and any employee, consultant or agent of you and any person related to this matter;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

3 The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

4 Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

5 This request is specific for the calendar appointments related to this matter.

6 “Communications” mean any and all written or oral communications, including but not limited to inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

7 “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: October 21, 2010. COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of October, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.
Daniel Loras Glynn
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

SECOND AMENDED NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF MERIDIAN, DUCES TECUM, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – CLAIMS OTHER THAN DAMAGES

TO: PLAINТIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEYS OF RECORD
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Theodore W. Baird, Jr. ("Baird"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the allegations by the City set forth in paragraphs 4 through 21 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 4 through 19, 23, 26 through 28, 31 through 37, 40 through 47, 50 through 52, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Baird is the person most knowledgeable regarding: (1) the facts the City claims support Petra's alleged breach of contract, (2) the facts the City claims support Petra's alleged breach of the covenant of good faith and fair dealing, (3) the facts the City claims support Petra's alleged unjust enrichment, (4) the facts the City claims support Petra's alleged fraud and fraud in the inducement, (5) the facts the City claims support Petra's alleged constructive fraud, (6) the facts the City claims support Petra's alleged gross negligence, and (7) the facts the City claims support Petra's alleged oppressive, malicious, fraudulent or outrageous conduct.

The primary objective of the Rule 30(b)(6) deposition is to inquire of Baird who may testify regarding the foregoing matters at trial.

The deposition will be taken on Wednesday, November 3, 2010, beginning at the hour of 12:00 p.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.
The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires Baird to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian’s claims described above.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.


COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, Duces Tecum, was served upon:

Kim J. Trout, Esq.
Daniel L. Glynn, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation, vs. PETRA INCORPORATED, an Idaho corporation,

Plaintiff/Counterdefendant, Defendant/Counterclaimant.

Case No. CV OC 0907257

AFFIDAVIT OF THOMAS G. WALKER DATED OCTOBER 21, 2010 IN SUPPORT OF OPPOSITION TO CITY'S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12

STATE OF IDAHO ) ) ss.
County of Ada )

I, THOMAS G. WALKER, being first duly sworn upon oath, depose and state:
1. I am one of the attorneys of record for the Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above-entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. I submit this affidavit in support of Petra's Opposition to the City's Motion for Order Approving Permission to Appeal from an Interlocutory Order Pursuant to Idaho Appellate Rule 12.

3. In the course of this litigation, the City has produced tens of thousands of documents, including emails between the City's representatives and Petra's representatives, created during the construction of the Meridian City Hall.

4. Attached as Exhibit A is a copy of an email exchange between the City's authorized representative, Keith Watts, and Wes Bettis of Petra. This email exchange was produced by the City during litigation, is Bates numbered CM012798-CM012799, and a true and correct copy is accurately reproduced here.

   [Signature]

   THOMAS G. WALKER

SUBSCRIBED AND SWORN to before me this 21st day of October, 2010.

[Signature]

JANETE K. CARSON
Notary Public for Idaho
Residing at Eagle, Idaho
My commission expires: March 31, 2016.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of October, 2010, a true and correct copy of the
within and foregoing document was served upon:

Kim J. Trout, Esq.
Daniel Loras Glynn
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile
☐ E-mail:

THOMAS G. WALKER
Good idea on the 2nd one. I will look at Will & Ted’s schedule to schedule a meeting and get back to you today. Thanks,

Keith Watts
Purchasing Agent
City of Meridian
33 East Idaho Avenue
Meridian, ID 83642
Ph. 208-888-4433 x207
Fax: 208-887-4813

From: Wesley Bettis Jr. [mailto:wbettis@petrainc.net]
Sent: Wednesday, September 05, 2007 9:52 AM
To: Keith Watts
Subject: RE: City Hall

Ours is not to question why merely to march on and do or die, right. We will keep submitting ideas and let the Committee and the Council address them accordingly. The next major hurdle is the Plaza and where that comes in price wise.

Any thought on a meeting for the Change Order Request for the CM fee on the Contaminated Soils? I have an informal COR for you to review on the change in project complexity from a $12.2 Million 80,000 SF to $19.9 Million 100,000 SF project, but thought I would hold off formal submittal until the Plaza is bid and the final base contract value is determined so that everything stays current and we do not create an image of “nickel and dime-ing” the project. wwb

From: Keith Watts [mailto:wattsk@meridiancity.org]
Sent: Wednesday, September 05, 2007 9:45 AM
To: Wesley Bettis Jr.
Subject: RE: City Hall

I agree and re-engineering was my term. I simply meant if you find was to save by giving the same quality etc. Just not by cutting something out.

Keith Watts
Purchasing Agent
City of Meridian
33 East Idaho Avenue
Meridian, ID 83642
Ph. 208-888-4433 x207
Fax: 208-887-4813

From: Wesley Bettis Jr. [mailto:wbettis@petrainc.net]
Sent: Wednesday, September 05, 2007 9:43 AM
To: Keith Watts
Subject: RE: City Hall

Re-engineering what? It is a little late to look at re-engineering structural, mechanical and electrical systems, given the Council mandate to go for LEED Silver Certification. Sorry, just venting a little. We also tried to move the glazing into the frame line of the building, but that
From: Keith Watts [mailto:wattsk@meridiancity.org]
Sent: Wednesday, September 05, 2007 9:29 AM
To: Wesley Bettis Jr.
Subject: RE: City Hall

I will inquire about the wire partitions and I need to review the minutes as well for further direction. The feeling was not to lessen the building by eliminating items. Re-engineering would be considered but not so much eliminating.

Keith Watts
Purchasing Agent
City of Meridian
33 East Idaho Avenue
Meridian, ID 83642
Ph. 208-888-4433 x207
Fax: 208-887-4813

From: Wesley Bettis Jr. [mailto:wbettis@petrainc.net]
Sent: Wednesday, September 05, 2007 9:08 AM
To: Keith watts
Subject: RE: City Hall

Does this mean the with or without the wire partitions? Anything else from the VE sheet or will this be in the minutes? wwb

From: Keith Watts [mailto:wattsk@meridiancity.org]
Sent: Wednesday, September 05, 2007 8:54 AM
To: Wesley Bettis Jr.; Gene Bennett
Cc: Adam Johnson
Subject: City Hall

I got to go to Council last night and talk about the Change Orders. During discussion Council agreed to finish the entire building. That is not leave any areas unfinished. This is to be Petra's official notice of that decision and to move forward accordingly. Council will be receptive to any significant cost savings but leaving the building unfinished is off the table. I will e-mail you the minutes from the meeting as soon as they are available.

Both Change Orders were approved. Please proceed with obtaining contractor signatures.

Keith Watts
Purchasing Agent
City of Meridian
33 East Idaho Avenue
Meridian, ID 83642
Ph. 208-888-4433 x207
Fax: 208-887-4813
The above-named Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP submits this memorandum in opposition to the City's Motion for an Order Approving Permission to Appeal from an Interlocutory Order Pursuant to Idaho Appellate Rule 12.
1. Introduction

The City's request for an order approving a permissive appeal fails to meet the criteria of Idaho Appellate Rule 12. First, the legal issue implicated by the City's Motion to Dismiss is not one of first impression. On the contrary, the City's Motion involved a straightforward application of existing law. There are no substantial grounds for differing opinions on this legal issue. Second, the notice provisions of I.C. § 50-219 and the Idaho Tort Claims Act (ITCA) do not control the outcome of this case. Allowing an appeal now would not "materially advance the orderly resolution of the litigation," but would lead to piece-meal litigation as a second appeal would certainly occur. If Petra successfully defends the City's claims at trial and prevails on its counterclaims, the City will have the opportunity to appeal the Court's decision regarding the ITCA. And most fundamentally, the Court correctly found that Petra complied with I.C. § 50-219 and the notice provisions of the ITCA. The City was fully apprised of Petra's claims within 180 days of their accrual.

In short, the City's Motion is unsupported by the plain language of I.A.R. 12 and the relevant case law. The Court correctly held that Petra complied with I.C. § 50-219 and the ITCA. Petra requests that the Court enter an order denying the City's Motion.

2. Background

This case arises out of work Petra performed as the construction manager on the development and construction of the Meridian City Hall and the City's failure to pay Petra all of the money to which it is entitled. The City hired Petra as the construction manager not-at-risk in August of 2006, representing to Petra that the maximum price of the project was $12,200,000.
By April 2008, Meridian had substantially expanded the original project to a 104,000 square foot LEED-certified three-story building with a full basement ("Project"). The City signed prime contracts and issued purchase and work orders for the Project totaling more than $21,700,000.

As a result of the significant changes to the Original Project, including, but not limited to an increase in size by 30%, enhancement of quality and complexity, Owner's schedule (i.e., fast-track construction), and increased cost, Petra's work as the construction manager was substantially increased. As a result, Petra is entitled to an equitable adjustment of the construction management fee ("CM fee"). The original CM fee was fixed at $574,000 (4.7% of the $12.2 million project budget). By its Change Order No. 2, Petra seeks an additional CM fee of $386,392 under Section 7 of the Construction Management Agreement ("CMA"), and $136,197 in additional reimbursable expenses under Section 6.2.2 of the CMA.

Rather than address the substance of the issue, the City seeks to dismiss Petra's counterclaim for an equitable adjustment in its CM fee based on lack of notice. One month after brushing aside Petra's initial request for mediation of the claim, and two months after denying Petra's request for an equitable adjustment of its CM fee, the City sued Petra. Sixteen months after filing the lawsuit, the City initiated its argument that it never received timely notice of Petra's claims. The Court correctly denied the City's Motion to Dismiss under the ITCA. The City's Motion for Summary Judgment, premised on a similar argument, remains under advisement.
3. **Law and Argument**

3.1 The City’s request for an order approving an interlocutory appeal does not satisfy the requirements of Idaho Appellate Rule 12 and should be denied.

The City’s request for an order approving permission to appeal this Court’s denial of its Motion to Dismiss (ITCA) fails to meet the criteria of Idaho Appellate Rule 12. A permissive appeal may be accepted from an interlocutory order or judgment of the district court if it “involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.” I.A.R. 12. Permissive appeals are only accepted by the Supreme Court in the “most exceptional cases.” *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 789, 215 P.3d 505, 509 (2009) (accepting a permissive appeal because of “confusion regarding the economic loss rule”). The Supreme Court accepts permissive appeals with the “intent to resolve ‘substantial legal issues of great public interest or legal issues of first impression.’” *Id.* (quoting *Budell v. Todd*, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983)).

First, as further explained below, this Court’s holding is consistent with well-established Idaho law addressing substantial compliance with the notice provisions of the ITCA. *See Cox v. City of Sandpoint*, 140 Idaho 127, 131, 90 P.3d 352, 356 (2003). Contrary to the City’s argument, this is not a case of first impression or one involving a “substantial legal issue of great public interest.” In fact, the City is attempting to have it both ways. On the one hand, the City argues this Court “disregarded Idaho case law on point and the plain language of the ITCA
supporting the opposite conclusion.” \(^1\) In the very next sentence, the City states “an immediate appeal would also satisfy one of the intents of Rule 12 because the Idaho Supreme Court has not yet addressed whether notice to a city attorney satisfies the notice requirements of the ITCA.” \(^2\) Besides being inconsistent, the City is incorrect. Every case has different facts. That does not make each case one of first impression. The Court’s ruling was a straightforward application of existing case law. \(^3\) There are dozens of cases discussing compliance with the notice requirements of the ITCA. The parties here obviously hold differing opinions on the issue, as is true in every case. But I.A.R. 12 is reserved for the “most exceptional cases.” \(^4\) Aardema, 147 Idaho at 789, 215 P.3d at 509. Under the City’s reasoning, almost every interlocutory order would be appealable.

Second, \(\text{Budell v. Todd}\) is dispositive. 105 Idaho 2, 665 P.2d 701 (1983). Under the reasoning of \(\text{Budell}\), the City’s request for an interlocutory appeal in this case should not be approved as it would not “advance the orderly resolution of the litigation.” I.A.R. 12. Under \(\text{Budell}\), one factor in accepting a permissive appeal under I.A.R. 12 is the “likelihood or possibility of another appeal after judgment is entered by the district court.” 105 Idaho at 4, 665 P.2d at 703. In \(\text{Budell}\), the Court rejected a permissive appeal due in part to the possibility the case would come before it again on appeal. \(\text{Id.}\)

\(^1\) \textit{Memorandum in Support of Plaintiff’s Motion for Order Approving Permission to Appeal from an Interlocutory Order Pursuant to Idaho Appellate Rule 12, at 4.}

\(^2\) \textit{Id.}

\(^3\) Petra made a number of alternative arguments in addition to its primary argument that the March 16, 2009 letter complied with the ITCA and that the claim accrued when the City denied Petra’s Change Order. These arguments include that Petra’s claims are equitable in nature and not damage claims and that the notice provisions of the ITCA should not apply to counterclaims. Petra understands the Court’s ruling as being grounded in the finding that Petra complied with the ITCA.
Here, if the Supreme Court hears the requested interlocutory appeal and affirms this Court’s ruling, the case will remain on for trial, after which another appeal is highly likely. And, in the unlikely event the Supreme Court accepts the appeal and reverses this Court, the ruling would not terminate the case. The City’s claims would remain alive and Petra intends to vigorously defend the case at trial. No matter who prevails at trial, the likelihood of another appeal in this case is extremely high. Furthermore, as the case stands today, if Petra successfully defends against the City’s claims at trial and prevails on its counterclaims, the City will have the opportunity to appeal the Court’s decision on the applicability of the ITCA. In sum, an appeal at this juncture will accomplish the exact opposite of “advanc[ing] the orderly resolution of the litigation” and would result in piece-meal litigation, a result the Supreme Court has repeatedly rejected in varying contexts. See e.g., Losser v. Bradstreet, 145 Idaho 670, 674, 183 P.3d 758, 762 (2008); Mortimer v. Rivera Apartments, 122 Idaho 839, 842, 840 P.2d 383, 386 (1992); Long v. Goodyear Tire Rubber Co., 100 Idaho 183, 184, 595 P.2d 717, 718 (1979).

Additionally, a permissive appeal will almost certainly increase the litigation costs of both parties and create an even greater burden on the courts.

Therefore, because the City has failed to meet the criteria of I.A.R. 12, the Court should enter an order disapproving of a permissive appeal.

3.2 The Court correctly held that Petra’s claim accrued when the City denied Petra’s request for an equitable adjustment in its CM fee.

The City continues to demonstrate its flawed understanding of I.C. § 50-219 and the ITCA by confusing the meaning of “claim” under the statute. Petra submits there are no

The notice provisions of the ITCA do not govern the normal operation of contract provisions like the equitable adjustment term found in Section 7 of the CMA or a routine change order in the construction context. Simply requesting a party to perform its contractual obligations does not trigger the 180-day notice requirement. For example, if the City’s position were correct, every contractor working on a project for a municipality would have to file a formal notice of claim alongside every change order. Anticipating and asserting a potential legal “claim” for breach of contract at every turn is not the policy goal I.C. § 50-219 and the ITCA were intended to implement. The City’s continuing and repeated attempt to conflate a change order with an ITCA “claim” is wrong.

The facts of Magnuson Properties Partnership v. City of Coeur d’Alene, 138 Idaho 166, 59 P.3d 971 (2002), demonstrate the City’s flawed reasoning. In Magnuson, the plaintiff, a developer, alleged the defendant City agreed to reimburse the plaintiff for the cost of extending a sewer line. 138 Idaho at 168, 59 P.3d at 973. After the oral contract was allegedly made, the
plaintiff ordered a contractor to do the work. *Id.* On May 10, 1996 the plaintiff's contractor submitted its costs to the plaintiff, who then turned to the City for reimbursement under the terms of the alleged oral agreement. *Id.* In a letter dated August 13, 1996, the City denied the request for reimbursement and denied the existence of the oral contract. *Id.* The plaintiff then filed a notice of claim on February 18, 1997 and filed suit nearly two years later. *Id.*

The Idaho Supreme Court considered the date the claim accrued to be the date the plaintiff received the letter, August 15, 1996, 189 days before he filed his notice of claim. *Id.* at 170, 59 P.3d at 974. The Court stated “As of August 15, 1996, a reasonable and prudent person would have knowledge of facts of a wrongful act, i.e., the City's denial of and/or breach of the alleged contract. Therefore, the 180-day notice period began on August 15, 1996, and Magnuson failed to provide timely notice of its claim.” *Id.* (emphasis added).

Under the City's reasoning, the plaintiff in *Magnuson* should have filed a notice of claim immediately upon ordering the sewer extension work. At that time, the plaintiff would certainly have known that he would eventually seek reimbursement from the City at some future date. The folly of this approach is apparent. The ITCA only applies in the context of disputes. It does not apply when parties are simply acting under the terms of a contract and seeking the performance of contractual obligations. When the City in *Magnuson* denied the plaintiff's request for reimbursement, the claim accrued. The same result adheres in this case. This Court correctly held Petra's claim accrued no sooner than February 24, 2009. That was when the City denied Petra's requests for an equitable adjustment in its CM fee and for additional reimbursables. That was the wrongful act in this case – the breach of contract.
Additionally, the City's own conduct during the construction of the Project demonstrates the defect in its argument. To give just one example, on September 5, 2007, during project construction, Wes Bettis of Petra emailed Keith Watts, the City authorized representative, about Petra's intent to seek a CM fee increase. Bettis wrote:

Any thought on a meeting for the Change Order Request for the CM fee on the Contaminated Soils? I have an informal COR [change order request] for you to review on the change in the project complexity from a $12.2 million 80,000 SF to a $19.9 Million 100000 SF project, but thought I would hold off formal submittal until the Plaza is bid and the final base contract value is determined so that everything stays current and we do not create an image of 'nickel and dime-ing' the project.

Keith Watts responded "Good idea on the 2nd one" referring to Change Order No. 2. This email not only demonstrates the parties' course of conduct in dealing with Petra's CM fee, it shows how these things are viewed in the construction world. Although the City's litigation position is that an ITCA notice of claim should have been filed the moment the project appeared to be growing in size and complexity, this is belied by the parties own conduct. In the above email, the City's authorized representative encourages Petra to hold off on formally requesting an adjustment in its CM fee. This email exchange shows that a change order is not a "claim" under the ITCA. A change order for an equitable adjustment is a contractual mechanism to

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4 Affidavit of Thomas G. Walker, dated October 21, 2010, filed in support of Petra's Opposition to the City's Motion for Order Approving Permission to Appeal from an Interlocutory Order Pursuant to Idaho Appellate Rule 12, at Exh. A.
5 Id. (emphasis added).
6 Id.
7 Petra submits this email demonstrates the inherent flaws in the City's Motion for Summary Judgment regarding lack of notice under the CMA.
8 It also demonstrates that Petra complied with the CMA in its handling of Change Order No. 2, fully disclosed its intent to seek a CM fee increase, and in fact acted at the City's direction in handling its request. The email exchange
address Petra’s entitlement to additional money. As the Court correctly held, a change order
does not become a claim under the ITCA unless and until it is denied in breach of the CMA.

Lastly, contrary to the City’s repeated claims, the record is clear that Petra disclosed its
intent to seek an equitable adjustment at the appropriate time and consistent with its contractual
obligations. It was perfectly reasonable for Petra to wait until August, 2007 to list its CM fee
request in a cost estimate or budget because, as Gene Bennett details in his affidavit, it was not
until “late August 2007 that the scope of the Project was developed to the point where the total
impact of the changes in the project scope could start to be assessed.”
It was not until late
August 2007 that many of the elements of project became known, including the extent of the
remediation of contaminated materials and unsuitable soils. Petra disclosed the CM fee request
before performing the additional services. Consequently, it was in late August and early
September that Petra raised the fact that the scope of the Project had changed considerably from
that contemplated in the CMA. Notably, when Wes Bettis of Petra indicated this in the above
email to the City’s authorized representative, Keith Watts did not express any disagreement.

3.3 The Court correctly held that Petra complied with I.C. § 50-219 and
the notice provisions of the ITCA.

This Court’s holding is consistent with Idaho law on compliance with I.C. § 50-219 and
the notice provisions of the ITCA. Contrary to the City’s argument, this is not a case of first

also shows why the City should be estopped in asserting Petra’s CM fee request was untimely and contradicts the
City’s claims that it was somehow blind-sided or deceived by Petra.

9 Affidavit of Eugene R. Bennett, dated September 13, 2010, filed support of Petra’s Opposition to the City of
Meridian’s Motion for Leave to Amend to Add a Claim for Punitive Damages, at ¶ 106.

10 Id.
11 Id. at ¶ 113.
12 Id. at ¶ 106.
impression or one involving a novel issue of law. Here, Petra sent the letter to the City through its counsel because the City was represented by counsel and because the City requested that communications be handled that way. This letter more than sufficed to give notice of Petra’s counterclaim. See Cox, 140 Idaho at 132, 90 P.3d at 357; see also Smith v. City of Preston, 99 Idaho 618, 621, 586 P.2d 1062, 1065 (1978). Placing form over substance, and entertaining the fiction that the City was unaware of Petra’s claim, is directly contrary to the cases interpreting the ITCA. See, e.g., Smith, 99 Idaho at 621-22, 586 P.2d at 1065-66.

Contrary to the City’s position that this “Court disregarded Idaho case law on point and the plain language of the ITCA supporting the opposite conclusion,” it is the City that fails to cite the relevant standard. The ITCA states: “A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is show that the governmental entity was in fact misled to its injury thereby.” I.C. § 6-907 (emphasis added); see Cox, 140 Idaho at 132, 90 P.3d at 357 (citing Smith, 99 Idaho at 621, 586 P.2d at 1065)). Further, the Supreme Court has stated its policy is to “take a liberal approach to interpreting the notice requirement of the Idaho Tort Claims Act.” Farber v. State, 102 Idaho 398, 630 P.2d 685, 689 (1981).

The City has not presented any evidence that it was “misled to its injury.” In fact, such evidence does not exist, as the City sued Petra after being presented with a request to mediate the denial of Petra’s CM fee request. The City was on notice of Petra’s claim before the City initiated litigation. This Court correctly held that Petra’s March 16, 2009 letter complied with the notice requirements of the ITCA.
4. Conclusion

The City’s request for an order approving a permissive appeal fails to meet the criteria of Idaho Appellate Rule 12. The City’s request does not involve “substantial legal issues of great public interest or legal questions of first impression.” Aardema, 147 Idaho at 789, 215 P.3d 505, 509 (2009). Neither does resolution of the ITCA issue control the outcome of the case as a whole. A permissive appeal at this juncture, when the case is set for an imminent trial, would create piecemeal litigation, increase litigation costs, and burden both the trial court and the appellate court. Most importantly, this Court’s denial of the City’s Motion to Dismiss was correct.

DATED: October 21, 2010

COSHO HUMPHREY, LLP

By: THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of October, 2010, a true and correct copy of the
within and foregoing document was served upon:

Kim J. Trout, Esq.
Daniel Loras Glynn
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

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[ ] E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

PETRA INCORPORATED'S SUPPLEMENTAL DISCLOSURE OF EXPERT WITNESS INFORMATION

Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker and pursuant to the Order Setting Trial and Other Deadlines and Rule 26(b)(4) of the Idaho Rules of Civil Procedure, hereby supplemental its Disclosure of Experts dated August 12, 2010 as follows:

Keith Pinkerton/Hooper Cornell, PLLC. A complete statement of all opinions to be expressed. Attached hereto is a true, correct and complete Preliminary Report dated


COSH HUMPHREY, LLP.

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of October, 2010 a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

[Signature]

U.S. Mail

THOMAS G. WALKER

PETRA INCORPORATED'S SUPPLEMENTAL DISCLOSURE
OF EXPERT WITNESS INFORMATION

Page 3
PRELIMINARY EXPERT WITNESS REPORT

City of Meridian
v.
Petra, Inc.

Prepared by:
Hooper Cornell, PLLC
250 Bobwhite Court, Suite 300
Boise, Idaho 83706

Prepared for:
Cosho Humphrey LLP

October 19, 2010
October 20, 2010

Mr. Thomas G. Walker, Esq.
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518

RE: City of Meridian v. Petra, Inc.

Dear Mr. Walker:

At your request, I have reviewed the facts and circumstances surrounding the counterclaim asserted by Petra, Inc., (Petra) in the matter cited above to quantify corresponding economic damages. This report is intended to summarize the analyses performed and illustrate the conclusions reached.

In performing this assignment, I assumed that Petra will prevail in its legal theories of this case. Accordingly, this report should not be construed to contain any opinions with regard to Defendant's liability.

Data Considered
During the course of this engagement, I reviewed relevant data obtained from the following sources: (1) building permit data from all of the incorporated entities in Ada and Canyon counties except for the municipalities of Notus and Greenleaf; (2) audited financial statements of Petra, Inc.; and (3) various legal filings associated with this case. In addition, I have had discussions with management of Petra and its advisors.

Methodology
To quantify damages, I used available data to estimate the magnitude of the nonresidential construction market in Ada and Canyon counties. I then coupled this information with data obtained from Petra to estimate its share of that market by year from 2003 forward. By comparing Petra's results in the marketplace both before and after the alleged wrongful acts of the City of Meridian, I was able to estimate the present value of lost profits incurred by Petra, Inc.

I also constructed a parallel analysis using the same input data and applying a technique known as Monte Carlo Simulation. This technique provides an alternative method of eliminating uncertainty through the use of statistics.

Both methods of analysis produce similar results and were designed to quantify damages with a reasonable degree of economic certainty; all of my conclusions are expressed on that basis.
Professional Qualifications
A listing of my professional qualifications and prior testimony are attached to this report.

Professional Billing Rates
Hooper Cornell's hourly rates currently range from $60 per hour for clerical staff to $300 per hour for senior partners. My personal billing rate in effect for this assignment is $285 per hour.

Conclusions
Based on the methods described above and as shown in additional detail on the accompanying schedules, it is my opinion that the present value of the economic damages incurred by Petra is between $3.9 million and $4.2 million.

Sincerely,

[Signature]

Keith A. Pinkerton
Director of Valuation Services
## Building Permit Data

<table>
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### City of Meridian v. Petra Inc.

**Historical Financial Information**

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<td>2.97%</td>
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## City of Meridian v. Petra Inc.  
### Estimation of Petra Market Share

### Schedule 3

#### Contract Revenue
: Construction Mgmt

<table>
<thead>
<tr>
<th>Period</th>
<th>Activity</th>
<th>Non-Residential CM Cost</th>
<th>Construction CM Not Thru</th>
<th>Period Activity Revenue</th>
<th>Petra GL</th>
<th>Total CM</th>
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<tbody>
<tr>
<td>2005</td>
<td>$747,262,691</td>
<td>$29,121,816</td>
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<td>$9,315,265</td>
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<td>$9,315,265</td>
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<tr>
<td>2006</td>
<td>$853,736,911</td>
<td>$29,121,816</td>
<td></td>
<td>$1,891,747</td>
<td>$6,675,516</td>
<td>$8,567,263</td>
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<tr>
<td>2007</td>
<td>$870,925,206</td>
<td>$29,121,816</td>
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<td>$31,281,028</td>
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<tr>
<td>2008</td>
<td>$679,719,387</td>
<td>$29,121,816</td>
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<td>$1,473,422</td>
<td>$12,114,577</td>
<td>$13,587,999</td>
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<td>2009</td>
<td>$496,881,601</td>
<td>$29,121,816</td>
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<td>$111,484</td>
<td>$340,206</td>
<td>$451,690</td>
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<tr>
<td>06/30/10</td>
<td>$156,898,687</td>
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<tr>
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<tr>
<td>2010*</td>
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<td>$172,696</td>
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#### Market Share

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<th>Market Share</th>
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<th>Construction Mgmt</th>
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<tbody>
<tr>
<td>2005</td>
<td>$506,379,407</td>
<td>5.75%</td>
<td>$5,350,859</td>
<td>1.1%</td>
</tr>
<tr>
<td>2006</td>
<td>$747,262,691</td>
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<td>$496,881,601</td>
<td>2.09%</td>
<td>$172,696</td>
<td>0.0%</td>
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#### 6-Mo Lag

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<th>Period</th>
<th>Activity</th>
<th>Non-Residential CM Cost</th>
<th>Construction CM Not Thru</th>
<th>Period Activity Revenue</th>
<th>Petra GL</th>
<th>Total CM</th>
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<td>$172,696</td>
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#### 1-Year Lag

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<th>Contract Revenue</th>
<th>Market Share</th>
<th>CM Cost</th>
<th>Construction Mgmt</th>
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<tbody>
<tr>
<td>2005</td>
<td>$506,379,407</td>
<td>5.75%</td>
<td>$5,350,859</td>
<td>1.1%</td>
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<tr>
<td>2006</td>
<td>$747,262,691</td>
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<tr>
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<td>1.6%</td>
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<td>0.1%</td>
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<tr>
<td>2010</td>
<td>$496,881,601</td>
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<td>$172,696</td>
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*Annualized
### Contract Projects

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<td><strong>Petra Market</strong></td>
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<td><strong>Share</strong></td>
<td><strong>Share</strong></td>
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<td>3-Year</td>
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<td>5.75%</td>
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### Construction Management

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<td><strong>Petra Market</strong></td>
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<tr>
<td><strong>Share</strong></td>
<td><strong>Share</strong></td>
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<td>3-Year</td>
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<td>Average</td>
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<td>1.00%</td>
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<tr>
<td><strong>Average Less Current</strong></td>
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**Minimum Lost Share**

- **2.00%**
- **1.00%**
Historical Petra "Market Share" of Construction Management Revenue in Ada & Canyon Counties with a 6-Month Lag

Lawsuit Filed 4-16-09
Historical Petra "Market Share" of Construction
Management Revenue in Ada & Canyon Counties with a 1-Year Lag

Lawsuit Filed 4-16-09

2005 2006 2007 2008 2009 2010

PETRA97115
Historical Petra "Market Share" of Contract Revenue in Ada & Canyon Counties with a 6-Month Lag

Lawsuit Filed 4-16-09

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<td>2008</td>
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<tr>
<td>2010</td>
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Schedule 8

Historical Petra "Market Share" of Contract Revenue in Ada & Canyon Counties with a 1-Year Lag

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<td>5.75%</td>
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<tr>
<td>2006</td>
<td>6.35%</td>
</tr>
<tr>
<td>2007</td>
<td>3.66%</td>
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<tr>
<td>2008</td>
<td>3.73%</td>
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<tr>
<td>2009</td>
<td>2.51%</td>
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<tr>
<td>2010</td>
<td>2.09%</td>
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Lawsuit Filed 4-16-09
## City of Meridian v. Petra Inc.
### Analysis of Cost of Capital using the Build-Up Method
as of 10/10/10

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<th>Source</th>
<th>Notes</th>
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<td>7.20%</td>
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<td>Historical Average, 1926-2009</td>
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<tr>
<td>Industry Risk Premium</td>
<td>2.04%</td>
<td>Ibbotson Associates</td>
<td>SIC 15</td>
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<tr>
<td>Size Premium</td>
<td>3.99%</td>
<td>Ibbotson Associates</td>
<td>Average of 9th and 10th deciles</td>
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<td>Company Specific Risk</td>
<td>3.00%</td>
<td>Hooper Cornell</td>
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<tr>
<td><strong>Estimated Cost of Intermediate Term Equity Capital</strong></td>
<td><strong>17.4%</strong></td>
<td><strong>Hooper Cornell</strong></td>
<td><strong>Average of 9th and 10th deciles</strong></td>
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City of Meridian v. Petra Inc.
Calculation of Economic Damages—Scenario 1

Schedule 10

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<tr>
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<td>$588,300,494</td>
<td>$405,339,488</td>
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<td>$318,150,000</td>
<td>$322,922,250</td>
<td>$329,380,695</td>
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<td>$347,743,669</td>
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<td>1.00%</td>
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<td>$148,221</td>
<td>$151,927</td>
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<td>$405,339,488</td>
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| Increase in Liability Insurance Expense | $0 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 |

Total Nominal Losses

| Risk-Adjusted Discount Rate | 17.4%     |
| Present Value Date          | 10/10/10   |
| Cash Flow Date              | 12/31/10  |
| No. of Discount Periods     | 0         |
| Present Value of Nominal Losses | $817,738 | $661,874 | $590,650 | $506,395 | $435,789 | $376,283 | $326,005 | $283,298 | $246,340 | $214,243 | $186,363 | $162,070  |
### Lost Market Share

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<td>5.75%</td>
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<td>6.35%</td>
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<td>3.84%</td>
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<tr>
<td>3.66%</td>
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<tr>
<td>3.73%</td>
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<td>1.22%</td>
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<td>1.12%</td>
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<tr>
<td>4.19%</td>
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<td>1.68%</td>
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<tr>
<td>Minimum</td>
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<tr>
<td>Maximum</td>
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<tr>
<td>Std Deviation</td>
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### Incremental Margins

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<tr>
<td>Minimum</td>
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<tr>
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### Revenue Growth Rate 2011 and 2012

- Low: -5.00%
- Most likely: 2.00%
- High: 4.00%

### Revenue Growth Rate 2014 - 2020*

- Minimum: -1.36%
- Maximum: 14.62%
- Median: 6.46%
- Mean: 7.00%
- Std Deviation: 3.12%

*Annual Change in US GDP, Nominal Basis, 1969-2010
### Simulation Statistics

**No. of Trials**: 100,000  
**Time**: 83.140625  
**Seed**: 1

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### City of Meridian v. Petra Inc.

#### Calculation of Economic Damages—Scenario 2

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<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
</tr>
<tr>
<td>Total CM Losses</td>
<td>$267,855</td>
<td>$202,267</td>
<td>$238,767</td>
<td>$315,237</td>
<td>$318,751</td>
<td>$354,881</td>
<td>$356,802</td>
<td>$246,221</td>
<td>$299,383</td>
<td>$603,630</td>
<td>$359,759</td>
<td>$282,801</td>
</tr>
</tbody>
</table>

#### Contract Revenue Losses

| Growth Rate of Contract Revenues | -0.18% | 0.11% | 3.74% | 11.80% | 8.63% | 6.90% | 9.33% | 3.78% | 5.80% |
| Overall Market Activity          | $588,300,494 | $405,339,488 | $315,000,000 | $314,436,360 | $314,780,672 | $326,569,198 | $365,088,282 | $396,581,474 | $423,961,240 | $463,523,729 | $481,057,475 | $508,969,084 |
| Lost Market Share                | 0.8%  | 3.8%  | 1.4%  | 3.2%  | 1.3%  | 1.8%  | 0.8%  | 1.3%  | 4.9%  | 4.3%  | 2.6%  | 0.0%  |
| Lost Contract Revenue            | $4,734,308 | $15,478,530 | $5,278,612 | $10,090,276 | $4,123,024 | $5,824,054 | $2,792,902 | $5,079,650 | $20,941,185 | $20,148,444 | $12,741,161 | $224,469 |
| Incremental Profit Margin        | 4.2%  | 4.2%  | 3.9%  | 3.6%  | 4.0%  | 3.7%  | 4.7%  | 4.4%  | 5.0%  | 4.9%  | 4.1%  | 4.5%  |
| Total Lost Contract Profits      | $209,655 | $655,129 | $175,369 | $358,513 | $163,960 | $215,545 | $131,198 | $222,756 | $1,057,407 | $981,362 | $524,346 | $10,925 |

#### Increase in Liability Insurance Expense

| Increase in Liability Insurance Expense | $0 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 |

#### Simulated Nominal Losses

| Simulated Nominal Losses | $468,510 | $932,396 | $489,040 | $748,750 | $557,172 | $645,426 | $563,000 | $543,977 | $1,431,790 | $1,659,991 | $959,105 | $368,726 |

#### Model Output

| Model Output | $837,976 | $651,949 | $673,311 | $675,024 | $676,138 | $707,844 | $741,885 | $777,185 | $817,269 | $859,505 | $903,390 | $948,368 |

#### Risk-Adjusted Discount Rate

| Risk-Adjusted Discount Rate | 17.4% |

#### Present Value Date

| Present Value Date | 10/10/10 |

#### Cash Flow Date

<table>
<thead>
<tr>
<th>Cash Flow Date</th>
<th>12/31/10</th>
<th>06/30/11</th>
<th>06/30/12</th>
<th>06/30/13</th>
<th>06/30/14</th>
<th>06/30/15</th>
<th>06/30/16</th>
<th>06/30/17</th>
<th>06/30/18</th>
<th>06/30/19</th>
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<tr>
<td>No. of Discount Periods</td>
<td>0</td>
<td>0.22</td>
<td>0.72</td>
<td>1.72</td>
<td>2.72</td>
<td>3.72</td>
<td>4.72</td>
<td>5.72</td>
<td>6.72</td>
<td>7.72</td>
<td>8.72</td>
</tr>
</tbody>
</table>

#### Present Value of Nominal Losses

| Present Value of Nominal Losses | $837,976 | $628,924 | $599,972 | $512,312 | $437,261 | $390,062 | $348,356 | $310,822 | $278,511 | $249,584 | $23,529 | $199,864 |

#### Cumulative Present Value of Losses

| Cumulative Present Value of Losses | $837,976 | $628,924 | $1,228,895 | $1,741,208 | $2,178,469 | $2,568,530 | $2,916,887 | $3,227,708 | $3,506,219 | $3,755,803 | $3,979,332 | $4,179,196 |

---

**Important Note:**

The rows above are presented only to help convey the structure of the projection model, not the results. Because this analysis relies on Monte Carlo simulation, the projected results shown above will change every time the spreadsheet is recalculated (i.e., every time any key is struck). The actual results stemming from this model are presented below on the line styled as "model output." Monte Carlo input variables are shown on Schedule 11, detailed output results by percentile are presented on Schedule 12.
Keith A. Pinkerton, CFA, ASA

Education
Bachelor of Arts (Economics), University of South Florida (Tampa, Florida), 1991
Master of Business Administration (Finance), Baylor University (Waco, Texas), 1996

Professional Certifications
Accredited Senior Appraiser, Business Valuation discipline, the American Society of Appraisers, awarded 2003.

Professional Employment History
2005 – Present Director of Valuation Services, Hooper Cornell, PLLC, Boise, Idaho
2009 - 2009 Adjunct Professor of Finance, George Fox University, Boise Center
2000 – 2003 Valuation Manager, WP Valuation Services, Fort Worth, Texas
1995 – 2000 Manager, the Perryman Group, Waco, Texas

Memberships and Affiliations
- The CFA Institute (www.cfainstitute.org)
- The CFA Society of Idaho
- The American Society of Appraisers (www.appraisers.org)
- National Association for Business Economics (www.nabe.com)
- National Association of Forensic Economics (www.nafe.net)
- Treasure Valley Estate Planning Council
- Ludwig von Mises Institute for Austrian Economics (www.mises.org)
- Business Valuation Discussion Group (www.bvdg.org)

Articles, Presentations and Professional Activities
- Co-Author, Marketability & Lack of Control Discounts, Paper presented to the American Academy of Matrimonial Lawyers, March 2002
- Panelist, Helping a Business Survive a Down Cycle, Panel discussion for the Fort Worth Chapter of the Texas Society of CPAs, February 2003
- Speaker, Business Valuation Update: Hot Issues, Presented to the Institute of Management Accountants, East Tennessee State University, September 2003
- Speaker, Business Valuation Update: Hot Issues, Presentation to the Institute of Management Accountants, Knoxville Chapter, September 2003
- Speaker, Litigation Support & Professional Practice Valuation, Presentation to the Institute of Management Accountants, Knoxville Chapter, December 2003
- Speaker, SFAS No. 141 & 142, Business Combinations and Intangible Assets, Presentation to the Fort Worth Chapter of the Texas Society of CPAs, November, 2002
- Grader, 2002, 2003, and 2004 Chartered Financial Analyst Examinations, the CFA Institute, Charlottesville, VA.
- Speaker, AICPA’s Proposed Business Valuation Standards, Presentation to Idaho Society of Certified Public Accountants, September, 2005.
- Member, Domestic Review Team, 2007 Chartered Financial Analyst Examination, CFA Institute, Charlottesville, VA.
Keith A. Pinkerton, CFA, ASA (continued)

- **Guest-Lecturer**, *Differences in Valuation of Publicly-Traded and Privately-Held Companies*, Presented to MBA students at Boise State University, April, 2006.
- **Author**, *2006 Valuation Court Case Update*, September 27, 2006.
- **Co-Author**, *Quantification of Company-Specific Risk: A New Empirical Framework with Practical Applications*, Business Valuation Update, Volume 13, Number 2; February 2007.
- **Guest-Lecturer**, *Understanding Valuation of Private Companies*, Presentation to graduate Finance class at Boise State University, May, 2007.
- **Speaker**, *Quantifying Company Specific Risk*, internal training seminar presented to a Top 100 public accounting firm, Minneapolis, MN, May 23, 2007.
- **Co-Author**, *Quantifying Company-Specific Risk: The Authors Answer Your Questions*, Business Valuation Update, Volume 13, Number 5; May 2007.
- **Speaker**, *Quantifying Company Specific Risk*, appraisal training session presented at the Institute of Business Appraisers 2007 Symposium; Denver, CO, June 2007.
- **Speaker**, *The Case of the Disappearing Debt: Valuation or Lost Profits with Changing Assumptions;* appraisal training Session presented at the Institute of Business Appraisers 2007 Symposium; Denver, CO, June 2007.
- **Co-Author**, *Company Specific Risk: The Dow 30 vs. Private Company USA;* The Value Examiner, September/October 2007.
Keith A. Pinkerton, CFA, ASA (continued)

- **Co-Developer**, Company-Specific Risk Calculator, a commercial program for computing company-specific risk for publicly-traded benchmarks; available on [www.bvmarketdata.com](http://www.bvmarketdata.com).
- **Co-Author**, Comparing the Butler-Pinkerton Model to Traditional Methods Under Four Daubert Criteria; Business Valuation Update, Volume 13, Number 11; November 2007.
- **Co-Author**, Quantifying Company-Specific Risk—Regardless of Your Faith in Beta; Business Appraisal Practice, Winter 2007
- **Co-Author**, Company-Specific Risk: Believe It or Not - You Can Quantify It! Adjusting Entries, the Journal of the ISCPA, Issue I, 2008.
- **Panelist**, Using the BPM™ Total Cost of Equity and Public Company Specific Risk Calculator™; an audio telephone conference hosted by NACVA and Business Valuation Resources, March 8, 2007.
- **Co-Author**, Butler Pinkerton Model™ Finds Another Application in SFAS 123R; Business Valuation Update, Volume 14, No.3, March, 2008.
- **Co-Author**, Total Cost of Equity of Company-Specific Risk—A Better Use for the BPM?; Business Valuation Update, Volume 14, No.4, April 2008.
- **Co-Author**, Why You Should Be Aware of the Impact of SSVS-1; Adjusting Entries, the Journal of the ISCPA, Issue II, 2008.
- **Speaker**, Pension Plans and Closely-Held Companies, Valuing Tricky Assets in Divorce; presented to the Idaho State Bar Association; Boise, Idaho; May 9, 2008.
- **Speaker**, The Butler Pinkerton Model: Empirical Support for Company Specific Risk; presented to the California Society of Certified Public Accountants—BVFLS Section, Las Angeles, CA; Aug 21, 2008.
- **Speaker**, Using the Butler Pinkerton Model in Valuation Reports; an Internet webinar hosted by the National Association of Certified Valuation Analysts; December 5, 2008.
- **Co-Author**, There's a New Beta in Town, and Its Name is Total Beta; Business Valuation Update, Volume 15, No.3, March 2009.
- **Co-Author**, A Total Repudiation of Mr. Kasper's Critique of the Butler Pinkerton Model, an online article disseminated through [www.bvmarketdata.com](http://www.bvmarketdata.com), May 2009.
- **Author**, Response to Larry Kasper Regarding the Diversification Argument; The Value Examiner, January/February 2010
- **Speaker**, Cost of Capital, California Society of CPAs, May 2009
- **Speaker**, Cost of Capital, presented to the National Association of Certified Valuation Analysts, Boston, MA; May 27, 2009.
- **Speaker**, Getting the Most from Your Financial Expert in Personal Injury Litigation Matters, a CLE presentation to various Boise-area law firms, various dates, 2009.
- **Author**, The Search for Value, published in the quarterly newsletter of George Fox University, Fall, 2009.
- **Speaker**, Buy-Sell Disagreements and Solutions, presented to the Boise Estate Planning Council, November 2, 2009.
Keith A. Pinkerton, CFA, ASA (continued)

- **Co-Author**, Give it to me Straight: Answers to Old Questions about Buy or Lease; Chiropractic Economics, Volume 56, Issue 7; May 12, 2010.
- **Author**, Financial Accounting and Managerial Accounting Compared, a paper to accompany the seminar Accounting 101 for Attorneys, presented August 12, 2010.
- **Author**, Financial Statement Basic Concepts, a paper to accompany the seminar Accounting 101 for Attorneys, presented August 12, 2010.
- **Instructor**, Accounting 101 for Attorneys, a CLE presentation given to area attorneys on August 12, 2010
- **Speaker**, Buy Sell Agreements: Road Map to Success or Recipe for Disaster, presented at the Idaho State Bar’s Annual Advanced Estate Planning Seminar, September 2010.

**Expert Testimony**

- **Cause No. 99-20905-V** in the 303rd District Court of Dallas County; Dallas, Texas, Trial Testimony, Business Appraisal for Marital Dissolution; retained by Plaintiff(s).
- **Cause No. 296-50175-01** in the 296th District Court of Colin County; McKinney, Texas, Trial Testimony, Business Appraisal for Marital Dissolution; retained by Plaintiff(s).
- **Cause No. 158874-2** in the Chancery Court for Knox County, Knoxville, Tennessee, Trial Testimony, Quantification of Economic Damages—Dissenting Shareholder matter; retained by Plaintiff(s).
- **Cause No. 153673-3** in the Chancery Court for Knox County, Knoxville, Tennessee, Deposition Testimony, Quantification of damages associated with the purchase of an operating business; retained by Plaintiff(s).
- **Civil Action No. 05-CI-00233**, Bell Circuit Court, Commonwealth of Kentucky, Deposition Testimony, Business appraisal and quantification of economic damages for dissenting shareholder matter; retained by Defendant(s).
- **Civil Action No. 05-CI-00233**, Bell Circuit Court, Commonwealth of Kentucky, Trial Testimony, Business appraisal and quantification of economic damages for dissenting shareholder matter; retained by Defendant(s).
- **Civil Case No. CV-05-12224**, Canyon County District Court, State of Idaho, Deposition Testimony, Quantification of damages associated with bad faith claim; retained by Defendant(s).
- **Civil Case No. 1:06-CV-141-S-EJL**, United States District Court, District of Idaho, Deposition Testimony, Quantification of damages associated with alleged trade-loading and breach of duty; retained by Defendant(s).
- **Civil Case No. CV-2005-493-C**, Valley County District Court, State of Idaho, Deposition Testimony, Quantification of damages associated with breach of contract; retained by Defendant(s).
- **Civil Case No. CV DR 0722658**, Ada County District Court, State of Idaho, Trial Testimony, Business appraisal for marital dissolution; retained by Defendant(s).
- **Civil Case No. CV OC 0608433**, Ada County District Court, State of Idaho, Deposition Testimony, quantification of damages associated with defamation claim; retained by Plaintiff(s).
- **Civil Case No. CV-2008-1069-OC**, Bannock County District Court, State of Idaho, Deposition Testimony, quantification of damages associated with defamation and interference with prospective advantage.
- **Civil Case No. CV-PI-0718437**, Ada County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with wrongful death and personal injury; retained by Defendant(s).
- **Civil Case No. CV-2006-3325-PI**, Bannock County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with personal injury; retained by Defendant(s).
• Civil Case No. CV-PI-0704871, Ada County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with personal injury; retained by Defendant(s).

• Appeal Nos. 09-A-1335 and 09-A-1336, Idaho Board of Tax Appeals; Rebuttal Testimony, proper application of appraisal theory; retained by Defendant(s).

• Civil Case No. CV-07-663, Jefferson County District Court, State of Idaho, Trial Testimony, quantification of damages associated with bad faith claim; retained by Defendant(s).

• Civil Case No. CV DR 2009-06035, Ada County District Court, State of Idaho, Trial Testimony, Business appraisal for marital dissolution; retained by Plaintiff(s).

• Civil Case No. CV OC 0902282, Ada County District Court, State of Idaho, Deposition Testimony, analysis of lost profits associated with breach of contract and misappropriation of trade secrets; retained by Defendant(s).

• Civil Case No. CV OC 0902282, Ada County District Court, State of Idaho, Trial Testimony, analysis of lost profits associated with breach of contract and misappropriation of trade secrets; retained by Defendant(s).

**Professional Billing Rate**

$285 per hour
Defendant Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP, hereby provides notice that it is vacating the following depositions.

Jason Neidigh scheduled October 25, 2010;
Lee Cotton scheduled October 28, 2010; and

DATED: October 22, 2010

COSHO HUMPHREY, LLP

By: THOMAS G. WALKER
Attorneys for Defendants, Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 22nd day of October, 2010, a true and correct copy of the within and foregoing document was served upon the following in the manner indicated:

Kim J. Trout, Esq.
Daniel Loras Glynn
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

MOTION TO SHORTEN TIME FOR HEARING RE: PLAINTIFF'S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12

COMES NOW Plaintiff the City of Meridian ("City"), by and through its counsel of record, the law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., and hereby moves this Court, pursuant to Rule 6(b) of the Idaho Rules of Civil Procedure, for an order shortening the time for notice of hearing on Plaintiff's Motion for Order Approving Permission to Appeal From an Interlocutory Order Pursuant to Idaho Appellate Rule 12. The motion was filed on October 14, 2010 and the Defendant filed an opposition on October 21, 2010. Plaintiff requests the hearing be set for November 5, 2010 at 1:00 p.m.
DATED this 27th day of October, 2010.

Certified by:

TROUT JONES GLEDHILL FUHRMAN
GOURLEY, P.A. --

By: __________

Kim J. Trout

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

AMENDED NOTICE OF HEARING RE: PLAINTIFF'S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12

PLEASE TAKE NOTICE, that the hearing currently scheduled on Monday, the 15th day of November, 2010, at the hour of 11:00 a.m. is hereby vacated and scheduled to be heard on the Friday, the 5th day of November, 2010 at the hour of 1:00 p.m., or as soon thereafter as counsel can be heard.

DATED this 27th day of October, 2010.

By: 
Kim J. Trout

NOTICE OF HEARING RE: PLAINTIFF'S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12 - 1
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered
U.S. Mail [X]
Fax
Fed. Express
Email

Daniel Loras Glynn
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

ORDER TO SHORTEN TIME FOR HEARING RE: PLAINTIFF'S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12

Case No. CV OC 09-7257

THIS COURT having reviewed Plaintiff's Motion for Order Shortening Time and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the time period set forth in Rule 6(d) of the Idaho Rules of Civil Procedure shall be shortened and Plaintiff shall be permitted to argue its Motion for Order Approving Permission to Appeal From an Interlocutory Order Pursuant to Idaho Appellate Rule 12 on November 5, 2010 at 1:00 p.m.
DATED this ___ day of ___, 2010.

By: HONORABLE JUDGE WILPER

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of ___, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Kim J. Trout
Trout Jones Gledhill Fuhrman Gourley, P.A.
225 N. 9th St., Ste. 820
P.O. Box 1097
Boise, ID 83701

Hand Delivered  U.S. Mail  Fax  Fed. Express  Email

J. DAVID NAVARRO
CLERK OF THE COURT

INGA JOHNSON
Deputy Clerk

ORDER TO SHORTEN TIME FOR HEARING RE: PLAINTIFF'S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12
Page 2
NOTICE IS HEREBY GIVEN that on this 29th day of October, 2010, Defendant Petra Incorporated's Response Dated October 29, 2010 to the City of Meridian’s Fifth Requests for Production of Documents, together with a copy of this Notice of Service of Discovery was
served on or about October 29, 2010 upon counsel for Plaintiff, The City of Meridian in the manner set forth below:

Kim J. Trout
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail
Hand Delivery
Overnight Courier
Facsimile:
E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

NOTICE IS HEREBY GIVEN that on this 29th day of October, 2010, Defendant Petra Incorporated’s Supplemental Response Dated October 29, 2010 to the City of Meridian’s First Set of Interrogatories and Requests for Production of Documents, together with a copy of this
Notice of Service of Discovery was served on or about October 29, 2010 upon counsel for Plaintiff, The City of Meridian in the manner set forth below:

Kim J. Trout  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile:  
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

The City of Meridian vs. Petra Incorporated

For: Cosho Humphrey, LLP
Washington Group Plaza IV
800 Park Blvd., Ste. 790
Boise, ID 83712

STATE OF IDAHO
COUNTY OF ADA

Received by TRI-COUNTY PROCESS SERVING LLC on October 29, 2010 to be served on LABOR READY NORTHWEST, INC.

I, Zach D. Heesch, who being duly sworn, depose and say that on Monday, November 1, 2010, at 12:23 PM, I:

SERVED the within named Labor Ready Northwest, Inc. by delivering a true copy of the Subpoena for Document Production to S.J. Tharp of CT Corporation System, Registered Agent for Labor Ready Northwest, Inc. Said service was effected at CT Corporation System, 1111 W. Jefferson Street Suite 530, Boise, ID 83702.

I also tendered and paid the sum of $25.00, (Witness Fee Tendered), at the time and place of service.

I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

Reference Number: 101276
Client Reference: Thomas G. Walker

Subscribed and sworn before me today
Monday, November 1, 2010

Zach D. Heesch

TRI-COUNTY PROCESS SERVING LLC
P.O. Box 1224
Boise, ID 83701
(208) 344-4132

Notary Public for the State of Idaho
Residing at Boise, Idaho
Thomas G. Walker (ISB 1856)
Mackenzie Whatcott (ISB 6774)
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell Phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: twalker@cosholaw.com; mwhatcott@cosholaw.com
Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

SUBPOENA FOR DOCUMENT PRODUCTION

THE STATE OF IDAHO SENDS GREETINGS TO

Labor Ready Northwest, Inc.
dba Labor Ready, 1604 Garrity Blvd., Nampa, Idaho 83687
Labor Ready, 1088 North Orchard Street, Boise, Idaho 83706
CT Corporation System
1111 W. Jefferson Street Suite 530
Boise, Idaho 83702

SUBPOENA FOR PRODUCTION OF DOCUMENTS TO LABOR READY NORTHWEST, INC.
YOU ARE COMMANDED:

☐ to appear in the Court at the place, date and time specified below to testify in the above case.

☐ to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

☒ to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below. (See list of documents or objects on Exhibit A attached hereto.)

☐ to permit inspection of the following premises at the date and time specified below.

PLACE DATE AND TIME: Documents shall be produced at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, ID 83712 not later than 5:00 p.m. on November 29, 2010.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this 29th day of October, 2010.

J. DAVID NAVARRO
Clerk of the Court

By

THOMAS G. WALKER
Attorney Licensed in the State of Idaho
EXHIBIT A

1. Produce true, correct, complete and legible copies of your file or files, information and documents in any way related to, connected with, attributable to, and associated with any and all documents prepared for or by Labor Ready regarding the new Meridian City Hall project ("Project"), including but not limited to all purchase orders, work orders, invoices, billings and other documents ("Documents") related in any way to modifications, alterations, improvements and repairs of the new Meridian City Hall building, facilities, systems and site improvements ("Project") during the period of time commencing on October 15, 2008 to the date of your response to this subpoena.

2. Produce, true, correct, complete and legible Bates numbered copies of all licenses, certifications and other state issued documentation confirming the qualifications of each person and entity that performed labor or provided materials in any way involving the HVAC system, on behalf of Labor Ready, Inc. for the Project during the period of time commencing on October 15, 2008 to the date of your response to this subpoena.

This subpoena not only calls for the documents in your possession, but also for all documents that are in your care, custody or control or in the care, custody and control of your employees, representatives and attorneys.

DATED this 29th day of October, 2010.

J. DAVID NAVARRO
Clerk of the Court

By THOMAS G. WALKER
Attorney Licensed in the State of Idaho

SUBPOENA FOR PRODUCTION OF DOCUMENTS TO LABOR READY NORTHWEST, INC.

Page 3

006726
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 29th day of October, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
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THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12

The Plaintiff City of Meridian ("Plaintiff" or "City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., hereby submits its Reply Memorandum in Support of Plaintiff’s Motion for Order Approving Permission to Appeal from an Interlocutory Order, Pursuant to Idaho Appellate Rule 12. Contrary to the assertions of the Defendant Petra, Incorporated ("Defendant" or "Petra"), this matter does present a case of controlling law upon which there is a substantial ground for difference of opinion, which if resolved by the Idaho Supreme Court would materially advance a more orderly resolution of this case.
ARGUMENT

A. The Issues Presented by the City's Motion to Dismiss Do Present Controlling Issues of Law as to Which There Is Substantial Grounds for Difference of Opinion.

As this Court is aware from the substantial briefing provided thus far in this case, and as it relates to Petra's counterclaim in this matter, Petra seeks additional compensation purportedly arising from the performance of its fiduciary duties arising under the Construction Management Agreement ("CMA") with the City. More specifically however, Petra's claim for additional compensation is grounded in its assertion that it is entitled to additional compensation based on overall increased costs of construction, an increased cost of construction which Petra was aware of at least as early as January of 2007 when it submitted its first of a series of cost estimates to the City. Yet as the construction process progressed and as Petra continued to provide the City with estimates of the increased costs of the overall construction, Petra never once adjusted the construction management fee it would seek. As Petra has argued, and thus conceded, it was not until well over a year later, in April of 2008 ("Change Order #2"), that Petra first submitted its claim for additional compensation.

This fact was significant to the City's Motion to Dismiss pursuant to the Idaho Tort Claims Act, I.C. § 50-219 ("ITCA") and is particularly significant to the present request for an order granting the City's permissive appeal. This Court's denial of the City's motion was expressly premised upon the conclusion that Petra's claim did not accrue until February of 2009 because that was the date, according to Petra's view of the evidence, that the City first denied its claim for additional compensation. Putting aside the City's dispute with that particular characterization of the evidence, what cannot be disputed is that there is a substantial dispute between the parties as to when a cause of action accrues for the purpose of triggering the notice provisions of the ITCA.
According to Petra’s argument, it could wait well over a year after having possession of facts that would, under its interpretation of the provisions of the CMA, give rise to grounds to seek additional compensation from the City. In essence, Petra’s argument allows it to wholly control its own limitation period regardless of when the facts giving rise to its claim arose. While it is true that there are a number of cases which address the application of the notice provisions of the ITCA, Petra must concede that none of those appellate decisions address the specific issue presented here. There is no Idaho case which addresses when the notice provision of the ITCA is triggered in a contract action between a contractor and a municipality, particularly where the contract between the two expressly provides the time frame and procedure for the assertion of a claim under the contract, as is the case in the CMA here. Nonetheless, it is clear from prior Idaho cases that there is no support for Petra’s position that it, and it alone, can control when its claim for purposes of the ITCA accrues. See Mitchell v. Bingham Memorial Hosp., 130 Idaho 420, 423, 942 P.2d 544, 547 (1997) (stating “a claimant is not required to know all the facts and details of a claim because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement.”); Magnuson Properties Partnership v. City of Coeur d’Alene, 138 Idaho 166, 59 P.3d 971 (2002) (stating that “the 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time.”).

Moreover, while apparently not a basis for this Court’s determination, a substantial amount of briefing between the parties was devoted to the issue of whether or not a counterclaim of the nature asserted by Petra in this matter obviates the need for pre-suit notification under the ITCA. It is clear that there is no Idaho case law on that subject. Harms Memorial Hosp. v. Morton, 112 Idaho 129, 730 P.2d 1049 (Ct. App. 1986).

Thus, the two issues presented by way of the City’s Motion to Dismiss are issues which concern controlling questions of law as to which there is substantial ground for difference of
opinion. Thus the City has satisfied the criteria set forth by Idaho Appellate Rule 12 for permission to appeal to the Idaho Supreme Court.

B. The Grant of the City’s Motion Would Advance the Orderly Resolution of the Case.

While it is not disputed that the dismissal of Petra’s Counterclaims would not terminate this litigation in its entirety, it would materially advance the orderly and efficient resolution of this litigation. The City commenced this action based on Petra’s failure to perform in accordance with those express fiduciary duties and obligations which it agreed to perform in its capacity as the construction manager for the Meridian City Hall. The City’s claims for contract damages and construction defects would continue regardless of whether or not Petra is entitled to present its claims for additional compensation from the City as alleged in its counterclaim.

However, the dismissal of Petra’s claims would greatly streamline the issues presented in these proceedings, thus significantly reducing the nature and duration of trial. This is certainly a not inconsequential result given, as Petra recently noted, the “significant legal expenses” (in excess of $1 million) that Petra and the taxpayers of the City of Meridian have had to incur and will be required to incur. See Petra’s Memorandum in Support of Motion in Limine to Exclude Testimony and Documents Regarding Meridian’s Claimed Damages, page 11. Moreover, an immediate appeal will not only save the parties tremendous expense, it will also reduce the impact upon the employees of Petra and the City, as well as other third party witnesses.

Accordingly, the grant of an immediate appeal as requested by the City would advance the orderly resolution of this case.
CONCLUSION

For the reasons set forth above, the City respectfully request that this Court grant it permission to appeal the Order denying the City’s Motion to Dismiss Petra’s Counterclaim to the Idaho Supreme Court.

DATED this 2 day of November, 2010.

TROUT • JONES • GLEDHILL • FUHRMAN • GOURLEY, P.A.

By: Daniel Loras
Attorneys for Plaintiff
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered
U.S. Mail
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Daniel Loras Glynn
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

COMES NOW Plaintiff the City of Meridian, by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and hereby moves this Court to dismiss, pursuant to Rule 12(b)(6), Petra, Incorporated's (hereafter "Petra") claim for lost profits and/or business devastation. This motion is supported by the Memorandum in Support of Plaintiff's Motion to Dismiss and the Affidavit of Daniel Loras Glynn filed concurrently herewith, and the pleadings and papers on file in this matter.

Oral argument is requested.
DATED this 4th day of November, 2010.

TROUT • JONES • GLEDHILL• FUHRMAN, P.A.

By:

Daniel Loras Glynn
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
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Daniel Loras Glynn
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

COMES NOW the Plaintiff City of Meridian ("Plaintiff" or "City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and hereby submits the following Memorandum in Support of Plaintiff's Motion to Dismiss Defendant Petra, Incorporated's ("Defendant" or "Petra") Claim for Lost Profits and/or Business Devastation Pursuant to the Idaho Tort Claims Act.

I. INTRODUCTION

At the outset, it is important to clarify and distinguish the City's present motion from the Motion to Dismiss (Pursuant to the Idaho Tort Claims Act) filed on August 17, 2010. The first Motion to Dismiss (Idaho Tort Claims Act), wherein the City has sought permission to appeal the
Court’s denial to the Idaho Supreme Court, sought to dismiss Petra’s then-known counterclaims against the City as set forth in the Change Order No. 2 Request, dated October 3, 2008 and prepared by Gene Bennett, wherein Petra sought increased management fees in the amount of $512,427.00.

The present Motion to Dismiss is being brought by the City in response to Petra’s newly alleged claim of lost profits and/or business devastation. Not only has Petra clearly failed to provide the City with proper notice of the lost profits and/or business devastation claim pursuant to the requirements of the Idaho Tort Claims Act, I.C. § 6-901 et seq. ("ITCA"), Petra has failed to even allege this claim in its Counterclaim, Amended Counterclaim filed on August 21, 2009, or in response to discovery requests from the City regarding Petra’s alleged damages. Instead, the first disclosure of the nature, breadth and scope of a claim for lost profits and/or business devastation until the Keith Pinkerton expert report received by the City on October 22, 2010, which attempts to set forth and quantify Petra’s lost profits and/or business devastation claim in the amount of 3.9 to 4.2 million dollars.

Accordingly, in view of the fact that Petra did not serve a notice of claim upon the City within 180 days from the date that the lost profits and/or business devastation claim against the City arose, or reasonably should have been known, Petra’s claim must be dismissed for failure to state a claim upon which relief can be granted.

II. ARGUMENT

Petra’s Claim for Lost Profits and/or Business Devastation Against the City Must be Dismissed With Prejudice in View of Petra’s Failure to Properly and Timely Provide the City with Notice of Such a Claim in Accordance with the ITCA.

Municipal corporations like the City are entitled to pre-suit notice under the ITCA. This requirement is found within Idaho Code § 50-219, which requires that “[a]ll claims for damages against a city must be filed as prescribed by [the ITCA].” I.C. § 50-219. See also, Sweitzer v. Dean, 118

“[T]he is clear that failure to comply with the notice requirement bars a suit regardless of how legitimate it might be.” Driggers v. Grafe, 148 Idaho 295, 297, 221 P.2d 521, 523 (Ct. App. 2009). See also, Bryant v. City of Blackfoot, 137 Idaho 307, 48 P.3d 636 (2002); Mallory v. City of Montpelier, 126 Idaho 446, 885 P.2d 1162 (Ct. App. 1994); McQuillen v. City of Ammon, 113 Idaho 719, 747 P.2d 741 (1987); Overman v. Klien, 103 Idaho 795, 654 P.2d 888 (1992). Accordingly, in all actions against a governmental entity such as the City here, the party asserting a claim must both plead and prove that he or she has complied with the requirements of the ITCA. Powers v. Demison, 120 Idaho 425, 816 P.2d 982 (1991) (summary judgment was proper as plaintiff had failed to make a showing sufficient to establish the existence of an element essential to her case on which she bore the burden of proof, i.e. compliance with ITCA).

Pursuant to I.C. § 6-907, a notice of claim must:

[Accurately describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time the claim arose.]

I.C. § 6-907.

Petra failed to provide notice to the City as required by the ITCA.

On May 6, 2009, Petra filed its original Answer and Counterclaim in this matter. Petra's Counterclaim does not contain any claim for lost profits and/or business devastation. On August
21, 2009, Petra filed its Amended Counterclaim in this matter, which also does not contain any claim for lost profits and/or business devastation.

In this regard it should be noted that on July 22, 2009, the City propounded discovery requests upon Petra, including Interrogatory No. 32, which stated:

INTERROGATORY NO. 32: Please set forth and describe with particularity each fact that supports your claim for any damages in this matter, including how you arrived at these damages, the calculation for the same, and identify any and all documents that support your claim for damages.

(Affidavit of Daniel Loras Glynn in Support of Second Motion to Dismiss ("Glynn Aff."), Exhibit "A").

On August 24, 2009, the City received Petra’s response to Interrogatory No. 32, which stated:

RESPONSE: See Change Order No.2 Request, dated 10/3/08 prepared by Gene Bennett.¹

(Glynn Aff., Exhibit "B").

Petra has not supplemented its response to Interrogatory No. 32. (Glynn Aff., ¶4.)

On October 22, 2010, Petra provided the City with an expert report from Keith A. Pinkerton, wherein Petra, for the first time, provided any detail concerning a claim for lost profits and/or business devastation in an amount of 3.9 to 4.2 million dollars. (Glynn Aff., Exhibit “C”)

Significantly, and as set forth in the expert report provided by Petra, the lost profits and/or business devastation claim arose immediately upon the City's filing of the Complaint in this matter on April 16, 2009.

Thus, according to Petra's own expert report, Petra has known or should have known about this lost profits and/or business devastation claim since April 16, 2009. Accordingly, Petra was

¹ Change Order No. 2 sought payment in the amount of $512,427.00 for an alleged increase in the management time and management fee on the project.
required to provide the City with proper notice of Petra's claim no later than October 19, 2009. See *Mitchell v. Bingham Memorial Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997) (stating “a claimant is not required to know all the facts and details of a claim because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement.”); *Magnuson Properties Partnership v. City of Coeur d'Alene*, 138 Idaho 166, 59 P.3d 971 (2002) (stating that “the 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time.”).

Petra, however, did not even allege its claim for lost profits and/or business devastation until producing the expert report on October 22, 2010, more than a year of the deadline mandated by the ITCA. As the Court is well aware, failure to comply with the notice requirement of the ITCA bars Petra's claim. Therefore, Petra's claim for lost profit and/or business devastation fails to state a claim upon which relief can be granted and should be dismissed with prejudice.

III. CONCLUSION

It is undisputed, and undisputable, that Petra wholly failed to plead, or comply with the ITCA and I.C. § 50-219 in regard to its claim for lost profit and/or business devastation. As such, these claims must be dismissed with prejudice.

DATED this 4th day of November, 2010.

TROUT • JONES • GLEDHILL • FUHRMAN • GOURLEY, P.A.

By: [Signature]
Daniel Loras Gun
Attorneys for Plaintiff
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

Daniel Loras Glynn
KIM J. TROUT, ISB # 2468
DANIEL LORAS GLYNN, ISB # 5113
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, ID 83701
Telephone: (208) 331-1170
Facsimile: (208) 331-1529
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

STATE OF IDAHO )
County of ADA )

DANIEL LORAS GLYNN, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

2. On July 22, 2009, the City of Meridian served upon Petra, Incorporated Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Request for Admissions to Defendant Petra Incorporated. Interrogatory No. 32 states:
Please set forth and describe with particularity each fact that supports your claim for any damages in this matter, including how you arrived at these damages, the calculation for the same, and identify any and all documents that support your claim for damages.

Attached hereto as Exhibit “A” is a true and correct copy of Interrogatory No. 32 served upon Petra Incorporated on July 22, 2009.

3. On August 21, 2009, Petra, Incorporated served, by mail, Petra Incorporated Response Dated August 21, 2009 to the City of Meridian’s First Set of Interrogatories, Requests for Production of Documents and Request for Admissions to Defendant Petra Incorporated. Petra responded to Interrogatory No. 32 by stating: “See Change Order No. 2 Request, dated 10/3/08 prepared by Gene Bennett.” Attached hereto as Exhibit “B” is a true and correct copy of Petra’s response to Interrogatory No. 32, and the verification page signed by Jerry Frank.

4. I have reviewed Petra’s Supplemental Responses and have determined that Petra has not supplemented its response to Interrogatory No. 32.

5. On October 22, 2010, Petra provided the City with an expert report from Keith A. Pinkerton, wherein Petra, for the first time, provided any detail concerning a claim for lost profits and/or business devastation in an amount of 3.9 to 4.2 million dollars. Attached hereto as Exhibit “C” is a true and correct copy of the report from Keith A. Pinkerton.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

TROUT • JONES • GLEDHILL • FUHRMAN •
GOURLEY, P.A.

By: Daniel Loras Glynn
Subscribed and sworn to before me this 4th day of November, 2010.

KEVIN KLUCKHORN
NOTARY PUBLIC
STATE OF IDAHO

Notary Public, State of Idaho
Residing at: Meridian, ID
My commission expires: November 3, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 2009, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Hand Delivered ☒
U.S. Mail ☐
Fax ☐
Email ☐

Kim J. Trout

AFFIDAVIT OF DANIEL LORAS GLYNN IN SUPPORT OF PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S CLAIM FOR LOST PROFITS AND/OR BUSINESS DEVASTATION PURSUANT TO THE IDAHO TORT CLAIMS ACT - 3
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

Plaintiff, by and through its counsel of record, Trout Jones Gledhill Fuhrman, P.A., and pursuant to Rules 26, 33, 34, and 36 of the Idaho Rules of Civil Procedure and in accordance with the definitions and instructions set forth below, requests that the Defendant, Petra, Incorporated, (hereinafter "Petra" or "Defendant"), answer the following Interrogatories, Requests for Production of Documents, and Requests for Admissions in writing, under oath, and within thirty (30) days. These Requests are continuing in nature and require supplementation pursuant to Idaho Rule of Civil Procedure Rule 26(e), anytime before trial, and in no event later than 45 days before trial.
recommendations to Owner and Architect as to the constructability, cost-effectiveness, clarity, consistency and coordination of Construction Documents.

INTERROGATORY NO. 30: Please list any and all services, including but not limited to, the date(s), name of person(s) performing service and description(s) of said services performed by Petta or Petta's agents in compliance with Article 4.5.8 of the Agreement as the preparation of value analysis studies on major construction components.

INTERROGATORY NO. 31: Please list any and all services, including but not limited to, the date(s), name of person(s) performing service and description(s) of said services performed by Petta or Petta's agents identified as "general conditions" specifically identified as items designated for procurement by the Construction Manager in the Construction Management Plan.

INTERROGATORY NO. 32: Please set forth and describe with particularity each fact that supports your claim for any damages in this matter, including how you arrived at these damages, the calculation for the same, and identify any and all documents that support your claim for damages.

INTERROGATORY NO. 33: Please set forth and describe with particularity each fact, document, and correspondence that Petta contends, if any, that Petta examined the Plaintiff's Criteria, prepared and submitted to Plaintiff a written report as required by Article 4.2 of the Agreement.

INTERROGATORY NO. 34: Please set forth and describe with particularity each fact and document, including but not limited to the date(s) and description(s) of services performed by Petta or Petta's agents in compliance with Article 4.4 of the Agreement, specifically the creation and submission of the Construction Management Plan.

INTERROGATORY NO. 35: Please set forth and describe with particularity each fact and document, including but not limited to the date(s) and description(s) of services performed by Petta.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2009, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

Kim J. Trout

PLAINTIFF THE CITY OF MERIDIAN FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED - 30
THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant.

Petra Incorporated ("Petra"), by and through its undersigned counsel, pursuant to Rules 33, 34 and 36 of the Idaho Rules of Civil Procedure, responds to Plaintiffs City of Meridian's (Meridian) First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions, served on or about July 22, 2009 as follows:
Numerous value engineering suggestions were pursued during the months of June, July, and August 2007 (see attached correspondence to subcontractors). These were summarized and given to City Council (see attachment 8/31/07). Three of the items were selected (see Mtg#74 - 9/17/07).

INTERROGATORY NO. 31: Please list any and all services, including but not limited to, the date(s), name of person(s) performing service and description(s) of said services performed by Petra or Petra’s agents identified as “general conditions” specifically identified as items designated for procurement by the Construction Manager in the Construction Management Plan.

RESPONSE: See response to Interrogatory No. 5 for documentation of performance under General Conditions.

INTERROGATORY NO. 32: Please set forth and describe with particularity each fact that supports your claim for any damages in this matter, including how you arrived at these damages, the calculation for the same, and identify any and all documents that support your claim for damages.

RESPONSE: See Change Order No. 2 Request, dated 10/3/08 prepared by Gene Bennett.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of August, 2009 a true and correct copy of the
within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail

Hand Delivery

Overnight Courier

Facsimile:

E-mail:

THOMAS G. WALKER
VERIFICATION

STATE OF IDAHO )

County of Ada. )

Jerry Frank, being first duly sworn on oath, deposes and says:

That he is the President of the Defendant Petra Incorporated in the above-entitled action; that he has read the foregoing Response to Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Request for Admissions, that by his own personal knowledge he knows the contents thereof; and, that the facts therein stated are true, correct and accurate to the best of his knowledge and belief.

JERRY FRANK

SUBSCRIBED AND SWORN to before me this 31st day August, 2009.

NOTARY PUBLIC For Idaho
Residing at Boise, Idaho
My Commission Expires: 10/10/2013

PETRA INCORPORATED RESPONSE DATED AUGUST 21, 2009 TO THE CITY OF MERIDIAN'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED
PRELIMINARY EXPERT WITNESS REPORT

City of Meridian
v.
Petra, Inc.

Prepared by:
Hooper Cornell, PLLC
250 Bobwhite Court, Suite 300
Boise, Idaho 83706

Prepared for:
Casno Humphrey LLP

October 19, 2010
October 20, 2010

Mr. Thomas G. Walker, Esq.
Cosho Humphrey, LLP
800 Park Blvd., Suite 790
PO Box 9518
Boise, ID 83707-9518

RE: City of Meridian v. Petra, Inc.

Dear Mr. Walker:

At your request, I have reviewed the facts and circumstances surrounding the counterclaim asserted by Petra, Inc., (Petra) in the matter cited above to quantify corresponding economic damages. This report is intended to summarize the analyses performed and illustrate the conclusions reached.

In performing this assignment, I assumed that Petra will prevail in its legal theories of this case. Accordingly, this report should not be construed to contain any opinions with regard to Defendant's liability.

Data Considered
During the course of this engagement, I reviewed relevant data obtained from the following sources: (1) building permit data from all of the incorporated entities in Ada and Canyon counties except for the municipalities of Notus and Greenleaf; (2) audited financial statements of Petra, Inc.; and (3) various legal filings associated with this case. In addition, I have had discussions with management of Petra and its advisors.

Methodology
To quantify damages, I used available data to estimate the magnitude of the nonresidential construction market in Ada and Canyon counties. I then coupled this information with data obtained from Petra to estimate its share of that market by year from 2003 forward. By comparing Petra's results in the marketplace both before and after the alleged wrongful acts of the City of Meridian, I was able to estimate the present value of lost profits incurred by Petra, Inc.

I also constructed a parallel analysis using the same input data and applying a technique known as Monte Carlo Simulation. This technique provides an alternative method of eliminating uncertainty through the use of statistics.

Both methods of analysis produce similar results and were designed to quantify damages with a reasonable degree of economic certainty; all of my conclusions are expressed on that basis.
Professional Qualifications
A listing of my professional qualifications and prior testimony are attached to this report.

Professional Billing Rates
Hooper Cornell's hourly rates currently range from $60 per hour for clerical staff to $300 per hour for senior partners. My personal billing rate in effect for this assignment is $285 per hour.

Conclusions
Based on the methods described above and as shown in additional detail on the accompanying schedules, it is my opinion that the present value of the economic damages incurred by Petra is between $3.9 million and $4.2 million.

Sincerely,

Keith A. Pinkerton
Director of Valuation Services
### City of Meridian v. Petra Inc.

**Building Permit Data**

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#### All Parcels

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<tr>
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#### Residential Parcels

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<td>$183,467,980</td>
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<tr>
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<tr>
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<tr>
<td>Greenleaf</td>
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#### Non-Residential Parcels

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<tbody>
<tr>
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<td>$79,544,887</td>
<td>$55,307,658</td>
<td>$59,579,699</td>
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<td>$311,388,281</td>
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<td>Eagle</td>
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<td>Canyon County</td>
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<td>$40,934,657</td>
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<td>$103,630,538</td>
<td>$145,491,781</td>
<td>$112,931,949</td>
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<tr>
<td>Greenleaf</td>
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</table>

#### Total:

- **Residential Parcels:** $38,993,800,386
- **Non-Residential Parcels:** $38,843,800,486
- **Total:** $77,837,600,872
## Historical Financial Information

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<thead>
<tr>
<th>Year</th>
<th>Petra Revenue</th>
<th>Other Income</th>
<th>Total Revenue</th>
<th>Direct Costs</th>
<th>Gross Profit</th>
<th>Incremental Costs</th>
<th>Net Incremental Earnings</th>
<th>Incremental Margin</th>
<th>CHI Margin</th>
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<tr>
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<td>2.93%</td>
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<td>$80,626,534</td>
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<td>$53,235,967</td>
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<td>4.00%</td>
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<td>$50,734,789</td>
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<td>$4,347</td>
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<td>4.37%</td>
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<td>$33,425,985</td>
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<td>$508,006</td>
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<td>4.78%</td>
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### Estimation of Petra Market Share

#### Non-Residential Construction

<table>
<thead>
<tr>
<th>Period</th>
<th>Activity</th>
<th>Contract Revenue</th>
<th>CM Revenue</th>
<th>CM Not Thru Petra</th>
<th>CM Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>$747,262,692</td>
<td>$47,471,859</td>
<td>$9,315,265</td>
<td>$0</td>
<td>$9,315,265</td>
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<tr>
<td>2006</td>
<td>$853,736,911</td>
<td>$31,281,028</td>
<td>$1,891,747</td>
<td>$6,675,516</td>
<td>$8,567,263</td>
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<tr>
<td>2007</td>
<td>$870,925,206</td>
<td>$32,472,819</td>
<td>$1,473,422</td>
<td>$12,114,577</td>
<td>$13,587,999</td>
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<tr>
<td>2008</td>
<td>$797,719,387</td>
<td>$17,044,396</td>
<td>$111,484</td>
<td>$340,206</td>
<td>$451,680</td>
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<td>2009</td>
<td>$496,881,601</td>
<td>$6,912,696</td>
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#### Market Share

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<tr>
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<th>Market Share</th>
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<tr>
<td>2005</td>
<td>5.7%</td>
</tr>
<tr>
<td>2006</td>
<td>6.2%</td>
</tr>
<tr>
<td>2007</td>
<td>3.6%</td>
</tr>
<tr>
<td>2008</td>
<td>3.7%</td>
</tr>
<tr>
<td>2009</td>
<td>2.6%</td>
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<td>2010</td>
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#### 3-Year Lag

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<th>CM Total</th>
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<tbody>
<tr>
<td>2005</td>
<td>$506,379,407</td>
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<tr>
<td>2006</td>
<td>$747,262,692</td>
<td>$47,471,859</td>
<td>$9,315,265</td>
<td>1.2%</td>
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<tr>
<td>2007</td>
<td>$853,736,911</td>
<td>$31,281,028</td>
<td>$8,567,263</td>
<td>1.0%</td>
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<tr>
<td>2008</td>
<td>$870,925,206</td>
<td>$32,472,819</td>
<td>$13,587,999</td>
<td>1.0%</td>
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<tr>
<td>2009</td>
<td>$797,719,387</td>
<td>$17,044,396</td>
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#### Market Share

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<tr>
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<th>Market Share</th>
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<tbody>
<tr>
<td>2005</td>
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<td>2006</td>
<td>6.2%</td>
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<td>2007</td>
<td>3.6%</td>
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<tr>
<td>2008</td>
<td>3.7%</td>
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<td>2009</td>
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<tr>
<td>2010</td>
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#### 6-Month Lag

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<th>CM Revenue</th>
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*Annualized*
### City of Meridian v. Petra Inc.

**Estimation of Lost Market Share**

#### Contract Projects

<table>
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<tr>
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<th>1-Year Lag</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Petra Market</td>
<td>4-Year</td>
<td>3-Year</td>
</tr>
<tr>
<td>Share</td>
<td>5.75%</td>
<td>6.35%</td>
<td>3.66%</td>
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<table>
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<tbody>
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<td>4-Year</td>
<td>3-Year</td>
</tr>
<tr>
<td>Share</td>
<td>4.65%</td>
<td>5.93%</td>
<td>3.63%</td>
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<tr>
<td>Average Less Current</td>
<td>2.04%</td>
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### Construction Management

<table>
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<tbody>
<tr>
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<td>Petra Market</td>
<td>4-Year</td>
<td>3-Year</td>
</tr>
<tr>
<td>Share</td>
<td>1.06%</td>
<td>1.25%</td>
<td>1.00%</td>
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<td>1.2%</td>
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<tr>
<td>Average Less Current</td>
<td>1.18%</td>
<td>1.07%</td>
<td>1.12%</td>
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<tbody>
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<td></td>
<td>Petra Market</td>
<td>4-Year</td>
<td>3-Year</td>
</tr>
<tr>
<td>Share</td>
<td>0.85%</td>
<td>1.16%</td>
<td>0.99%</td>
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<tr>
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<td>1.0%</td>
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<td>1.00%</td>
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<tr>
<td>Average Less Current</td>
<td>1.15%</td>
<td>0.96%</td>
<td>0.97%</td>
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</table>

Minimum Lost Share: 2.00%
Historical Petra "Market Share" of Construction Management Revenue in Ada & Canyon Counties with a 6-Month Lag

Lawsuit Filed 4-16-09
Historical Petra "Market Share" of Construction Management Revenue in Ada & Canyon Counties with a 1-Year Lag

2005: 1.06%
2006: 1.25%
2007: 1.00%
2008: 1.56%
2009: 0.07%
2010: 0.1%

Lawsuit Filed 4-16-09
Schedule 7

Historical Petra "Market Share" of Contract Revenue in Ada & Canyon Counties with a 6-Month Lag

Lawsuit Filed 4-16-09
Historical Petra "Market Share" of Contract Revenue in Ada & Canyon Counties with a 1-Year Lag

Lawsuit Filed 4-16-09
City of Meridian v. Petra Inc.
Analysis of Cost of Capital using the Build-Up Method as of 10/10/10

<table>
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<tr>
<th>Element</th>
<th>Amount</th>
<th>Source</th>
<th>Notes</th>
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<tr>
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<td>5-Year Constant Maturity Treasury</td>
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<tr>
<td>Intermediate Term Equity Risk Premium</td>
<td>7.20%</td>
<td>Ibbotson Associates</td>
<td>Historical Average, 1926-2009</td>
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<tr>
<td>Industry Risk Premium</td>
<td>2.04%</td>
<td>Ibbotson Associates</td>
<td>SIC 15</td>
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<tr>
<td>Size Premium</td>
<td>3.99%</td>
<td>Ibbotson Associates</td>
<td>Average of 9th and 10th deciles</td>
</tr>
<tr>
<td>Company Specific Risk</td>
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<tr>
<td>Estimated Cost of Intermediate Term Equity Capital</td>
<td>17.40%</td>
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</tbody>
</table>
## Calculation of Economic Damages--Scenario 1

**Contract Management (CM) Losses**

<table>
<thead>
<tr>
<th></th>
<th>2020</th>
<th>2021</th>
<th>2022</th>
<th>2023</th>
<th>2024</th>
<th>2025</th>
<th>2026</th>
<th>2027</th>
<th>2028</th>
<th>2029</th>
<th>2030</th>
</tr>
</thead>
<tbody>
<tr>
<td>Growth Rate of CM Revenues</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
</tr>
<tr>
<td>Overall Market Activity</td>
<td>$588,300,494</td>
<td>$405,339,488</td>
<td>$315,000,000</td>
<td>$318,150,000</td>
<td>$322,922,250</td>
<td>$329,380,695</td>
<td>$337,615,122</td>
<td>$347,743,669</td>
<td>$358,175,979</td>
<td>$364,921,258</td>
<td>$379,988,867</td>
</tr>
<tr>
<td>Lost Market Share</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
</tr>
<tr>
<td>Historical Average CM Fees</td>
<td>4.50%</td>
<td>4.50%</td>
<td>4.50%</td>
<td>4.50%</td>
<td>4.50%</td>
<td>4.50%</td>
<td>4.50%</td>
<td>4.50%</td>
<td>4.50%</td>
<td>4.50%</td>
<td>4.50%</td>
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<tr>
<td>Lost CM Fees</td>
<td>$264,735</td>
<td>$182,403</td>
<td>$144,750</td>
<td>$143,168</td>
<td>$145,315</td>
<td>$148,221</td>
<td>$151,927</td>
<td>$156,485</td>
<td>$161,179</td>
<td>$166,015</td>
<td>$170,995</td>
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<td>Lost CM Reimbursed Salaries</td>
<td>0</td>
<td>0</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
</tr>
</tbody>
</table>

**Total CM Losses**

|          | $864,728 | $482,408 | $300,759 | $300,585 | $300,821 | $300,827 | $300,489 | $300,589 | $300,589 | $300,589 | $300,589 |

**Contract Revenue Losses**

<table>
<thead>
<tr>
<th></th>
<th>2020</th>
<th>2021</th>
<th>2022</th>
<th>2023</th>
<th>2024</th>
<th>2025</th>
<th>2026</th>
<th>2027</th>
<th>2028</th>
<th>2029</th>
<th>2030</th>
</tr>
</thead>
<tbody>
<tr>
<td>Growth Rate of Contract Revenues</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
<td>1.00%</td>
</tr>
<tr>
<td>Overall Market Activity</td>
<td>$588,300,494</td>
<td>$405,339,488</td>
<td>$315,000,000</td>
<td>$318,150,000</td>
<td>$322,922,250</td>
<td>$329,380,695</td>
<td>$337,615,122</td>
<td>$347,743,669</td>
<td>$358,175,979</td>
<td>$364,921,258</td>
<td>$379,988,867</td>
</tr>
<tr>
<td>Lost Market Share</td>
<td>2.0%</td>
<td>2.0%</td>
<td>2.0%</td>
<td>2.0%</td>
<td>2.0%</td>
<td>2.0%</td>
<td>2.0%</td>
<td>2.0%</td>
<td>2.0%</td>
<td>2.0%</td>
<td>2.0%</td>
</tr>
<tr>
<td>Lost Contract Revenue</td>
<td>$11,769,210</td>
<td>$8,306,790</td>
<td>$6,300,000</td>
<td>$6,363,000</td>
<td>$6,458,445</td>
<td>$6,587,614</td>
<td>$6,752,304</td>
<td>$6,954,873</td>
<td>$7,183,520</td>
<td>$7,378,423</td>
<td>$7,599,778</td>
</tr>
<tr>
<td>Incremental Profit Margin</td>
<td>4.7%</td>
<td>4.7%</td>
<td>4.7%</td>
<td>4.7%</td>
<td>4.7%</td>
<td>4.7%</td>
<td>4.7%</td>
<td>4.7%</td>
<td>4.7%</td>
<td>4.7%</td>
<td>4.7%</td>
</tr>
</tbody>
</table>

**Total Lost Contract Profits**

|          | $884,788 | $584,800 | $384,385 | $384,545 | $384,708 | $384,871 | $384,699 | $384,963 | $385,136 | $385,310 | $385,486 |

**Increase in Liability Insurance Expenses**

|          | $0 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 |

**Total Nominal Losses**

|          | $837,788 | $658,802 | $462,880 | $467,862 | $467,862 | $462,880 | $464,885 | $464,885 | $464,885 | $464,885 | $464,885 |

**Risk-Adjusted Discount Rate**

|          | 17.4% |

**Present Value Date**

|          | 10/10/10 |

**Cash Flow Date**

|          | 12/31/10 | 06/30/11 | 06/30/12 | 06/30/13 | 06/30/14 | 06/30/15 | 06/30/16 | 06/30/17 | 06/30/18 | 06/30/19 | 06/30/20 |

**No. of Discount Periods**

|          | 0 | 0.22 | 0.72 | 1.72 | 2.72 | 3.72 | 4.72 | 5.72 | 6.72 | 7.72 | 8.72 | 9.72 |

**Present Value of Nominal Losses**


**Cumulative Present Value of losses**

|          | $837,788 | $885,834 | $1,286,534 | $1,712,829 | $2,148,709 | $2,524,389 | $2,858,807 | $3,134,305 | $3,308,634 | $3,394,697 | $3,781,304 | $3,848,300 |
## Derivation of Monte Carlo Variables

### Lost Market Share

<table>
<thead>
<tr>
<th>Contract Projects</th>
<th>Average</th>
<th>Contract Projects</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Pre-Loss</td>
<td>Post-Loss</td>
<td>Lost</td>
</tr>
<tr>
<td>Market Share</td>
<td>Market Share</td>
<td>Market Share</td>
<td>Market Share</td>
</tr>
<tr>
<td>5.75%</td>
<td>2.51%</td>
<td>3.24%</td>
<td></td>
</tr>
<tr>
<td>6.35%</td>
<td>2.51%</td>
<td>3.84%</td>
<td></td>
</tr>
<tr>
<td>3.66%</td>
<td>2.51%</td>
<td>1.15%</td>
<td></td>
</tr>
<tr>
<td>3.73%</td>
<td>2.51%</td>
<td>1.22%</td>
<td></td>
</tr>
<tr>
<td>4.65%</td>
<td>2.51%</td>
<td>2.13%</td>
<td></td>
</tr>
<tr>
<td>5.93%</td>
<td>2.51%</td>
<td>3.42%</td>
<td></td>
</tr>
<tr>
<td>3.63%</td>
<td>2.51%</td>
<td>1.12%</td>
<td></td>
</tr>
<tr>
<td>4.19%</td>
<td>2.51%</td>
<td>1.68%</td>
<td></td>
</tr>
<tr>
<td>Minimum</td>
<td>1.12%</td>
<td>Maximum</td>
<td>3.84%</td>
</tr>
<tr>
<td>Maximum</td>
<td>1.90%</td>
<td>Median</td>
<td>1.70%</td>
</tr>
<tr>
<td>Mean</td>
<td>2.22%</td>
<td>Std Deviation</td>
<td>1.32%</td>
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</table>

### Incremental Margins

<table>
<thead>
<tr>
<th>Year</th>
<th>Contract Projects</th>
<th>Construction Management</th>
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</thead>
<tbody>
<tr>
<td>2004</td>
<td>5.29%</td>
<td>4.07%</td>
</tr>
<tr>
<td>2005</td>
<td>4.20%</td>
<td>2.92%</td>
</tr>
<tr>
<td>2006</td>
<td>3.90%</td>
<td>2.97%</td>
</tr>
<tr>
<td>2007</td>
<td>3.61%</td>
<td>4.08%</td>
</tr>
<tr>
<td>2008</td>
<td>4.76%</td>
<td>4.37%</td>
</tr>
<tr>
<td>2009</td>
<td>4.69%</td>
<td>4.78%</td>
</tr>
<tr>
<td>Minimum</td>
<td>3.61%</td>
<td>2.92%</td>
</tr>
<tr>
<td>Maximum</td>
<td>5.29%</td>
<td>4.78%</td>
</tr>
<tr>
<td>Median</td>
<td>4.44%</td>
<td>4.07%</td>
</tr>
<tr>
<td>Mean</td>
<td>4.42%</td>
<td>3.86%</td>
</tr>
<tr>
<td>Std Deviation</td>
<td>0.82%</td>
<td>0.75%</td>
</tr>
</tbody>
</table>

### Revenue Growth Rate 2011 and 2012

- Low: -5.00%
- Most Likely: 2.00%
- High: 4.00%

### Revenue Growth Rate 2004 - 2009*

- Minimum: -1.36%
- Maximum: 14.62%
- Median: 6.46%
- Mean: 7.08%
- Std Deviation: 3.12%

*Annual Change in US GDP, Nominal Basis, 1969-2010
### Simulation Statistics

<table>
<thead>
<tr>
<th>Percentile</th>
<th>Output 1</th>
<th>Output 2</th>
<th>Output 3</th>
<th>Output 4</th>
<th>Output 5</th>
<th>Output 6</th>
<th>Output 7</th>
<th>Output 8</th>
<th>Output 9</th>
<th>Output 10</th>
<th>Output 11</th>
<th>Output 12</th>
</tr>
</thead>
<tbody>
<tr>
<td>10%</td>
<td>440,758</td>
<td>379,395</td>
<td>461,657</td>
<td>463,598</td>
<td>462,178</td>
<td>478,751</td>
<td>495,616</td>
<td>514,540</td>
<td>535,509</td>
<td>558,866</td>
<td>580,315</td>
<td>601,690</td>
</tr>
<tr>
<td>15%</td>
<td>514,578</td>
<td>429,236</td>
<td>500,624</td>
<td>502,197</td>
<td>501,400</td>
<td>520,816</td>
<td>539,707</td>
<td>562,021</td>
<td>585,967</td>
<td>611,036</td>
<td>637,828</td>
<td>663,168</td>
</tr>
<tr>
<td>20%</td>
<td>571,265</td>
<td>468,388</td>
<td>530,588</td>
<td>533,080</td>
<td>532,088</td>
<td>554,105</td>
<td>575,454</td>
<td>600,692</td>
<td>626,189</td>
<td>654,414</td>
<td>684,580</td>
<td>713,242</td>
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<tr>
<td>25%</td>
<td>621,184</td>
<td>502,038</td>
<td>557,056</td>
<td>559,646</td>
<td>559,410</td>
<td>582,811</td>
<td>606,504</td>
<td>632,436</td>
<td>661,024</td>
<td>691,773</td>
<td>724,065</td>
<td>757,046</td>
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<tr>
<td>30%</td>
<td>666,431</td>
<td>534,108</td>
<td>581,530</td>
<td>583,798</td>
<td>583,873</td>
<td>608,482</td>
<td>633,752</td>
<td>661,895</td>
<td>693,148</td>
<td>725,936</td>
<td>760,336</td>
<td>795,622</td>
</tr>
<tr>
<td>35%</td>
<td>708,945</td>
<td>563,220</td>
<td>603,850</td>
<td>606,289</td>
<td>606,079</td>
<td>632,514</td>
<td>660,135</td>
<td>689,351</td>
<td>722,447</td>
<td>758,224</td>
<td>794,678</td>
<td>831,970</td>
</tr>
<tr>
<td>40%</td>
<td>749,517</td>
<td>590,889</td>
<td>625,756</td>
<td>627,585</td>
<td>627,820</td>
<td>656,297</td>
<td>685,269</td>
<td>715,927</td>
<td>751,786</td>
<td>788,844</td>
<td>827,396</td>
<td>867,466</td>
</tr>
<tr>
<td>45%</td>
<td>788,823</td>
<td>617,741</td>
<td>646,315</td>
<td>648,587</td>
<td>649,073</td>
<td>678,342</td>
<td>709,999</td>
<td>742,377</td>
<td>780,271</td>
<td>819,210</td>
<td>859,504</td>
<td>902,003</td>
</tr>
<tr>
<td>50%</td>
<td>826,970</td>
<td>644,889</td>
<td>667,393</td>
<td>669,331</td>
<td>670,314</td>
<td>700,456</td>
<td>734,520</td>
<td>768,207</td>
<td>808,767</td>
<td>848,648</td>
<td>891,731</td>
<td>936,063</td>
</tr>
<tr>
<td>55%</td>
<td>867,303</td>
<td>672,472</td>
<td>688,270</td>
<td>690,196</td>
<td>691,551</td>
<td>723,651</td>
<td>758,708</td>
<td>794,931</td>
<td>826,636</td>
<td>876,383</td>
<td>923,761</td>
<td>970,413</td>
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<tr>
<td>60%</td>
<td>906,903</td>
<td>700,301</td>
<td>710,333</td>
<td>711,822</td>
<td>713,190</td>
<td>746,980</td>
<td>784,129</td>
<td>821,641</td>
<td>865,112</td>
<td>909,816</td>
<td>957,767</td>
<td>1,006,125</td>
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<tr>
<td>65%</td>
<td>949,627</td>
<td>729,304</td>
<td>733,120</td>
<td>734,656</td>
<td>735,939</td>
<td>770,897</td>
<td>810,644</td>
<td>849,392</td>
<td>895,610</td>
<td>942,252</td>
<td>992,852</td>
<td>1,043,522</td>
</tr>
<tr>
<td>70%</td>
<td>994,033</td>
<td>760,371</td>
<td>757,275</td>
<td>758,559</td>
<td>760,452</td>
<td>797,449</td>
<td>838,791</td>
<td>879,417</td>
<td>927,535</td>
<td>976,755</td>
<td>1,029,759</td>
<td>1,083,078</td>
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<tr>
<td>75%</td>
<td>1,042,946</td>
<td>793,809</td>
<td>784,002</td>
<td>785,148</td>
<td>787,144</td>
<td>826,681</td>
<td>869,398</td>
<td>912,971</td>
<td>962,958</td>
<td>1,015,113</td>
<td>1,071,446</td>
<td>1,126,190</td>
</tr>
<tr>
<td>80%</td>
<td>1,080,387</td>
<td>830,871</td>
<td>813,533</td>
<td>815,239</td>
<td>817,120</td>
<td>858,935</td>
<td>904,514</td>
<td>950,423</td>
<td>1,003,570</td>
<td>1,058,648</td>
<td>1,116,943</td>
<td>1,176,345</td>
</tr>
<tr>
<td>85%</td>
<td>1,163,304</td>
<td>875,997</td>
<td>848,242</td>
<td>849,569</td>
<td>852,154</td>
<td>896,957</td>
<td>946,278</td>
<td>994,163</td>
<td>1,050,795</td>
<td>1,108,638</td>
<td>1,170,741</td>
<td>1,235,133</td>
</tr>
<tr>
<td>90%</td>
<td>1,246,755</td>
<td>932,818</td>
<td>892,524</td>
<td>893,614</td>
<td>897,858</td>
<td>946,242</td>
<td>998,668</td>
<td>1,051,386</td>
<td>1,111,506</td>
<td>1,174,837</td>
<td>1,241,121</td>
<td>1,310,333</td>
</tr>
<tr>
<td>95%</td>
<td>1,376,507</td>
<td>1,022,651</td>
<td>960,514</td>
<td>962,461</td>
<td>968,719</td>
<td>1,021,425</td>
<td>1,080,069</td>
<td>1,138,596</td>
<td>1,205,403</td>
<td>1,281,357</td>
<td>1,351,017</td>
<td>1,430,555</td>
</tr>
<tr>
<td>100%</td>
<td>2,382,776</td>
<td>1,684,225</td>
<td>1,674,579</td>
<td>1,630,734</td>
<td>1,616,925</td>
<td>1,707,104</td>
<td>2,102,659</td>
<td>2,073,329</td>
<td>2,019,410</td>
<td>2,298,990</td>
<td>2,299,289</td>
<td>2,482,089</td>
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</tbody>
</table>

**Output from Monte Carlo Simulation**
## City of Meridian v. Petra Inc.
### Calculation of Economic Damages—Scenario 2

<table>
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<th></th>
<th></th>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Growth Rate of CM Revenues</td>
<td>-0.18</td>
<td>0.11</td>
<td>3.74</td>
<td>11.80</td>
<td>8.63</td>
<td>6.90</td>
<td>9.33</td>
<td>3.78</td>
<td>5.80</td>
<td></td>
</tr>
<tr>
<td>Overall Market Activity</td>
<td>$588,300,494</td>
<td>$405,339,488</td>
<td>$315,000,000</td>
<td>$314,436,360</td>
<td>$314,780,672</td>
<td>$326,569,198</td>
<td>$365,088,282</td>
<td>$396,581,474</td>
<td>$423,961,240</td>
<td>$463,523,729</td>
</tr>
<tr>
<td>Lost Market Share</td>
<td>1.1%</td>
<td>1.1%</td>
<td>0.7%</td>
<td>1.6%</td>
<td>1.4%</td>
<td>1.4%</td>
<td>1.0%</td>
<td>0.7%</td>
<td>1.0%</td>
<td>1.9%</td>
</tr>
<tr>
<td>Lost CM Volume</td>
<td>$6,233,093</td>
<td>$4,306,622</td>
<td>$2,112,048</td>
<td>$5,010,660</td>
<td>$4,453,226</td>
<td>$4,656,058</td>
<td>$3,735,528</td>
<td>$2,919,874</td>
<td>$4,357,084</td>
<td>$8,946,088</td>
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<tr>
<td>Historical Average CM Fees</td>
<td>4.3%</td>
<td>4.7%</td>
<td>4.2%</td>
<td>3.3%</td>
<td>3.8%</td>
<td>4.4%</td>
<td>5.5%</td>
<td>3.3%</td>
<td>3.4%</td>
<td>5.1%</td>
</tr>
<tr>
<td>Lost CM Fees</td>
<td>$267,851</td>
<td>$202,267</td>
<td>$88,671</td>
<td>$165,237</td>
<td>$168,751</td>
<td>$204,881</td>
<td>$206,802</td>
<td>$196,221</td>
<td>$149,383</td>
<td>$453,630</td>
</tr>
<tr>
<td>Lost CM Reimbursed Salaries</td>
<td>0%</td>
<td>0%</td>
<td>150,000</td>
<td>150,000</td>
<td>150,000</td>
<td>150,000</td>
<td>150,000</td>
<td>150,000</td>
<td>150,000</td>
<td>150,000</td>
</tr>
<tr>
<td>Total CM Losses</td>
<td>$267,851</td>
<td>$202,267</td>
<td>$88,671</td>
<td>$165,237</td>
<td>$168,751</td>
<td>$204,881</td>
<td>$206,802</td>
<td>$196,221</td>
<td>$149,383</td>
<td>$453,630</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Contract Revenues Losses</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Growth Rate of Contract Revenues</td>
<td>-0.18</td>
<td>0.11</td>
<td>3.74</td>
<td>11.80</td>
<td>8.63</td>
<td>6.90</td>
<td>9.33</td>
<td>3.78</td>
<td>5.80</td>
</tr>
<tr>
<td>Overall Market Activity</td>
<td>$588,300,494</td>
<td>$405,339,488</td>
<td>$315,000,000</td>
<td>$314,436,360</td>
<td>$314,780,672</td>
<td>$326,569,198</td>
<td>$365,088,282</td>
<td>$396,581,474</td>
<td>$423,961,240</td>
</tr>
<tr>
<td>Lost Market Share</td>
<td>0.8%</td>
<td>3.8%</td>
<td>1.4%</td>
<td>3.2%</td>
<td>1.3%</td>
<td>1.8%</td>
<td>0.8%</td>
<td>1.3%</td>
<td>4.9%</td>
</tr>
<tr>
<td>Lost Contract Revenue</td>
<td>$4,734,308</td>
<td>$15,478,530</td>
<td>$4,527,632</td>
<td>$10,090,726</td>
<td>$4,123,024</td>
<td>$5,824,054</td>
<td>$2,792,902</td>
<td>$5,079,650</td>
<td>$20,941,185</td>
</tr>
<tr>
<td>incremental Profit Margin</td>
<td>4.2%</td>
<td>4.2%</td>
<td>3.9%</td>
<td>3.6%</td>
<td>4.0%</td>
<td>3.7%</td>
<td>4.7%</td>
<td>4.4%</td>
<td>5.0%</td>
</tr>
<tr>
<td>Total Lost Contract Profits</td>
<td>$266,605</td>
<td>$898,129</td>
<td>$326,948</td>
<td>$296,869</td>
<td>$392,585</td>
<td>$383,796</td>
<td>$208,736</td>
<td>$1,067,409</td>
<td>$598,362</td>
</tr>
</tbody>
</table>

| Increase in Liability Insurance Expense | $0 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 | $75,000 |

| Simulated Nominal Losses         | $465,390 | $880,385 | $880,040 | $746,780 | $657,732 | $645,485 | $643,977 | $1,436,790 | $1,540,901 | $590,166 | $366,785 |

**Important Note:**
Results shown are presented only to help convey the structure of the projection model, not the results. Because this analysis relies on Monte Carlo simulation, the projected results shown above will change every time the spreadsheet is recalculated (i.e., every time any key is struck). The actual results stemming from this model are presented below on the line styled as "model output." Monte Carlo input variables are shown on Schedule 22, detailed output results by percentile are presented on Schedule 12.

### Model Output
- **Model Output:**
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976

### Risk-Adjusted Discount Rate
- **Present Value Date:**
  - 10/10/10

### Cash Flow Date
- **Cash Flow Date:**
  - 12/31/10
  - 06/30/11
  - 06/30/12
  - 06/30/13
  - 06/30/14
  - 06/30/15
  - 06/30/16
  - 06/30/17
  - 06/30/18
  - 06/30/19
  - 06/30/20

### No. of Discount Periods
- **No. of Discount Periods:**
  - 0

### Present Value of Nominal Losses
- **Present Value of Nominal Losses:**
  - $857,976
  - $857,976
  - $857,976
  - $857,976

### Cumulative Present Value of Losses
- **Cumulative Present Value of Losses:**
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976
  - $857,976

### Economic Damages—Scenario 2

- **Schedule 13**

---

*Illustration*

- *Illustration Image*
Professional Qualifications
Keith A. Pinkerton, CFA, ASA

Education
Bachelor of Arts (Economics), University of South Florida (Tampa, Florida), 1991
Master of Business Administration (Finance), Baylor University (Waco, Texas), 1996

Professional Certifications
Accredited Senior Appraiser, Business Valuation discipline, the American Society of Appraisers, awarded 2003.

Professional Employment History
2005 – Present Director of Valuation Services, Hooper Cornell, PLLC, Boise, Idaho
2009 - 2009 Adjunct Professor of Finance, George Fox University, Boise Center
2000 – 2003 Valuation Manager, WP Valuation Services, Fort Worth, Texas
1999 – 2000 Manager, the Perryman Group, Waco, Texas

Memberships and Affiliations
- The CFA Institute (www.cfainstitute.org)
- The CFA Society of Idaho
- The American Society of Appraisers (www.appraisers.org)
- National Association for Business Economics (www.nabe.com)
- National Association of Forensic Economics (www.nafe.net)
- Treasure Valley Estate Planning Council
- Ludwig von Mises Institute for Austrian Economics (www.mises.org)
- Business Valuation Discussion Group (www.bvdg.org)

Articles, Presentations and Professional Activities
- Co-Author, Marketability & Lack of Control Discounts, Paper presented to the American Academy of Matrimonial Lawyers, March 2002
- Presenter, Helping a Business Survive a Down Cycle, Panel discussion for the Fort Worth Chapter of the Texas Society of CPAs, February 2003
- Speaker, Business Valuation Update: Hot Issues, Presented to the Institute of Management Accountants, East Tennessee State University, September 2003
- Speaker, Business Valuation Update: Hot Issues, Presentation to the Institute of Management Accountants, Knoxville Chapter, September 2003
- Speaker, Litigation Support & Professional Practice Valuation, Presentation to the Institute of Management Accountants, Knoxville Chapter, December 2003
- Speaker, SFAS No. 141 & 142, Business Combinations and Intangible Assets, Presentation to the Fort Worth Chapter of the Texas Society of CPAs, November, 2002
- Grader, 2002, 2003, and 2004 Chartered Financial Analyst Examinations, the CFA Institute, Charlottesville, VA.
- Member, Domestic Review Team, 2007 Chartered Financial Analyst Examination, CFA Institute, Charlottesville, VA.


Keith A. Phelan CA, ASA (cont.)
Keith A. Pinkerton, CFA, ASA (continued)

- **Co-Developer**, Company-Specific Risk Calculator, a commercial program for computing company-specific risk for publicly-traded benchmarks; available on www.bvmarketdata.com.


- **Co-Author**, Comparing the Butler-Pinkerton Model to Traditional Methods Under Four Daubert Criteria; Business Valuation Update, Volume 13, Number 11; November 2007.


- **Co-Author**, Company-Specific Risk: Believe it or Not - You Can Quantify it! Adjusting Entries, the Journal of the ISCPA, Issue 1, 2008.

- **Panelist**, Using the BPM™ Total Cost of Equity and Public Company Specific Risk Calculator™; an audio telephone conference hosted by NACVA and Business Valuation Resources, March 8, 2007.

- **Co-Author**, Butler Pinkerton Model™ Finds Another Application in SFAS 123R; Business Valuation Update, Volume 14, No.3, March, 2008.

- **Co-Author**, Total Cost of Equity of Company-Specific Risk—A Better Use for the BPM?; Business Valuation Update, Volume 14, No.4, April 2008.

- **Co-Author**, Why You Should Be Aware of the Impact of SSVS-1; Adjusting Entries, the Journal of the ISCPA, Issue II, 2008.

- **Speaker**, Pension Plans and Closely-Held Companies, Valuing Tricky Assets in Divorce; presented to the Idaho State Bar Association; Boise, Idaho; May 9, 2008.


- **Speaker**, The Butler Pinkerton Model: Empirical Support for Company Specific Risk; presented to the California Society of Certified Public Accountants—BVFLS Section, Los Angeles, CA; Aug 21, 2008.

- **Speaker**, Using the Butler Pinkerton Model in Valuation Reports; an Internet webinar hosted by the National Association of Certified Valuation Analysts; December 5, 2008.

- **Co-Author**, There's a New Beta in Town, and Its Name is Total Beta; Business Valuation Update, Volume 15, No,3, March 2009.


- **Co-Author**, A Total Repudiation of Mr. Kasper's Critique of the Butler Pinkerton Model, an online article disseminated through www.bvmarketdata.com, May 2009.

- **Author**, Response to Larry Kasper Regarding the Diversification Argument; The Value Examiner, January/February 2010


- **Speaker**, Cost of Capital, California Society of CPAs, May 2009

- **Speaker**, Cost of Capital, presented to the National Association of Certified Valuation Analysts, Boston, MA; May 17, 2009.

- **Speaker**, Getting the Most from Your Financial Expert in Personal Injury Litigation Matters, a CLE presentation to various Boise-area law firms, various dates, 2009.

- **Author**, The Search for Value, published in the quarterly newsletter of George Fox University, Fall, 2009.

- **Speaker**, Buy-Sell Disagreements and Solutions, presented to the Boise Estate Planning Council, November 2, 2009.


Keith A. Pinkerton, CFA, ASA (continued)

- **Author.** The Wonder Years: Integrating Your Practice into a Comprehensive Retirement Plan, Chiropractic Economics, Volume 56, Issue 6; April 20, 2010.
- **Author.** An Update on Proposed IRS' Appraiser Penalty Procedures; Adjusting Entries, the Journal of the ISCPA, Issue II, 2010.
- **Co-Author.** Give it to me Straight: Answers to Old Questions about Buy or Lease; Chiropractic Economics, Volume 56, Issue 7; May 12, 2010.
- **Author.** Sale-oblare Your Practice; Chiropractic Economics, Volume 56, Issue 10; June 25, 2010.
- **Author.** Financial Accounting and Managerial Accounting Compared, a paper to accompany the seminar Accounting 101 for Attorneys, presented August 12, 2010.
- **Author.** Financial Statement Basic Concepts, a paper to accompany the seminar Accounting 101 for Attorneys, presented August 12, 2010.
- **Instructor.** Accounting 101 for Attorneys, a CLE presentation given to area attorneys on August 12, 2010
- **Speaker.** Buy Sell Agreements: Road Map to Success or Recipe for Disaster, presented at the Idaho State Bar's Annual Advanced Estate Planning Seminar, September 2010.

**Expert Testimony**

- **Cause No. 99-20925-V** in the 303rd District Court of Dallas County; Dallas, Texas, Trial Testimony, Business Appraisal for Marital Dissolution; retained by Plaintiff(s).
- **Cause No. 296-50175-01** in the 296th District Court of Collin County; McKinney, Texas, Trial Testimony, Business Appraisal for Marital Dissolution; retained by Plaintiff(s).
- **Cause No. 150874-2** in the Chancery Court for Knox County, Knoxville, Tennessee, Trial Testimony, Quantification of Economic Damages—Dissenting Shareholder matter; retained by Plaintiff(s).
- **Cause No. 132673-3** in the Chancery Court for Knox County, Knoxville, Tennessee, Deposition Testimony, Quantification of damages associated with the purchase of an operating business; retained by Plaintiff(s).
- **Civil Action No. 05-CI-00333,** Bell Circuit Court, Commonwealth of Kentucky, Deposition Testimony, Business appraisal and quantification of economic damages for dissenting shareholder matter; retained by Defendant(s).
- **Civil Action No. 05-CI-00333,** Bell Circuit Court, Commonwealth of Kentucky, Trial Testimony, Business appraisal and quantification of economic damages for dissenting shareholder matter; retained by Defendant(s).
- **Civil Case No. CV-05-12324,** Canyon County District Court, State of Idaho, Deposition Testimony, Quantification of damages associated with bad faith claim; retained by Defendant(s).
- **Civil Case No. 1:06-CV-141-S-JL,** United States District Court, District of Idaho, Deposition Testimony, Quantification of damages associated with alleged trade-loading and breach of duty; retained by Defendant(s).
- **Civil Case No. CV-2005-493-C,** Valley County District Court, State of Idaho, Deposition Testimony, Quantification of damages associated with breach of contract; retained by Defendant(s).
- **Civil Case No. CV DA 0722658,** Ada County District Court, State of Idaho, Trial Testimony, Business appraisal for marital dissolution; retained by Defendant(s).
- **Civil Case No. CV 06-00433,** Ada County District Court, State of Idaho, Deposition Testimony, quantification of damages associated with defamation claim; retained by Plaintiff(s).
- **Civil Case No. CV-2008-1069-OC,** Bannock County District Court, State of Idaho, Deposition Testimony, quantification of damages associated with defamation and interference with prospective advantage.
- **Civil Case No. CV-PL-0718437,** Ada County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with wrongful death and personal injury; retained by Defendant(s).
- **Civil Case No. CV-2006-3323-PL,** Bannock County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with personal injury; retained by Defendant(s).
- **Civil Case No. CV-P1-0704871**, Ada County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with personal injury; retained by Defendant(s).

- **Appeal Nos. 09-A-1335 and 09-A-1336**, Idaho Board of Tax Appeals; Rebuttal Testimony, proper application of appraisal theory; retained by Defendant(s).

- **Civil Case No. CV-07-663**, Jefferson County District Court, State of Idaho, Trial Testimony, quantification of damages associated with bad faith claim; retained by Defendant(s).

- **Civil Case No. CV DR 2008-06033**, Ada County District Court, State of Idaho, Trial Testimony, Business appraisal for marital dissolution; retained by Plaintiff(s).

- **Civil Case No. CV QC 0902282**, Ada County District Court, State of Idaho, Deposition Testimony, analysis of lost profits associated with breach of contract and misappropriation of trade secrets; retained by Defendant(s).

- **Civil Case No. CV QC 0902282**, Ada County District Court, State of Idaho, Trial Testimony, analysis of lost profits associated with breach of contract and misappropriation of trade secrets; retained by Defendant(s).

**Professional Billing Rate**

$285 per hour
Defendant Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP, hereby provides notice that it is vacating the deposition of Laura Knothe scheduled for November 5, 2010.
DATED: November 4, 2010

COSHO HUMPHREY, LLP

By: THOMAS G. WALKER
Attorneys for Defendants, Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 4th day of November, 2010, a true and correct copy of the within and foregoing document was served upon the following in the manner indicated:

Kim J. Trout, Esq.
Daniel Loras Glynn
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail
Hand Delivery
Overnight Courier
Facsimile:
E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

PLAINTIFF’S MOTION FOR SANCTIONS

The City of Meridian, ("City"), by and through its attorney of record, Kim J. Trout of the firm TROUT • JONES • GLEDHILL • FUHRMAN • GOURLEY, P.A., moves this Court pursuant to Rules 1 and 26 of the Idaho Rules of Civil Procedure for sanctions against Petra, Incorporated finding and concluding the following:

1. Petra, Incorporated ("Petra") violated Idaho Rule of Civil Procedure 26(b)(4)(A)(iii) by contacting expert witnesses of an opposing party without first obtaining permission of the opposing party or the Court.
2. Petra by direct and/or indirect force and threats willfully intimidated, and attempted to influence, impede, deter, threaten, and obstruct the City's expert witness from testifying freely, fully and truthfully in the civil proceeding, in violation of Idaho Code §18-2604(1).

Due to these facts, the City requests this Court impose sanctions as follows:

1. That the defenses asserted by Petra in this matter be hereby stricken;
2. That the Court vacate the trial in order to allow the City to replace its expert witnesses;
3. That in addition the Court allow monetary costs for experts which had been previously employed by the City to testify in this matter;
4. For attorneys fees and cost for preparing new experts for trial;
5. For attorneys fees and costs for bringing this Motion; and
6. Imposing civil penalties against Petra.

This Motion is based on the pleadings, records and files in this case. The City's Memorandum in Support of its Motion For Sanctions filed and served contemporaneously herewith, together with the Affidavit of Kim J. Trout, Leo Geis, and Tim Petsche filed contemporaneously herewith.

Oral Argument is requested on this Motion.

DATED this 5th day of November, 2010.

TROUT & JONES & GLEDHILL & FUHRMAN & GOURLEY, P.A.

By: [Signature]
Kim J. Trout
Attorneys for Plaintiff
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered ✗
U.S. Mail
Fax
Fed. Express
Email

Kim J. Trout

PLAINTIFF'S MOTION FOR SANCTIONS - 3
KIM J. TROUT, ISB #2468
DANIEL LORAS GLYNN, ISB#5113
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, ID 83701
Telephone: (208) 331-1170
Facsimile: (208) 331-1529
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS

COMES NOW, THE Plaintiff/Counter-defendant, The City of Meridian, ("City"), by and through its attorney of record, Kim J. Trout of the firm TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., and hereby submits the following Memorandum in support of the City's Motion for Sanctions. This Memorandum is supported by the Affidavit of Kim J. Trout filed concurrently herewith, the undisputed facts, as well as the papers and pleadings filed in this matter. In this action the City seeks relief from the Court, in the form of sanctions.
I. INTRODUCTION

This matter concerns a construction project that spanned two and a half years. During that construction there were approximately forty prime-contracts for various components of the construction, and currently there are six major systems of construction requiring expert opinion analysis. Moreover, due to the magnitude and complexity of the construction, a substantial amount of documentation and numerous depositions had to be necessarily reviewed by the experts employed by the City in order to properly prepare this matter for trial, and to defend itself against Defendant's Counterclaims. For example, during the voluminous discovery process, the City alone produced more than 116,000 pages, which consists of more than 33,000 documents. Likewise, Petra produced approximately 15,000 documents consisting of approximately 55,000 pages of documents. After all this effort and expense on the City's behalf, and with trial less than one (1) month away, it has come to the City's attention that Petra has contacted several of the City's expert witnesses, and willfully through direct and/or indirect threats attempted to intimidate, influence, impede, deter, threaten, and obstruct the City's expert witnesses from testifying freely, fully and truthfully in the civil proceeding presently before this honorable Court.

II. ARGUMENT

With regard to witness intimidation, Idaho Code §18-2604(1) states “any person who, by direct or indirect force or by any threats to a person or property or by any manner willfully intimidates, influences, impedes, deters, threatens, harasses, obstructs or prevents a witness ... or any person who may be called as a witness or any person he believes may be called as a witness in a civil proceeding from testifying freely, fully and truthfully in the civil proceeding is guilty of a misdemeanor.” The penalty for violating Idaho Code §18-2604(1) is a maximum of six months in jail, a $300 fine, or both. See Idaho Code §18-113. Moreover, Idaho Rule of Civil Procedure 26(b)(4)(A)(iii) states "no party shall contact an expert witness of an opposing party without first obtaining permission of an opposing party"
or the court.” Further, Idaho Rule of Civil Procedure Rule 1 mandates that the rules of civil procedure “be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding.” (Emphasis added.)

In State of Idaho v. Rogers, 143 Idaho 320, 144 P.3d 25 (2006) the Supreme Court held that a party who violates a court order or rule is susceptible to sanctions. See 143 Idaho at 322, 144 P.3d at 27. For the purpose of imposing sanctions, a party acts in bad faith when it willfully conducts itself improperly or acts with an improper purpose. Id. (citing Fink v. Gomez, 239 F.3d 989, 992 (Ninth Cir. 2001)). Moreover, the Idaho Supreme Court has recognized “that trial courts have an ‘inherent authority to assess sanctions for bad faith conduct against all parties appearing before it.’” Id. (citing In re SRBA, Case No. 39576, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995) (citing Chambers v. Nasco, Inc., 501 U.S. 32, 50, 111 S.Ct. 2123, 2136, 115 L.Ed. 2d 27, 48 (1991)).

Clearly, Petra willfully conducted itself improperly and acted with an improper purpose when it contacted several of the City's expert witnesses, and through its direct and/or indirect threats intimidated, influenced, impeded, deterred, threatened, and obstructed the City’s expert witness from testifying freely, fully and truthfully in the civil proceeding presently before this honorable Court. As discussed above, the City has had to expend considerable time, effort and resources in order prepare and present expert testimony, not only to defend itself against Defendant’s Counterclaims, but to present its case to this Court in order to get relief from Petra wrongdoing. Due to these facts, sanctions against Petra are not only justified, they are warranted. The City respectfully requests that this Court impose all of the following sanctions against Petra for it egregious conduct at this late date:

1. That the defenses asserted by Petra in this matter be hereby stricken;
2. That the Court vacate the trial in order to allow the City to replace its expert witnesses;
3. That in addition the Court allow monetary costs for experts which had been previously employed by the City to testify in this matter;
4. For attorneys fees and cost for preparing new experts for trial;

5. For attorneys fees and costs for bringing this Motion; and

6. Imposing civil penalties against Petra.

CONCLUSION

For the reasons stated, the City respectfully requests that this Court grant its Motion for Sanctions.

RESPECTFULLY submitted this 5th day of November, 2010.

TROUT • JONES • GLEDHILL • FUHRMAN • GOURLEY, P.A.

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Kim J. Trout

By:  

Kim J. Trout
Attorneys for Plaintiff

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,                             Case No. CV OC 09-7257
                         Plaintiff,

v.                                                              AFFIDAVIT OF LEO GEIS IN SUPPORT

PETRA, INCORPORATED, an Idaho Corporation,                           OF PLAINTIFF’S MOTION FOR SANCTIONS
                          Defendant.

STATE OF IDAHO   )
                         ) : ss
County of ADA   )

LEO GEIS, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

2. I am employed by Idaho Airships, Inc. and Votum Thermography. I have been hired by law firm of TROUT JONES GLEDHILL FUHRMAN GOURLEY, P.A., as an expert witness testifying on behalf of the Plaintiff in this matter, and I make the following statements based upon my own personal knowledge.
3. On or about October 21, 2010, Jerry Frank, of Petra, Incorporated contacted me via telephone. During the conversation, his demeanor was icy. It was my perception that Mr. Frank held the belief that since I was testifying on behalf of the City, that I was coming after him.

4. While he expressed no direct threat against me he did quote me a verse from Proverbs 25:9 which states, “Debate thy cause with thy neighbor himself, and discover not the secret to another.”

5. Mr. Frank’s point was that since we were both Christians, we should go to church leadership with our difficulties and avoid the public eye. I felt that this was a very skewed interpretation of this passage.

6. It would be unreasonable for me to say that Mr. Frank was not trying to influence me, however, I am uncertain what he wanted me to do. A reasonable man would conclude that he wanted me to do something.

7. I felt that this contact was grossly inappropriate. I tried to explain to Mr. Frank that I give testimony on both sides of issues, and that I am unbiased. As proof of this I pointed out that the pictures I had taken are purely objective. However, I could tell that these arguments got no traction with him.

8. It was my impression from Mr. Frank’s interpretation of this Proverb that what he was trying to say to me was as a Christian I should not testify in a manner that would be pejorative against another Christian.

FURTHER YOUR AFFIANT SAYETH NAUGHT.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Hand Delivered ❌
U.S. Mail ❌
Fax ❌
Email ❌

Kim J. Trout

Subscribed and sworn to before me this 5th day of November, 2010.

[Seal]

Serrano
Notary Public, State of Idaho
Residing at: Boise, ID
My commission expires: 01/20/2016
TIM PETSCHE, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

2. I am employed by TEP, Inc. I have been hired by law firm of TROUT • JONES • GLEDHILL • FUHRMAN • GOURLEY, P.A., as an expert witness testifying on behalf of the Plaintiff in this matter, and I make the following statements based upon my own personal knowledge.
3. On or about November 2, 2010, Brad Bird, contacted me via telephone. The conversation concerned the work that he had performed on the Meridian City Hall which is the focus of this case. During the conversation, he indicated to me that he had become aware that I had been hired as an expert witness testifying on behalf of the Plaintiff in this matter. While he didn't seem to know specifically how I was going to testify, he made it very clear that it was his opinion that the City of Meridian got exactly what they paid for.

4. It was my impression that part of Mr. Bird's motive in contacting me was to discover additional information regarding my investigation and findings.

5. While he expressed no direct threat against me, I did feel intimidated. Furthermore, I felt that this contact was grossly inappropriate.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

TIM PETSCHER

Subscribed and sworn to before me this 5th day of November, 2010.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

AFFIDAVIT OF TIM PETSCHER IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS - 2

006789
AFFIDAVIT OF TIM PETSCHÉ IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS - 3
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

STATE OF IDAHO)

County of ADA)

KIM J. TROUT, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

2. I am a member of the law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., and represent the Plaintiff in this matter, and I make the following statements based upon my own personal knowledge.
3. Jason Neidigh is the general manager of DeBest Plumbing, Incorporated. Mr. Neidigh has been retained by this firm as an expert witness in the above-entitled matter.

4. Milford Terrell is the founder and president of DeBest Plumbing, Incorporated.

5. In several conversations that I have had with Jason Neidigh it has been disclosed to me that Jerry Frank of Petra, Inc. contacted Milford Terrell and indicated to him that if DeBest Plumbing were to proceed to provide testimony against Petra, Inc. in this matter, that it would negatively impact any future business relationship between DeBest Plumbing and Petra, Inc.

6. Due to this fact Mr. Neidigh has been placed in a very negative situation by Petra, Inc.

7. Based upon the information I have received, Petra willfully conducted itself improperly and acted with an improper purpose when it contacted this expert witness' employer, and through its direct and/or indirect threats has attempted to intimidate, influence, threaten, and obstruct the City's expert witness from testifying freely, fully and truthfully in the matter presently before this Court.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

KIM J. TROUT

Subscribed and sworn to before me this 4th day of November, 2010.

Notary Public, State of Idaho
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Email

Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE 
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho 
Municipal Corporation, 
Plaintiff, 
v. 
PETRA, INCORPORATED, an Idaho 
Corporation, 
Defendant.

COMES NOW Plaintiff, the City of Meridian ("City"), by and through its attorney of 
record, Kim J. Trout of the law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., and hereby moves this Court, pursuant to Rule 6(b) of the Idaho Rules of Civil 
Procedure, for an order shortening the time for notice of hearing on Plaintiff’s Motion for Sanctions.

DATED this 5th day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By: ________________

KIM J. TROUT
Attorneys for Plaintiff
CERTIFICATE OF SERVICE

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Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN,
an Idaho Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED,
an Idaho Corporation,

Defendant.

Case No. CVOC 09 07257

ORDER DENYING
PLAINTIFF’S MOTION
FOR PERMISSIVE APPEAL

This matter came before the Court on Plaintiff Meridian’s Motion for Permissive Appeal pursuant to Idaho Appellate Rule 12. The Court heard oral argument on this motion on Friday, November 5, 2010. Kim Trout appeared for Plaintiff Meridian. Thomas Walker appeared for Defendant Petra. The Court took the motion under advisement.

Generally, an appeal under Idaho Appellate Rule 12 will be permitted only when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and when an immediate appeal may materially advance the orderly resolution of the litigation. *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 149, 982 P.2d 309, 311 (1990). In “accepting or rejecting an appeal by certification under I.A.R. 12, the Court should consider such factors” as: 1) whether there are substantial legal issues of great public interest or legal questions of

ORDER DENYING PLAINTIFF’S MOTION FOR PERMISSIVE APPEAL - Page 1
first impression involved; 2) the impact of an immediate appeal upon the parties; 3) the effect of the delay of the proceedings in the district court pending the appeal; 4) the likelihood or possibility of a second appeal after judgment is finally entered by the district court; and 5) the case workload of the appellate courts. Budell v. Todd, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983). No single factor controls the Court's decision, but Rule 12 was intended to create an appeal in the exceptional case and it was not intended to broaden the appeals which may be taken as a matter of right under Rule 11. Id.

Upon consideration of the rule and the factors instructed by the caselaw, the Court DENIES plaintiff's motion for permissive appeal pursuant to I.A.R. 12.

IT IS SO ORDERED.

Dated this 5 day of November, 2010.

Ronald L. Wilner
DISTRICT JUDGE
CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 0 day of November, 2010, I caused a true and correct copy of the foregoing ORDER DENYING PLAINTIFF'S MOTION FOR PERMISSIVE APPEAL to be served by the method indicated below, and addressed to the following:

Kim J. Trout
TROUT JONES GLEHDHILL FUHRMAN GOURLEY, PA
225 N. 9th St., Ste 820
PO Box 1097
Boise, ID 83701
Fax: (208) 331-1529

Thomas G. Walker
COSHO HUMPHREY, LLP
800 Park Blvd, Ste 790
PO Box 9518
Boise, ID 83707
Fax: (208) 338-3290

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By
Deputy Clerk
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

NOTICE OF HEARING

TO: THE ABOVE NAMED DEFENDANT AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE, that the hearing on Plaintiff’s Motion to Dismiss Defendant’s Claim for Lost Profits and/or Business Devastation Pursuant to the Idaho Tort Claims Act and Plaintiff’s Motion for Sanctions will be heard on Monday November 22, 2010 at the hour of 1:30 p.m. before the Honorable Ronald J. Wilper. The hearing is scheduled at the Ada County Courthouse located at 200 W. Front St., Boise, ID, 83702.
DATED this 8th day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By: ________________

Kim J. Trout
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of November, 2010, a true and correct copy of
the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
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Boise, ID 83707-9518
Fax: (208) 639-5609

Hand Delivered
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Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, AN IDAHO MUNICIPAL CORPORATION,

Plaintiff,

v.

PETRA, INCORPORATED, AN IDAHO CORPORATION,

Defendant.

Case No. CV-OC 2009-07257

MEMORANDUM IN SUPPORT OF PETRA’S RENEWED MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE CITY’S CLAIMED DAMAGES

The above-named Defendant/Counterclaimant, Petra, Incorporated (“Petra”), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP submits this memorandum in support of its Renewed Motion in Limine to Exclude Testimony and Documents regarding the Plaintiff City of Meridian’s (“City”) claimed damages.
1. **Introduction**

During Petra’s depositions of the City’s primary experts, there have been at multiple instances of improper coaching or unwarranted objections by counsel for the City, particularly Mr. Trout. The City’s obstructionist tactics at deposition have hindered Petra’s ability to depose the City’s experts and discover the basis for the damage claims. The tactics, coupled with the late, incomplete, and deficient disclosures by the City on its damages, have prejudiced Petra’s ability to defend the case. Therefore, Petra requests an order excluding the City from offering evidence of its damages at trial, pursuant to I.R.C.P. 30(d)(1) and 37(b)(2)(B).

2. **Background**

The City’s continued obstructionist tactics in this case merit sanctions. The City filed this lawsuit after brushing aside Petra’s attempts to mediate the claims pursuant the parties’ contract. The next attempt at mediation was short-circuited by the City’s claim it needed a full-blown discovery effort, exactly the result that the mediation provision was intended to avoid. The City has twice successfully vacated the trial and is now seeking a third order vacating the trial. Nearly 17 months after filing this lawsuit, the City finally made a feeble effort to disclose a basis for its claimed damages. This followed Petra’s motion for a Court order excluding evidence of City’s damages at trial. After reviewing the hodgepodge of documents the City claimed supported its damage claims, Petra sought to depose the City’s experts and 30(b)(6) designees to determine whether there was any real basis for the City’s claims. Petra’s depositions were met with obstructionist tactics, continuing a pattern that developed at the beginning of this case and has now reached the point of causing prejudice.
Petra is entitled to know the basis for the City's claimed damages. Now, just 22 days before trial, the City continues its gamesmanship. As the Court knows, Petra has repeatedly attempted to ascertain the basis for the City's claim that it suffered damages because of what Petra did or failed to do. On September 27, 2010, the Court heard Petra's Motion in Limine to Exclude Evidence of the City's Claimed Damages. Although the Court did not grant Petra's Motion, the Court ordered the parties to meet and confer about the adequacy of the City's disclosures on damages not later than 30 days before trial. At the October 18, 2010 mediation, the City provided a seemingly unrelated assortment of documents purporting to be supplementation of the City's responses to Petra's discovery requests regarding damages. Petra then took the deposition of Theodore W. Baird, Jr., the person the City designated as the most knowledgeable person regarding the City's claims. Petra followed with the deposition of the City's expert Steven J. Amento, the person the City designated as the most knowledgeable person on the subject of the City's claimed damages. After these depositions, and considering the inadequate disclosures of October 18, 2010, Petra must again ask the Court to exclude evidence of the City's claimed damages at trial.

3. Law and Argument

The collection of documents the City offers as a response to Petra's discovery requests is inadequate, particularly with regard to the claimed damage amounts. As discussed in Petra's motion regarding the City's experts, filed contemporaneously, the City has provided various

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1 See Affidavit of Thomas G. Walker filed Nov. 9, 2010 (Walker Nov. 9 Affidavit), at Exh. 3, pp. 53-54.
2 See Walker Nov. 9 Affidavit at Exh. 5, 7.
3 See Walker Nov. 9 Affidavit at Exh. 6, 8.
None of these amounts have any foundation. All of them are the product of guesswork and speculation. Under the discovery rules, Petra is entitled to know the facts that the City claims support these amounts in order to have the opportunity to meet and rebut the facts at trial.

Further, Petra has conducted a Rule 30(b)(6) deposition of the person designated by the City as the “most knowledgeable regarding the damages” allegedly suffered by the City. Likewise, Petra has conducted the 30(b)(6) deposition of the person designated as most knowledgeable of the allegations set forth in paragraphs 4 through 21 of the City’s Complaint. Mr. Trout’s conduct during these depositions can only be described as obstructionist. And the City’s 30(b)(6) deponents failed to support the City’s damage claims and often failed to explain any of this City’s recent damage disclosures.

3.1 The City has provided no basis for its damage claims, which are speculative, conclusory, and lack reliability and should be excluded under I.R.E. 702 and 703, and the Court’s orders

Not only has the City failed to provide any testimony addressing how Petra’s performance caused any of its claimed damages, all the damage amounts lack foundation. Each is the product of speculation and none were arrived at through any reliable process. It is legally insufficient to simply provide an amount, even if it is provided by a construction professional. Without a foundation as to how the expert arrived at the figure, the damage amount should be excluded at trial. See J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford, 146 Idaho 311, 315, 193 P.3d 858, 862 (2008).

4 See Walker Nov. 9 Affidavit at Exh. 1.
A review of the damage disclosures by the City demonstrates that all the damage amounts lack support or explanation. Consequently, Petra cannot determine how the City calculated any of them. There is no itemization or even a general explanation. An expert cannot simply throw out an amount and sit down. At this point, because an explanation and foundation should have been disclosed in advance of trial under the Court’s orders and Rule 26, the damage amounts themselves must be excluded. Without knowing how the figures were arrived at, it is impossible for Petra to assess and rebut the damage claims. This type of prejudice is precisely what the rules of civil procedure and evidence are designed to prevent. See *Clark v. Klein*, 137 Idaho 154, 156-59, 45 P.3d 810, 812-15 (2002); *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89-91, 813 P.2d 897, 899-902 (1991). Petra is not required to bend over backwards to extract basic information regarding how the City was allegedly damaged by anything Petra did or failed to do. Discovery rules are “intended to insure ‘proper litigation’ by making the ‘trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.’” *Scott and Fetzer Co. v. Dile*, 643 F.2d 670, 674 (9th Cir. 1981) (quoting *Goldman v. Checker Taxi Co.*, 325 F.2d 853, 855 (7th Cir. 1963)) (citations omitted).

The City’s failure to disclose how Petra caused any damage to the City or how the City has derived their damage ‘estimates’ merits sanctions and Petra again requests that the Court exclude evidence relating to the City’s damages at trial.

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5 Walker Affidavit at Exh. 1.
6 The Court granted Petra’s Motion to Strike as impermissibly conclusory this paragraph in the Second Affidavit of Todd Weltner dated July 6, 2010: “With further analysis and discovery, I will be able to obtain actual bids for the repairs necessary for the defects noted above, but based upon my education, training, and experience, I would conservatively estimate the costs of repairs/replacements to be in excess of $1 million.”
Rule 26 provides:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person’s testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

I.R.C.P. 26(e)(1) and (2). Rule 26 also outlines a permissible sanction for the trial court to impose on a party for non-compliance with the Rule:

If a party fails to seasonably supplement the responses as required in this Rule 26(e), the trial court may exclude the testimony of witnesses or the admission of evidence not disclosed by a required supplementation of the responses of the party.

I.R.C.P. 26(e)(4). The Court is authorized to exclude evidence “as a sanction for a party’s failure to seasonably supplement responses to discovery requests.” Clark v. Raty, 137 Idaho 343, 347, 48 P.3d 672, 676 (Ct. App. 2002). A decision to exclude evidence for non-compliance with Rule 26 is within the discretion of the Court. Id.

Furthermore, the Court ordered the City and Petra to meet and confer on the City’s damage disclosures no less than 30 days before trial. 7 This occurred at the parties’ mediation on October 18, 2010. 8 The gross deficiency in the City’s disclosures amounts to a violation of the Court’s order that the City submit an adequate disclosure of its damage claims no later than 30

7 Walker Nov. Affidavit, at Exh. 3, pp. 53-54.
8 Walker Nov. 9 Affidavit at ¶ 4.
days before trial. The Idaho Supreme Court has provided the governing standard for compliance with pretrial orders as follows:

A trial court has authority to sanction parties for non-compliance with pretrial orders, and sanctions may include those enumerated in I.R.C.P. 37(b)(2)(B), (C), and (D) for discovery violations. I.R.C.P. 16(1). The imposition of such sanctions is committed to the discretion of the trial court, and we will not overturn such a decision absent a manifest abuse of that discretion. S. Idaho Prod. Credit Ass’n v. Astorquia, 113 Idaho 526, 528, 746 P.2d 985, 987 (1987).


The Court would be well within its discretion to exclude evidence of the City’s alleged damages at trial. First, the City stonewalled Petra on the issue of damage for over 16 months, forcing Petra to file a motion to exclude with the Court. Then, the City disclosed a conglomeration of receipts, drawings, contract provisions, and baseless expert opinion – hundreds of documents and photos – just prior to the parties’ mediation session. 9 Then, the City’s 30(b)(6) designees, with the help of obstructionist tactics employed by the City’s counsel, ensured that Petra would not be able to actually discover the basis for the City’s damage claims. The damage amounts remain just that – amounts. Petra cannot determine how they were derived based upon the information provided by the City. Nor does Petra know how the City believes anything Petra did or failed to do caused the alleged damages.10 None of the City’s witnesses address causation, an essential element of the City’s case. “The purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering.” *Edmunds v. Kraner*, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006).

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9 Walker Affidavit Nov. 9, at ¶ 3, Exh. 1.
10 See Petra’s companion motion regarding the City’s expert disclosures for a more detailed analysis of the City’s damage claims.
The City’s “hide the ball” tactics run contrary to the purpose of the discovery rules and violate Rule 26. Petra has been prejudiced by the City’s failure to disclose the basis of its damage claims. Petra has been unable to adequately prepare for a trial that is, as of the date of this memorandum, just 22 days away. The City’s failure to disclose any meaningful, material or relevant evidence regarding its damages has prejudiced Petra’s ability to analyze and meet the City’s damage claims.

3.2 Counsel for the City employed obstructionist tactics at the 30(b)(6) depositions regarding damages and the 30(b)(6) designees were largely non-responsive.

During Petra’s depositions of the City’s primary experts, there have been at multiple instances of improper coaching or unwarranted objections by counsel for the City, particularly Mr. Trout. At the 30(b)(6) deposition of Mr. Amento, Mr. Trout, counsel for the City, made at least 41 objections during the approximate hour and a half that the deposition took. At the 30(b)(6) deposition of Mr. Baird, Mr. Trout made at least 47 objections during that two-hour deposition. During Mr. Amento’s prior deposition, Mr. Trout made 76 objections.\(^{11}\) In the deposition of Mr. Wetherholt, Mr. Trout made 37 objections.\(^{12}\) This is just a sampling. The City’s obstructionist tactics during depositions have hindered Petra’s ability to depose the City’s witnesses and discover the basis for the damage claims.

In many of the key depositions in this case, Mr. Trout has brazenly coached the City’s witnesses, impairing Petra’s efforts to obtain crucial information about the City’s case. The testimony of a witness in a deposition is governed by the Idaho Rules of Civil Procedure and

\(^{11}\) See Affidavit of Ginny Sam dated Nov. 9, 2010, at __.  
\(^{12}\) See Affidavit of Ginny Sam dated Nov. 9, 2010, at __.
related judicial precedent. As a general rule, “examination or cross-examination of witnesses may proceed as permitted at the trial.” I.R.C.P. 30(c). During the proceedings, counsel for any party may make objections; however, “[a]ny objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner.” I.R.C.P. 30(d)(1) (emphasis added). “Conduct of counsel or other persons during the deposition shall not impede, delay or frustrate the fair examination of the deponent.” Id. The Court may sanction a party if it finds an “impediment, delay, or other conduct has frustrated the fair examination of the deponent.” Rule 30(d)(1) incorporates by reference the sanctions listed in Rule 37(b), among which is “prohibiting [a] party from introducing designated matters in evidence” I.R.C.P. 37(b)(2)(B).

The U.S. Supreme Court has consistently upheld the broad nature of F.R.C.P. 26, the federal analog to Idaho’s Rule, observing:

The key phrase in this [Rule 26] definition - “relevant to the subject matter involved in the pending action” - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

witnesses were designed to promote fairness and candor.” Radmer v. Ford Motor Co., 120 Idaho 86, 89, 813 P.2d 897, 900 (2006). “Effective cross-examination and rebuttal of expert witnesses requires advanced preparation and knowledge of that expert’s testimony.” Id.

One much-cited federal case noted:

One of the purposes of the discovery rules in general, and the deposition rules in particular, is to **elicit the facts** of a case before trial. Another purpose is to **even the playing field** somewhat by allowing all parties access to the same information, thereby tending to **prevent trial by surprise**. Depositions serve another purpose as well: the memorialization, the **freezing**, of a witness’s testimony at an early stage of the proceedings, before that witness’s recollection of the events at issue either has faded or has been altered by intervening events, other discovery, or the helpful suggestions of lawyers.


The Utah Supreme Court has indicated that candid responses to discovery questions are critical in litigation and help accomplish the underlying purpose of broad discovery, which is to elicit the relevant facts of the case before trial. *Ellis v. Gilbert*, 429 P.2d 39, 40 (Utah 1967).

The *Ellis* court put it this way:

> We are not unaware of the arguments against disclosure, but in weighing them against the various considerations hereinabove discussed in favor of disclosure we have concluded that the ruling of the trial court is correct in **unmasking the truth**, at least to the attorneys and to the court, **so that the proceedings can be carried on with candor and honesty and without cunning and deception**. This serves the desired objective of encouraging informed and enlightened procedure in accordance with the hereinabove stated purpose of our rules, “to secure the just, speedy, and inexpensive determination of every action."

*Id.* at 42 (emphasis added).

I.R.C.P. 30(d)(1) embraces the philosophy that abusive deposition conduct should not be allowed to hinder the truth-finding process. It reads:
Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Conduct of counsel or other persons during the deposition shall not impede, delay or frustrate the fair examination of the deponent. If the court finds an impediment, delay or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible appropriate sanctions, including the reasonable costs and attorney's fees incurred by parties as a result thereof, and those listed in Rule 37(b).

I.R.C.P. 30(d)(1) (emphasis added). The Rule proscribes improper deposition objections or conduct that “impedes or delays the examination.” I.R.C.P. 30(d)(2). Many federal and state courts have recognized and prohibited abusive deposition tactics. These courts have recognized the true function of depositions as a discovery conversation between the deposing attorney and the witness. The Hall court stated:

The underlying purpose of a deposition is to find out what a witness saw, heard, or did – what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness’s own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answer. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness’s words to mold a legally convenient record. . . . Rather, a lawyer must accept the facts as they develop.

Hall, 150 F.R.D. at 528 (emphasis added). The purpose of the deposition is to discover information that will assist both sides to “obtain the fullest possible knowledge of the issues and facts before trial.” Hickman v. Taylor, 329 U.S. 495, 501 (1947). Coaching and making numerous frivolous objections necessarily impede this process.

One commentator has defined “coaching” as follows:

“Coaching” encompasses many different forms of behavior at a deposition, including improper objections, improper instructions, and repeated off-the-
record conferences with the deponent . . . . The "coach," of course, is the defending lawyer who subtly – or not so subtly – attempts to manipulate the deponent's answers.

Jeffrey S. White & Eve T. Saltman, Problem Counsel, Problem Witnesses, in EFFECTIVE DEPOSITIONS 455, 456 (Henry L. Hecht, ed., American Bar Association, 1997) (emphasis added). The Advisory Committee notes on the 1993 amendments to Federal Rule 30 recognize that coaching frustrates the quest for truth:

[Rule 30(d)(1)] provides that any objections during a deposition must be made concisely and in a nonargumentative and nonsuggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond.

Fed. R. Civ. P. 30 Advisory Committee's Notes. Other courts have strongly condemned coaching. See Eggleston v. Chicago Journeymen Plumbers Local Union No. 130, 657 F.2d 890, 901-02 (7th Cir. 1981) (stating that a broader standard of relevancy governs depositions and that frivolous objections may be out of order); Damaj v. Farmers Insurance Co., 164 F.R.D. 559, 561 (N.D. Okla. 1995) (objections should be limited to only those that must be raised at a deposition, that assert a privilege, that are necessary to enforce a previous ruling as to scope, or that are necessary for a Rule 30(d) motion).

Following are just some of the egregious examples of how counsel's frivolous objections alerted the witness as to when he should clam up or be evasive. 13 There are more examples highlighted in blue in the deposition transcript itself:

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13 Mr. Trout's objections in this case amount to saying to the witness, "You don't know. Tell him you don't know and clam up!" In any case, no court would allow such impromptu guidance from counsel at trial and it should not be allowed in the deposition.
After counsel for Petra showed Mr. Baird Master Project Schedules excerpted from Petra's monthly reports, which were produced by the City, Mr. Trout states:

I'm going to object to the form of the question and the questions which have preceded this related to these documents. The representation, according to the Counsel, was that these were the monthly reports. The documents are incomplete and not consecutively Bates numbered, so these documents have been created in some fashion by the defendant for purposes of creating a false impression. 14

One common objection by Mr. Trout came after counsel for Petra asked: “What facts does the City rely on for the statement that Petra failed to obtain any prior approval for Change Order No. 2?” Mr. Trout objects, even though this type of inquiry was why the 30(b)(6) deposition was noticed up in the first place:

Object to the form of the question to the extent it may call for any form of legal conclusion. You can answer. 15

Another common objection by Mr. Trout came after counsel for Petra read an email from Keith Watts, and then asked for Mr. Baird’s understanding of the exchange. This example shows how the witness, after hearing Mr. Trout’s objection, simply parrots it back:

Q. Do you understand what Mr. Watts is referring to in that statement?

MR. TROUT: Object to the form of the question. Calls for speculation. May call for some kind of legal conclusion. It is also vague and ambiguous.

THE WITNESS: Yeah, I'd only be speculating what he's talking about. 16

After one question by counsel for Petra, Mr. Trout answers the question:

An error by who; Petra? 17

15 Id. at 14:2-5.
16 Id. at 24:13-19.
Another example of Mr. Trout's violation of Rule 30(d)(1) and his abusive discovery tactics occurs when he attempts to control what can be asked at this deposition.

**MR. TROUT:** Object to the form of the question. It's outside the scope of this witness's 30(b)(6) designation. You've already received the expert reports in this case. You've already received and had an opportunity to depose most, if not all of those experts, Counsel. That's not part of this 30(b)(6) deposition, and he doesn't have to respond to you. This is 30(b)(6) with respect to the position that he stated, and that's all. So you don't get to inquire beyond that. 18

Here Mr. Trout takes over the role of the deponent and testifies himself as to the City's claims, a gross violation of the rules:

**MR. TROUT:** With all due respect, Counsel, the question has been asked and answered. You've been referred to the expert witness reports and all of the information already provided to your client in this case regarding exactly how the building fails to meet the plan and specification, and the construction under Petra's watch failed to meet the plans and specifications, and Petra's precise responsibility to conduct daily inspection to determine whether or not the work met plan and specification, and best construction practices according to the Construction Management Plan prepared by Petra -- 19

Here again Mr. Trout continues:

**MR. TROUT:** By the way I'm going to object to any questions regarding the proposed first amended complaint. Until the Court grants us leave to file it, I don't think it's appropriate for Counsel to inquire with respect to the first amended complaint. I'll allow questions to be asked, but I want a standing objection to any questions related to it. 20

...  
**MR. TROUT:** I'm going to object and instruct the witness not to answer that question. He is here to respond pursuant to the 30(b)(6) notice and not

17 *Id.* at 11:7.
18 *Id.* at 37:10-19.
19 *Id.* at 39:11-22.
20 *Id.* at 42:20-43:1.
to make any quote/unquote new deals or acceptable arrangements with counsel for the defendant regarding this matter. My objection stands to any questions regarding to the first amended complaint or proposed first amended complaint until such time as the Court allows it, or, Counsel, you are willing to stipulate to its filing.21

The foregoing is wrongful deposition conduct. "It is not the prerogative of counsel, but of the court to rule on objections. Indeed, if counsel were to rule on the propriety questions, oral examination would be quickly reduced to an exasperating cycle of answerless inquiries and court orders." Kelvey v. Coughlin, 625 A.2d 775, 776 (R.I. 1993) (quoting Shapiro v. Freeman, 38 F.R.D. 308, 311 (S.D.N.Y.1965)). It is not the role of the attorney defending the deposition to make rulings on relevancy, or other grounds of admissibility. Rule 32(d)(3)(A) does not allow counsel to object on relevancy grounds, much less order a witness not to answer. See Int’l Union of Elec., Radio & Machine Workers v. Westinghouse Electric Corp., 91 F.R.D. 277, 280 (D. D.C. 1981). Furthermore, both Mr. Amento and Mr. Baird were largely non-responsive as a result of counsel’s wrongful coaching, and neither apparently were the person most knowledgeable on the topic, as the City represented to Petra. Mr. Amento was designated as the person most knowledgeable on the City’s damages. Although Amento purportedly drew up the list of amounts attached to counsel’s affidavit as Exhibit 1, his lack of understanding revealed that he was relying entirely upon other persons without having reaching an independent judgment himself. Simply stated, Amento failed to illuminate any of the City’s claimed damages. On a number of occasions, Mr. Amento stated he was relying on Mr. Weltner, Mr. Petsche, or Ms.

21 Id. at 43:10-20.
Knothe.\textsuperscript{22} Therefore, Mr. Amento was not in fact the most knowledgeable person regarding the City’s damage claims, or at least he was not willing to share his knowledge with Petra. Examples are highlighted in green the deposition transcript for the Court’s information.\textsuperscript{23}

The City’s tactics described above and evident in the deposition transcripts, coupled with the late, incomplete, and deficient disclosures by the City regarding its claimed damages, have prejudiced Petra’s ability to defend the case. Therefore, Petra requests an order excluding the City from offering evidence of its damages at trial, pursuant to I.R.C.P. 30(d)(1) and 37(b)(2)(B). The end result of the City’s damage disclosures – from its stonewalling for 17 months, its insufficient damage disclosures, and its obstructionist tactics at deposition – has been to achieve the opposite of what the discovery rules envision.

4. Conclusion

Considering the foregoing, Petra again requests the Court to exclude all testimony and documents regarding the City’s claimed damages, pursuant to Rules 26, 30(d)(1), and 37(b)(2)(B). Particularly, but not exclusively, Petra requests an order excluding the various cost estimates provided by the City and attached as Exhibit 1 to the counsel’s affidavit.\textsuperscript{24}

DATED: November 9, 2010.

COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorneys for Petra Incorporated

\textsuperscript{22} Walker Nov. 9 Affidavit at Exh. 9, Amento Deposition.
\textsuperscript{23} Id. at Exh. 9, Amento Deposition.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9th day of November, 2010, a true and correct copy of
the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail
Hand Delivery
Overnight Courier
Facsimile: 331-1529
E-mail:

THOMAS G. WALKER
Thomas G. Walker (ISB No. 1856)
Erika Klein (ISB No. 5509)
Mackenzie Whatcott (ISB No. 6774)
Matthew B. Schelstrate (ISB No. 8276)
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell Phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: twalker@cosholaw.com; mwhatcott@cosholaw.com; eklein@cosholaw.com; mschelstrate@cosholaw.com

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,
   Plaintiff/Counterdefendant,
vs.
PETRA INCORPORATED, an Idaho corporation,
   Defendant/Counterclaimant.

STATE OF IDAHO )
   ss.
County of Ada       )

I, THOMAS G. WALKER, being first duly sworn upon oath, depose and state:

AFFIDAVIT OF THOMAS WALKER DATED NOVEMBER 9, 2010.
1. I am one of the attorneys of record for the Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above-entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. I submit this affidavit in support of Petra's Renewed Motions in Limine to Exclude Evidence of the City's Claimed Damages and to Exclude Evidence by the City's Experts.

3. Attached as Exhibit 1 is the damage summary disclosed by the City, which was provided to Petra just prior to the parties' October 18, 2010 mediation session.

4. This mediation session constituted the 'meet and confer' on damages ordered by the Court to occur no later than 30 days before trial.

5. Attached as Exhibit 2 is the disclosures made by the City in support of their claim for $1,650,000 in damages based on the same amount of liquidated damages Petra allegedly failed to collect from 44 prime contractors.

6. Attached as Exhibit 3 is a true and correct copy of the Reporter's Transcript of Proceedings held on September 27, 2010 before Ronald J. Wilper, District Court Judge.

7. Attached as Exhibit 4 is the Amended Notice of Taking of the Audio-Video Deposition of the City of Meridian, Duces Tecum, Pursuant to I.R.C.P. 30(b)(4) and 30(b)(6)—Damages, pursuant to which Petra took the deposition of Steven J. Amento.

8. Attached as Exhibit 5 is the Second Amended Notice of Taking of the Audio-Video Deposition of the City of Meridian, Duces Tecum, Pursuant to I.R.C.P. 30(b)(4) and 30(b)(6)—Claims other than damages, pursuant to which Petra took the deposition of Ted Baird.
9. Attached as Exhibit 6 is a true and correct copy, with highlighting, of the Audio-Video 30(b)(6) Deposition of Steven J. Amento, taken on November 4, 2010.

10. Attached as Exhibit 7 is a true and correct copy, with highlighting, of the Audio-Video Deposition of Theodore W. Baird, taken on November 3, 2010.

THOMAS G. WALKER

SUBSCRIBED AND SWORN to before me this 9th day of November, 2010.

PAMELA R. CRANON
Notary Public for Idaho
Residing at Eagle, Idaho
My commission expires: March 31, 2016.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of November, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Daniel Loras Glynn
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☒ Hand Delivery
☐ Overnight Courier
☐ Facsimile
☐ E-mail:

THOMAS G. WALKER
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Tab 1
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$1,650,000.00
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<td>Alpha Masonry CO #2 - providing new cap stones (rework)</td>
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<td>Axelsson (Phase 4) CO #3 - repair const. damage</td>
<td>$3,127.00</td>
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<td>Buss Mech CO #2 - reroute roof drains</td>
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<td>Cobblestone CO #2 - rework areas</td>
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<td>Commercial Painting (Phase III) CO #7 (paint prep Rule Steel material)</td>
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<td>Custom Glass (Phase II) (charge for opening not built correctly)</td>
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<td>108</td>
<td>K &amp; B Fabrication CO #2 (rework to meet code)</td>
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<td>109</td>
<td>Paige Mech CO #1 (to meet inspector's requirements)</td>
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<td>Rule Steel CO #3 (30 day float was not set against &quot;weather extension&quot;??)</td>
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<td>Schindler Elevator CO #3 (testing / adjustments for construction use)</td>
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<td>Sunshine LS (Phase IV) CO #3 (add top soil)</td>
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<td>Tamoseal in lieu of PVC liner / S.S. attachments in entry pools</td>
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<td>Tamoseal installed (765 sf @ $1.73 / sf)</td>
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<td>PVC liner installed (800 sf @ $4.35 / sf)</td>
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<th>&quot;Extra Materials&quot;</th>
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<td>02780 (Unit Pavers) - Extra Material - 20 each paver</td>
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<td>09310-1.7 (Tile) Extra Material - 1 box each</td>
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<td>09457-1.9 (Linear Metal Ceiling) 2% Extra Materials</td>
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<td>09652-1.7 (Sheet Vinyl) Extra Materials - 2%</td>
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<tr>
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<td>09720-1.6 (Wall Covering) Extra Material 5%</td>
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<td>09841-1.7 (Acoustical Wall Panel) Extra Material - 2%</td>
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<tr>
<td></td>
<td>09912-1.7 (Paint) Extra Material - 5% / 1 gal. min.</td>
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<tr>
<td></td>
<td>09931-1.7 (Stain) Extra Material - 5% / 1 gal. min.</td>
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<tr>
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<td>10265-1.7 (Impact Resist. Wall Protect) Extra Material - 2%</td>
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<td>10651-1.9 (Operable Panel) Extra Material 4 panels</td>
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<td>15325 (Fire Sprinklers) Extra Materials - Special Cabinet / Heads / Wrenches</td>
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<td>16425 (Switchboxes) Extra Material - 3 Fuses each type / 1 Fuse puller</td>
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<td>Special Warranties</td>
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<td>16741-4.1 (Telecomm) Special Warranty - 25 years</td>
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<tr>
<td>N</td>
<td>16761-1.8 (Video Surveillance) Special Warranty - 2 years</td>
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| 3 Submittals / Closeout |
| --- | --- |
| Most | Provide one year warranty on work |
| Ltd | 01770-1.3.3 Submit warranties / final certifications / etc |
| Ltd | 01770-1.3.5 Submit Project Record Documents / O & M manuals / etc. |
| Ltd | 01770-1.3.9 Submit test / adjust / balance reports |
| N | 01770-1.6 B Record Drawings (marked "PROJECT RECORD DRAWING") |
| N | 01770-1.6 C Record Specifications |
| N | 01770-1.6 D Record Product Data (in binder) |
| N | 01770-1.6 E Misc. Record Submittals (in binder) |
| Most | 01770-1.7 O & M Manuals (in detailed sections as required in Section 01782) |
| N | 01770-1.8 Warranties (in binders) |
| 01782-1.4 Submit draft O & M for review 15 days prior to SC. |
| 01810 - 3.16 (Heery) Commissioning Report & CD |
| 02810 (Irrigation) - 1 set reproducible drawings |
| 02840 (Planting) - "as built" drawings |

Tab 4
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<td>transparencies / 3 sets as built prints</td>
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<td>15127 (Meters &amp; Gauges) - Product Certification</td>
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<td>15950-1.2 / 1.4 / 1.5 / 3.17 (HVAC) Reporting of Test Results</td>
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<td>16125-3.6 (Mod. Underfl. Dist.) 4 copies training video</td>
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<td></td>
<td>16622 (Generator) 6 copies O &amp; M Manual</td>
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<td>Item #</td>
<td>Issue</td>
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Total: $43,790.46

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- fully investigate the roof via "hands & knees" inspection.
- drain all patches holding water / reseal
- provide saddle flashings
- provide related transitions
- correct where roofing turns up wall @
  - mechanical with a termination bar
- correct areas below the doors, windows
  - and brick ledges
- provide counter flashing at the base of
  - the brick ledger
- correct transitional counter flashing at
  - curbs and air handling units
- complete protection at unfinished / unprotected joint / materials
- address any and all areas marked on the
  - roof made by inspectors
- install a reglet where the brick wall or
  - stone overlaps the reglet
- correct clamping or boot failures
- Provide roofing pressure relief vents
- Provide Masonry interface / details
- correct / reinstall drain clamping per plans
- correct / reinstall crickets / roof slopes

Contingency: $ 20,000.00
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<td>Laura Knothe</td>
<td>$ 2,500.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>other</td>
<td>TBD</td>
</tr>
<tr>
<td>7</td>
<td>Project contingency</td>
<td></td>
<td>$ 7,500.00</td>
</tr>
<tr>
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</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>$ 49,000.00</td>
</tr>
</tbody>
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Tab 11
<table>
<thead>
<tr>
<th>Item #</th>
<th>Issue</th>
<th>Performed by</th>
<th>Est. Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Review</td>
<td>Todd Weltner</td>
<td>$2,500.00</td>
</tr>
<tr>
<td>2</td>
<td>Plans / Specs</td>
<td>ZGA</td>
<td>TBD</td>
</tr>
<tr>
<td>3</td>
<td>Bid mgmt / oversight</td>
<td>Laura Knothe</td>
<td>$4,000.00</td>
</tr>
<tr>
<td>4</td>
<td>Repairs / Corrections</td>
<td></td>
<td>$75,000.00</td>
</tr>
<tr>
<td></td>
<td>remove backfill / waterproof</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>seal all penetrations</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>repair / redo back fill / landscape</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>repair / replace damaged elec buss</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>repair / replace damaged FP elements</td>
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<td></td>
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<tr>
<td></td>
<td>inspect repair / redo</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>grounding bar / wires</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>contingency</td>
<td></td>
<td>$12,500.00</td>
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<td></td>
</tr>
<tr>
<td></td>
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<td></td>
</tr>
<tr>
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<td>Todd Weltner</td>
<td>$2,500.00</td>
<td></td>
</tr>
<tr>
<td></td>
<td>other</td>
<td>TBD</td>
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</tr>
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<td>6</td>
<td>Proj. Close out</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>Todd Weltner</td>
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<td></td>
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<tr>
<td>7</td>
<td>Project contingency</td>
<td></td>
<td>$10,000.00</td>
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Tab 12
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<th>Performed by</th>
<th>Est. Cost</th>
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<tbody>
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<tr>
<td>2</td>
<td>Plans / Specs</td>
<td>ZGA</td>
<td>TBD</td>
</tr>
<tr>
<td>3</td>
<td>Bid mgmt / oversight</td>
<td>Laura Knothe</td>
<td>$4,000.00</td>
</tr>
<tr>
<td>4</td>
<td>Ceiling Repairs / Corrections</td>
<td></td>
<td>$17,500.00</td>
</tr>
<tr>
<td></td>
<td>provide positive barrier / seal</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>seal channels from exterior</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>redo tubes channels by walls</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>paint / touch up</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>contingency</td>
<td></td>
<td>$2,500.00</td>
</tr>
<tr>
<td>5</td>
<td>Construction Admin</td>
<td>ZGA</td>
<td>TBD</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Laura Knothe</td>
<td>$2,500.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Todd Weltner</td>
<td>$2,500.00</td>
</tr>
<tr>
<td></td>
<td>other</td>
<td>TBD</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Proj. Close out</td>
<td>ZGA</td>
<td>TBD</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Laura Knothe</td>
<td>$2,500.00</td>
</tr>
<tr>
<td></td>
<td>other</td>
<td>TBD</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Project contingency</td>
<td></td>
<td>$10,000.00</td>
</tr>
</tbody>
</table>

**Total** $44,000.00
Contractors performing Work at the Site, as submitted, provide for coordination among the Contractors for the portions of the Work each will perform. Construction Manager shall monitor each Contractor’s compliance with the safety program and quality assurance plan and report to Owner promptly concerning any deviation therefrom along with recommendations for correction. Construction Manager shall be responsible for coordinating the Contractors for each portion of the Work.

4.7.7 Upon receipt, Construction Manager shall carefully review and examine each Contractor’s schedule of values (“Schedule of Values”), together with any supporting documentation or data that Owner, Construction Manager or Architect may require from the Contractor. The purpose of such review and examination shall be to protect Owner from an unbalanced Schedule of Values that allocates greater value to certain elements of the Work than is indicated by such supporting documentation or data or than is reasonable under the circumstances. If the Schedule of Values is not found to be appropriate, or if the supporting documentation or data is deemed to be inadequate, and unless Owner directs Construction Manager to the contrary in writing, the Schedule of Values shall be returned to the Contractor for revision or supporting documentation or data. After making such examination, if the Schedule of Values is found to be appropriate as submitted, or if necessary, as revised, Construction Manager shall sign the Schedule of Values thereby indicating its informed belief that the Schedule of Values constitutes a reasonable, balanced basis for payment of the Contract Price to the Contractor. Construction Manager shall not sign such Schedule of Values in the absence of such belief unless directed to do so, in writing, by Owner.

4.7.8 Construction Manager shall promptly examine, study, approve or otherwise respond to each Contractor’s shop drawings and other submittals. Construction Manager’s approval of such submittals shall constitute its representation to Owner that such submittals are in general conformance with the Construction Documents, Construction Management Plan and Project Schedule. After Construction Manager’s review, Construction Manager shall promptly forward such submittals to Architect, with Construction Manager’s comments attached, for review, approval, rejection or other response. Construction Manager shall promptly forward information or actions received from Architect to the appropriate Contractor.

4.7.9 Construction Manager shall carefully observe the Work of each Contractor whenever and wherever necessary, and shall, at a minimum, observe Work at the Project site at least frequently than each scheduled weekday. The purpose of such observations shall be to determine the quality and quantity of the Work in conformance with the requirements of the Construction Documents. Construction Manager’s observations, Construction Manager shall promptly forward information or actions received from Architect and observation, Construction Manager shall submit a written report of each observation to Owner and Architect together with any appropriate comments or recommendations.

4.7.10 Construction Manager shall reject, in writing, any Work of a Contractor that is not in compliance with the Construction Documents unless otherwise directed by Owner in writing.
City of Meridian City Hall Project  
Quality Management Plan  
Page 2.

e.) Development of a preliminary plan for the construction of the project including; site access control, prime contractor scheduling, material deliveries, staging and waste control.

d.) Internal Project Team meetings to review implementation of existing design and develop recommendations to the City for budget and design considerations prior to the bidding and construction phases of the project.

e.) Review and publish bid packages for the scopes of work in each phase of the project. Assist City in the bidding process. Control the pre-bid RFI and addendum process to minimize the impact on the project constructability and optimize value engineering suggestions within the Idaho Public Works Construction Law statutes.

f.) Review the bid results in detail with the City and collect any additional information to insure that the project value is in keeping with the intent of the bid documents prior to making recommendations for acceptance by the City.

III.) The Construction Phase of the Quality Management Plan is where the planning and organization of the Construction and Construction Management Team come together. The Petra Team is specifically responsible for:

a.) The collection, review and processing of the submittal packages prior to and after review by the Design Team to confirm that the intent of the design is being met, in accordance with the Project Communications Plan.

b.) Weekly progress meetings on site with all prime contractors on site or scheduled to be on site to review work in progress, work quality controls by trade, quality assurance testing requirements that are scheduled or need to be scheduled.

c.) Daily inspection for correctness and quality of work being installed by the Petra Project Management team confirming that the work is being installed in accordance with the contract design and best construction practices.

d.) Monthly review with the City of the quality of the work in place, the schedule, any value engineering or design modification suggestions submitted by the Construction Team and how each of these would impact the quality, construction schedule and long term performance of the project.

IV.) The Commissioning & Occupancy Phase of the Quality Management Plan is the stage where the City will learn how the City Hall Building works and begin occupying the facility. The Quality Management Plan focuses on the steps necessary to insure that all equipment and building components are operating correctly including:

a.) Assist the Commissioning Agent in the distribution of the Operations & Maintenance Manuals (O&M) from the prime contractors as required by the construction documents. Participate in the training process and documentation to insure a smooth transition between the construction and operation of the facility.

b.) Schedule and direct the City and the Design Team in the Punch list process and then manage the punch list to insure that any corrections are completed in a timely manner in accordance with the best construction practices.

c.) Implement the contract warranty procedure, and address any and all warranty calls from the City in a timely manner to minimize negative impact on the City and to insure proper material and equipment warranties and operation. Log and track all warranty reports to identify trends and notify the City of any potential patent or latent product or workmanship issues that may require further action by the City.

d.) At the end of the one-year builder’s warranty, deliver to the City a binder containing all warranty call back information, results and any warranty extensions or warranty claim documentation.
AIA Document A101/CMA™ – 1992

Standard Form of Agreement Between Owner and Contractor
where the basis of payment is a STIPULATED SUM

AGREEMENT
made as of the 17th day of JULY in the year of 2001
(In words, indicate day, month and year)

BETWEEN the Owner:
(Name and address)

CITY OF MERIDIAN
33 East Idaho Avenue
Meridian, Idaho 83642-2300

and the Contractor:
(Name and address)

Hobson Fabricating Corporation
6428 Business Way
Boise, Idaho 83716

For the following Project:
(Include detailed description of Project, location, address and scope.)

New Meridian City Hall
33 East Broadway Avenue
Meridian, Idaho 83642

An approximately 100,000 square foot, multi-story city hall office building with a
d basement.

The Construction Manager is:
(Name and address)

PETRA INCORPORATED
1097 N. Rosario Street
Meridian, Idaho 83646

The Architect is:
(Name and address)

LCA ARCHITECTS, P.A.
1221 Shoreline Lane
Boise, Idaho 83702

The Owner and Contractor agree as set forth below.

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An Additions and Deletions Report that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.


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User Notes:
ARTICLE 1 THE CONTRACT DOCUMENTS
The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 9.

ARTICLE 2 THE WORK OF THIS CONTRACT
The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION
§ 3.1 The date of commencement is the date from which the Contract Time of Section 3.2 is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

(Paragraphs deleted)
September 15, 2007

§ 3.2 The Contractor shall achieve Substantial Completion of the entire Work not later than __________) days after the Date of Commencement.
(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)

Portion of Work Substantial Completion date
The complete work of providing all material, July 3, 2008
equipment, tools, labor and supervision for a complete
and operational dry side HVAC system in cooperation
with the plumbing scope of work; including all duct,
fittings, valves, gauges, meters, piping, insulation,
diffusers, registers, grilles, instrumentation and
controls, ventilators, and related components in
accordance with the plans and specifications.

Division I — General Requirements
Section 07841 — Through-Penetration Firestop
Systems
Section 07842 — Fire-Resistive Joint Systems
Section 15053 — Common Work Results for HVAC
Section 15057 — Common Motor Requirements for
Plumbing Equipment
Section 15058 — Common Motor Requirements for
HVAC
Section 15062 — Hangers and Supports for HVAC
Piping and Equipment
Section 15077 — Identification for HVAC Piping and
Equipment
Section 15082 — Plumbing Insulation
Section 15738 — Split-System Air-Conditioning Unit

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User Notes:
ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Contractor in current funds for the Contractor’s performance of the Contract the Contract Sum of Two Million Sixty Thousand Dollars ($2,060,000.00), subject to additions and deductions as provided in the Contract Documents.

§ 4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner:

(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date until which that amount is valid.)

§ 4.3 Unit prices, if any, are as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Units</th>
<th>Price ($ 0.00)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

ARTICLE 5 PROGRESS PAYMENTS

§ 5.1 Based upon Applications for Payment submitted by the Contractor to the Construction Manager, and upon Project Applications and Certificates for Payment issued by the Construction Manager and Architect, the Owner

The Contractor acknowledges and agrees that the Owner will suffer financial loss in an amount that is difficult to quantify if the Work is not substantially complete on the date set forth in the Contract Documents. The Owner shall have the option to assess liquidated damages against the Contractor (and to secure, if any) in an amount of Five Hundred Thousand Dollars ($500,000) per calendar day; for each calendar day of delay until the Work is substantially complete. The Contractor acknowledges and agrees that the amounts set forth above are reasonable estimates of the damages that will likely be incurred by Owner in the event that the Work is not substantially complete by the date set forth in the Contract Documents, and not a penalty. The responsibility for a delay is substantial completion based on the Contractor and others. Owner may reasonably expect the damages for liquidated damages to be reasonable. The Owner, in addition to and not in the place of any right or remedy available to the Owner, may enforce such rights or remedy as is under law, in equity, or under Contract Documents.
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

State of Idaho }
)ss
County of Ada }

STEVEN J. AMENTO, being duly sworn upon oath, deposes and says:

1. I am above the age of 18 years and have personal knowledge of the facts contained herein.

2. I am a co-founder and President of Corke Amento, Inc.

2. I am an experienced construction manager in the State of Washington, having managed several major projects over the course of my career. In my role as President, I have directly or indirectly managed over 70 construction projects which have an aggregate value in excess of $100 Million. My C.V. has been previously submitted to the Court along with my prior Affidavit, all of which contains my professional qualifications.
3. As stated in my previous Affidavit, I have undertaken an examination of the Project Records for the Meridian City Hall Project, as they relate to the issue of Petra's contract administration, particularly with respect to payments to Prime Contractors and Liquidated Damages.

4. Each Prime Contract (AIA-A-101 Form), for the Meridian City Hall Project contained a $500 per day liquidated damage clause, in the event the Prime Contractor failed to achieve the required Substantial Completion Date established by the Prime Contract.

5. Petra was, as the Construction Manager pursuant to the Construction Management Agreement, responsible for Contract Administration of the Prime Contracts.

6. Petra, pursuant to the Construction Management Plan created by Petra and section 9.8 of the AIA201 CMa contract, and sound construction management was responsible to insure that the Architect, Lombard Conrad Architects, appropriately provided a Certificate of Substantial Completion for each Prime Contractor as part of its Contract Administration.

7. I have not seen any evidence Certificates of Substantial Completion were issued by Lombard Conrad for any Prime Contractor on the Meridian City Hall Project.

8. The Certificate of Substantial Completion is a very important document because it establishes, amongst other things, the responsibilities and rights of the Owner and Contractor for damage to the work, warranty commencement, insurance obligations, uncompleted work and the end date for liquidated damage calculation and assessment.

9. Petra failed to ensure Certificates of Substantial Completion were issued.

10. Despite the fact that Certificates were not issued, Petra issued Change Orders which contained a date of “Substantial Completion” to 34 of the 44 Prime Contractors. (I have not determined how the 34 were selected by Petra). The dates inserted by Petra on the various Change Orders do not appear to be supported by project documentation and/or schedule.
analyses (if they exist) undertaken by Petra. The only exception is the Change Order to Rule Steel whereas Petra conducted an evaluation of Rule’s performance and recommended assessment of liquidated damages which was eventually incorporated into the monetary value of the Change Order. I know of no reason why Petra would prepare a liquidated damages analysis solely for Rule Steel, and not perform similar analyses for the other Prime Contractors, and ensure the Substantial Completion Certificate process provided in Section 9.8 of the Contract was properly executed. (See Exhibit A for a summary of the Substantial Completion Dates for each Prime Contractor.)

11. Absent such analyses, Petra appears to have arbitrarily inserted “Substantial Completion” dates on the Change Orders which Petra then presented to the City for signature. For example, the contract for MJ’s Backhoe contains a substantial completion date of 7/22/2007 and Petra inserted a completion date of 8/28/2008 on Change Order #3 to MJ’s Backhoe, which essentially extended the contractual completion date 403 calendar days. This inserted completion date is contrary to data found on Petra’s “Master Production Schedule” dated 5/2/08 which shows completion of site backfill and commencement of subsequent concrete activities in July of 2007. Another example of Petra’s arbitrary contract extension involves TMC Masonry:

<table>
<thead>
<tr>
<th>Contractual Substantial Completion Date:</th>
<th>12/21/2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date inserted by Petra on C.O. #3:</td>
<td>8/28/2008</td>
</tr>
<tr>
<td>Resulting Contract Completion Extension:</td>
<td>251 Calendar Days</td>
</tr>
<tr>
<td>Completion Date for Exterior Masonry on Petra schedule of 5/2/08:</td>
<td>02/22/2008</td>
</tr>
</tbody>
</table>

In both examples there is no apparent explanation or support for the substantial completion dates Petra choose to insert on these Change Orders and present to the City for signature. (See Exhibit B Petra’s Master Production Schedule dated 5/2/08.)
12. Petra's failure to follow the contractual requirements and provide reasonable contract administration and construction management has severely hindered the City's ability to assess liquidated damages against those Prime Contractors who failed to complete their work on, or before their contractual substantial completion dates. Petra, without City knowledge or knowing approval, waived by its conduct in recommending Change Orders with arbitrary completion dates.

13. Having signed the various Change Orders, the City has arguably waived rights against those Contractors and is now confronted with a set of facts and circumstances which I predict will be utilized by those Contractors in defense of liquidated damage claims asserted by the City.

14. Each Prime Contract includes a provision for liquidated damages of $500 per calendar day.

15. Without the benefit of the Certificates of Substantial Completion and a contemporaneous schedule analysis, the City's damages are difficult to determine and will required costly and time-consuming legal and consulting efforts underwritten by the City.

16. One damage calculation is based upon the difference between the original planned date of building occupancy and the actual date of City occupancy. Petra's CMP schedule of 2/12/2007 showed 8/1/2008 as the planned occupancy date for the City Hall. The City actually occupied the building on 10/15/2008, 75 calendar days later than planned. Under the terms of each Prime Contract, the City is entitled to liquidated damages, but now cannot ascertain or determine which Contractors are responsible for the delayed occupancy, much less which Contractor failed to complete its work on or before its Substantial Completion Date. It is possible each of the 44 Prime Contractors is jointly responsible for the delay; thus the City would assert an aggregate claim of $1,650,000 (44 contractors x 75 days x $500/day) for liquidated damages. Predictably, the 34 Contractor with signed Change Orders would argue the City has waived its rights to liquidated damages and the other 10
Contractors would argue project delays are the responsibility of other Contractors and the City. The City may be required to sue every, or many of the, forty-four Contractors as a means to resolve the liquidated damage claim. In the unfortunate event the City has to pursue each Contractor, the ultimate outcome and damages awarded to the City (or negotiated) will depend upon a variety of factors, primarily how much time, energy and resources the City has available to resolve a problem which was caused solely by Petra's failure to follow the contract provisions.

17. Petra's failure to require the issuance of the Certificates of Substantial Completion, combined with the arbitrary date of "Substantial Completion" in the Change Orders is a material breach of the Construction Management Agreement, and a material breach of the fiduciary duty contained therein, and is also a material breach of the duty of due care applicable to Petra's conduct on the Meridian City Hall Project.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

By: [Signature]

STEVEN J. AMENTO

Subscribed and sworn to before me this 20th day of September, 2010.

Janet M. Fife
Notary Public, State of Washington
Residing at: EDAMOS, WA
My commission expires: 10-05-12
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Email

______________________________
Kim J. Trout
## Exhibit A

### Meridian City Hall-Substantial Completion Worksheet

**Prepared 9/10/10**

<table>
<thead>
<tr>
<th>Contract #</th>
<th>Contractor</th>
<th>Description of Work</th>
<th>Substantial Completion Date (Per Prime Contract)</th>
<th>Substantial Completion Date (Per Change Order)</th>
<th>Change Order #</th>
<th>Resulting Contract Extension (Calendar Days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>P2 - 1</td>
<td>IMJ Rundhour</td>
<td>Site Work</td>
<td>7/25/2007</td>
<td>8/26/2008</td>
<td>CO 3</td>
<td>403</td>
</tr>
<tr>
<td>P2 - 2</td>
<td>Siderwall LLC</td>
<td>Site Concrete</td>
<td>10/14/2007</td>
<td>8/26/2008</td>
<td>CO 5</td>
<td>357</td>
</tr>
<tr>
<td>P2 - 3</td>
<td>TMC</td>
<td>Big Masonry</td>
<td>12/21/2007</td>
<td>8/29/2008</td>
<td>CO 3</td>
<td>251</td>
</tr>
<tr>
<td>P2 - 4</td>
<td>Rile Steel</td>
<td>Sheet Felt &amp; Felt</td>
<td>10/22/2007</td>
<td>11/12/2008</td>
<td>CO 3</td>
<td>368</td>
</tr>
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<td>P2 - 5</td>
<td>None</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>P2 - 7</td>
<td>Air Walkover</td>
<td>Framing / Drywall</td>
<td>10/26/2007</td>
<td>No Change Order</td>
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### Total

|                  |                  |                                  |                                                  |                                                |                | 2,435                                       |

---

CM114407

006851
## Exhibit A

### Meridian City Hall-Substantial Completion Worksheet

**Revised** 10/5/10

<table>
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<tr>
<th>Contract No.</th>
<th>Contractor</th>
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**Total:** 3,531
DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF ADA

Case No. CVOC-09-07257

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,
Plaintiff/Counterdefendant,
vs.
PETRA INCORPORATED, an Idaho corporation,
Defendant/Counterclaimant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Held on September 27, 2010, before
Ronald J. Wilper, District Court Judge.

APPEARANCES
For Plaintiff/Counterdefendant
Kim J. Trout
TROUT JONES GLEDHILL FUHRMAN, P.A.
225 North 9th Street, Suite 820
Boise, Idaho 83701

For Defendant/Counterclaimant Petra
Thomas G. Walker
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, Idaho 83707-9518

Reported by
Dianne E. Cromwell
CSR No. 21
THE COURT: We'll take up Meridian versus Petra, CVOC-D9-07257. This is the time scheduled for hearing on Meridian's motion to dismiss and both parties have motions in limine.

Mr. Walker appears on behalf of the Defendant Petra. Mr. Trout appears on behalf of the Plaintiff City of Meridian.

Mr. Trout, I guess you're up on your motion to dismiss on the tort claim issue.

MR. TROUT: Thank you, Judge. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. TROUT: Your Honor, I think the fundamentals of this motion are very clear. As a matter of fact, Petra has never provided a tort claim notice pursuant to IDAHO Title 6 to the city. That fact is undisputed in this matter. And the significance of that fact I think is borne out by both the statute and the case law in the state of Idaho.

The case law specifically requires that once a party has knowledge of facts which would put a reasonably prudent person on inquiry, it triggers the 180-day period. That's a direct quote from McQuillen versus City of Ammon at 130 Idaho 420, page 423, it specifically states:

"A claimant is not required to know all the facts and details of a claim because such a prerequisite would allow the claimant to delay completion of their investigation before triggering the notice requirement."

If you followed Petra's argument that we didn't know it was a claim until the city denied payment, then that's exactly what the court said you cannot do in the Mitchell case because Petra could control the timeframe in which it asked for payment and hence received the denial. And that's clearly not the purpose of the statute. And in fact, the purpose of the statute as stated in the Pounds decision is exactly why in this circumstance with this set of facts the act has to be strictly enforced.

In order to serve the primary purpose of the act and to quote, save needless expense and litigation by providing an opportunity for amicable resolution of the differences between the parties, then notice must be given and it must be given early.

And under this set of circumstances, I find it either disingenuous or impossible to
believe that if as stated in the multiple affidavits submitted to the court and the multiple pleadings submitted to the court, Petra knew from the time they signed this contract that their fee was going to be based on a percentage of total cost, which is what the mantra has been from day one. It's always been 4.7 percent of the cost.

If in fact that's true, then on January 15, 2007 they knew they had a claim for an increase in the amount of their fee, and the 180-day notice provision was triggered, and they must have given the notice within that period of time.

I'll address two additional points. The first point is, Petra is going to assert that while the federal statute says a counterclaim is sufficient notice, and therefore, the state ought to follow the federal rule.

Well, unfortunately we have to give due deference to the legislature who is presumed to know what it is doing and what the state of the law is, and at the time they passed 5219 and the Idaho Tort Claims Act, the federal statute was in existence and allowed by statute a counterclaim to be sufficient to comply. And the Idaho Code Section 50-219 and 6-901 and the following subsections.

Well, first of all, Your Honor, the counterclaim for the construction manager's fee and the reimbursable expenses seeks specific performance of the construction management agreement, not money damages.

So Petra's counterclaim in that regard does not fall within the purview of the Idaho Tort Claims Act. Now, admittedly, Your Honor, Petra's claims for lost past and future earnings and lost business and investment opportunities are a claim for damages, but as I'll point out in a minute.

much,.

Mr. Trout. 4 language in paragraph 7 of the construction provides that, "A claim must have given the notice within that period of 12 and the filing of the counterclaim simply doesn't increase in the amount of their fee, and the does not expressly contain such an exception.

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legislature chose not to follow the federal format.

And as a result, we have case law in our state, the Knudsen decision, Knudsen versus Agee at 128 Idaho 776, which specifically says the court would not look to a federal court interpretation of a federal statute -- in that case a wiretap statute -- for the creation of a discovery exception where a similar state statute does not expressly contain such an exception.

We have an identical situation here, and the filing of the counterclaim simply doesn't meet the standard, and there's a good reason.

The good reason is, the same principle espoused in the Pounds decision that identifies the whole purpose for giving a notice and giving it early. Give the parties a fair opportunity to resolve this, give the city an opportunity to begin their investigation not in 2009 but in 2007, specifically in January of 2007 when they should have given notice of the increase in fee to begin with under their fiduciary responsibility to the city.

It's for those reasons, Your Honor, that we respectfully ask that the court apply as

the Supreme Court has the tort claims notice in 5219 to dismiss all of Petra's claims with prejudice. Thank you.

THE COURT: Thank you very much, Mr. Trout.

Mr. Walker?

MR. WALKER: Thank you, Your Honor. Well, here we are, Your Honor, more than 17 months of litigating this case and after the parties have incurred more than a million dollars in costs and fees, Meridian asserts it was not sufficiently put on notice of Petra's damages claim against the city because it failed to file a claim under Idaho Code Section 50-219 and 6-901 and the following subsections.

Well, first of all, Your Honor, the counterclaim for the construction manager's fee and the reimbursable expenses seeks specific performance of the construction management agreement, not money damages.

So Petra's counterclaim in that regard does not fall within the purview of the Idaho Tort Claims Act. Now, admittedly, Your Honor, Petra's claims for lost past and future earnings and lost business and investment opportunities are a claim for damages, but as I'll point out in a minute.

Your Honor, Petra substantially complied with the Idaho Tort Claims Act in any event.

Now, back to the equitable adjustment language in paragraph 7 of the construction management agreement. That paragraph provides that a change shall entitle the construction manager to an equitable adjustment in the schedule of performance, the construction manager's fees, and/or the not-to-exceed limits for reimbursable expenses. So the essence, Your Honor, of Petra's claim is equitable in nature and not one for money damages.

And as I mentioned, so the bottom line with respect to the request for the construction manager's fee and the expenses are simply a request that the court specifically enforce the contract.

Now, in this regard, Idaho Code Section 50-219 states that, "All claims for damages against the city must be filed as prescribed by Chapter 9, Title 6 Idaho Code."

Idaho Code Section 6-904 provides that, "A claim means any written demand to recover money damages from a governmental entity or its employee, which any person is legally entitled to recover under
The custom and practice in the construction industry. The third source is the party's course of dealing during the project period, and the fourth source is the definition of claim contained in the Idaho Tort Claims Act itself.

Now, regarding the construction management agreement itself. The second source is the custom and practice in the construction industry. The third source is the party's course of dealing during the project period, and the fourth source is the definition of claim contained in the Idaho Tort Claims Act itself.

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management agreement, paragraph 8.1 of the agreement states, and I quote: "In the event that any claim, dispute, or other matter in question between the owner and construction manager arising out of or related to this agreement or breach hereof (a claim), owner and construction manager shall first endeavor to resolve the claim through direct discussions."

So, Your Honor, applying the canon of construction, noscitur a sociis, which means that words are known by the company they keep, and we've cited the court to Idaho Supreme Court case State versus Richards with regard to that. These two canons of construction confirm that a matter is not a claim under the construction management agreement until it is disputed.

Now, moving on, Your Honor, to the third source, the parties' course of dealing during the project period. Now, the parties did not treat change order number 1 as a claim until it was denied. "Likewise, the construction management agreement defines a claim as a 'dispute or other matter in question.'"

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statutes began to run on that date.

So focusing on that date, then Petra substantially complied with the notice requirements under the Idaho statutes, and that position is supported by my March 16, 2009 letter to Bill Nary, the city attorney, requesting mediation. And that was sent certainly within 180 days. That was sent within 20 days of the change order was denied and the claim arose.

In addition to that, Petra filed and served its answer and counterclaim on May 6, 2009, which is also within the 120-day -- or 180-day period, setting forth its damages claims and its claims with respect to the construction management fee and reimbursable expenses.

Now, additionally, and this is germane to the cases cited in our briefing, there were substantial communications between Mr. Trout and I regarding this matter early on in the case and certainly before the 180 days expired.

And finally, Your Honor, Petra filed and served its first amended answer and counterclaim on August 21, 2009, which was also within the 180-day period that expired on August 23 of 2009. So all three of those events occurred, those events of notice occurred, prior to the expiration of the 180 days.

Now, in looking at the purpose of the statute, the Court of Appeals in Cox versus City of Sandpoint, which we've cited in our briefing, the court explained, and I quote: "The primary function of notice under the Idaho Tort Claims Act is to put the government entity on notice that a claim against it is being prosecuted and thus apprise it of the need to preserve evidence and perhaps prepare a defense."

There's no suggestion here at this point, Your Honor, that Meridian was not able to preserve evidence and prepare a defense. There's no suggestion that Meridian was blind-sided by Petra's claims and not afforded the opportunity to address each and every one of them outside of litigation.

On the contrary, Your Honor. While my request for mediation made on behalf of Petra was pending, the city brought this matter into court by filing its complaint on April 16, 2009. And they did this, the city did this, not withstanding the requirement in the construction management agreement that, quote, all claims shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party. Requests for mediation shall be filed in writing with the other party to this agreement." And it required that it be filed within 21 days, and we complied with that by my letter of March 16, 2009 which was served on the city attorney Bill Nary on March 16.

And, Your Honor, despite the requirement that the city mediate and despite our request for mediation, the city refused to mediate.

In addition, the notice requirements of the Idaho Tort Claims Act do not apply to counterclaims in our judgment, Your Honor, particularly compulsory counterclaims that are filed within the 180-day period. Now, there's no published opinion in Idaho holding that the notice requirements of the Idaho Tort Claims Act apply to counterclaims. However, other jurisdictions and notably Oregon, our sister state, have addressed this issue, and they've answered that a counterclaim satisfies the acts requirements.

In the Oregon case, Urban Renewal Agency of the City of Coos Bay versus Lacky, 275...
THE COURT: It's a contract-based cause of action, not a tort. And with respect to the counterclaims alleging negligence, and so forth, in seeking and containing a prayer for relief seeking damages sounding in tort, your contention is that your cause of action didn't accrue until February of '09 when your claim was denied or when your requests for additional money for change order number 2 was actually denied, and that would trigger your cause of action sounding in tort. And then your letter of the 16th of March constituted compliance with the Tort Claim Act.

MR. WALKER: Correct, and also compliance with the construction management agreement.

THE COURT: And in any event, if the court were to follow the authority that you've cited, the persuasive authority that you have cited from the state of Oregon, a compulsory counterclaim wouldn't be subject to the Tort Claim Act in any event.

MR. WALKER: Or it would satisfy the notice requirements, Your Honor.

THE COURT: Right. And that was filed on May 6.

MR. WALKER: May 6 the first one and

they have to satisfy the conditions precedent to any kind of claim for specific performance under any interpretation of contract law.

And let's take a look at what the specific provision is. This is in section 7.

This is the, quote/unquote, equitable adjustment section that was just cited to you by Petra, and it says: "Prior to providing any additional services, the construction manager shall notify the owner of the proposed change in services and receive the owner's approval for the change."

There was no evidence in this case that that was complied with with respect to section 7. None, zero, no evidence.

And there is no evidence that can be created today to show compliance with that specific condition precedent.

THE COURT: Well, Mr. Trout, as I understood the purpose of the hearing, your motion to dismiss was premised on your contention that Petra failed to comply with the Tort Claim Act. What you're arguing here is that they failed — that really their claims, their contract claims, should be dismissed based on their failure to satisfy this condition precedent contained in the contract.

August 21 the second one.

THE COURT: And both of them are within six months if, again, the clock starts ticking on that 180-day time period on March 16.


THE COURT: That's what I meant. Thank you very much, counsel.

And, Mr. Trout, it's your motion, so I'll give you the final word on this issue.

MR. TROUT: I would like to show the court a couple of things if I can.

First of all, Your Honor, I think it's fundamentally important to recognize that this Latin term, ipse dixit, I say it, therefore it is.

And there is no question that what Petra seeks as a result of it's, quote/unquote, claim or, quote/unquote, action for specific performance, is money. They're not asking us to specifically perform in any other fashion but to provide money in a very large amount.

And so if we're going to look at what they're talking about in section 7 for specific performance, let's just take an example. Then

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And so if we're going to look at what they're talking about in section 7 for specific performance, let's just take an example. Then
additional services on July 31 of 2007 in the form of 3.5 hours charged to Wes Bettis, the project manager.

Now, when should a reasonably prudent construction manager, charged with a fiduciary duty to this city, be on notice of facts giving rise to the claim? Well, when they begin providing the additional service if section 7 is the basis upon which they want to do it or when they know of an increase in cost, which was January 15 of 2007. Neither of those dates is in February of 2009. Can't get there from here. The facts don't support their position.

And so whether you call this some kind of equitable claim, which still seeks money damages, or whether you call it a breach of contract claim, which still seeks money damages, the fundamental question is, if you're going to seek money from the city, you go back to the city of Ammon case and say, "When does a reasonably prudent person in their position have notice of facts which would give rise to the claim?"

Those are the two dates, January 15 or the day they began providing additional services, even though they didn't meet that condition of the 1

your satisfaction is look to how the Supreme Court of Idaho answered that question to its satisfaction in the Udell decision.

They said: "In our view, the sovereign immunity protected by the act, speaking of the Tort Claims Act, should not be dissipated by ad hoc waivers."

Now, each of the items, that each of those four items are specifically ad hoc waivers that Petra would like the court to adopt as exceptions to the rule. And that's clearly not the case in Idaho, and it clearly can't be the case in Idaho. It is answered by the Udell decision. It's also answered in another way by another decision of the state. Kelso Irwin, PA versus the State Insurance Fund, 134 Idaho 130, in which the court, Supreme Court, uniformly stated: "It has been long recognized that the general rule is that equitable estoppel may not be invoked against a government or public agency functioning in the governmental capacity."

There's absolutely no doubt, none, that the provision of notice under 5219 and the Idaho Tort Claims Act to -- not the city attorney, not me, not anybody except the city clerk who is charged as the recipient of the appropriate notice can be anything other than compliance with the act.

There is no substantial compliance, and no case cited by Petra that says substantial compliance means I can talk to the city attorney in a meeting. I can talk to Mr. Trout who is representing them. I can send a letter to the city attorney.

You won't find a single case in Idaho that says anything other than an appropriate notice sent to the clerk of the municipal entity within 180 days of the date the claim was made aware of by the claimant is anything but compliant.

And under that set of circumstances, all four of the items cited by Petra as excuses, custom and trade, which is, by the way, a legal opinion by Mr. Bauer and not one that is subject to the court's deference, some kind of notice under section 8.1 which specifically says, it doesn't define claim as just a claim for money damages. It says, "or other matter in question arising out of or related to this agreement." And then it says not "and," but it says, "or the
breach hereof."

Under that set of circumstances and the contractual definition of claim, was this a matter in question? Well, it's a matter in question if prior to providing any additional service the construction manager shall notify of the proposed change. And under section 8.1, which I'll point out to the court, it isn't 180 days, Judge. It's the 21.

THE COURT: Well, let me ask you this. Given the provision in the contract that requires any dispute over any claim to be submitted for discussion -- right? -- it seems to me that that might allow the city to continue with the discussion of this claim and this dispute for a lengthy period of time, perhaps for 181 days, and then say, "Discussion is over, we're not paying."

And then come back and say, "Sorry. You didn't comply with the Tort Claim Act. You can't sue us either."

MR. TROUT: There's no provision in the statute that talks about, quote/unquote, wrongful inducement by the city. There's no provision in the case law that talks about some kind of wrongful inducement by any city. There's no

January 15 of 2007 or it's got to be based upon the date they started providing the additional services and the notice was required to the owner then.

One last item.

THE COURT: Go ahead, and then I'll have one question.

MR. TROUT: The last item is this. It addresses the point that was being made about the passage of time. And I'll give you two pieces, Judge. The first is, the Udell case specifically deals with the passage of time: "If the state is immune from liability because of a failure of the claimant to comply with the notice requirements of the Tort Claims Act, the immunity may be raised at any time."

No question about that. That's a specific finding.

THE COURT: Because it is jurisdictional.

MR. TROUT: That's because it's jurisdictional. And secondarily, I would ask the court to turn its attention, because I thought Petra might raise this issue to a case called Trees, just like the ones that stand with leaves, versus Kersey, which is at 56 P.2d Third 765. It

is a 2002 decision of the Supreme Court.

And what is important about the Kersey case is, claims like contract claims that might be illegal or claims that fail under the Tort Claims Act can be raised at any time, and in fact, "The court has a duty to raise the issue of illegality sua sponte."

And so for Petra to argue that there's any kind of waiver, that there's any kind of, quote/unquote, equitable right that is not being adjusted here does not resolve the question of illegality.

THE COURT: And the question I had for you, Mr. Trout, was, I usually see the defense of failure to comply with the Tort Claim Act, the notice requirement of the Tort Claim Act, in a pure tort setting. And here it appears that the allegation here is sounding in breach of contract as opposed to tort.

And you look at the language of the Tort Claim Act itself which talks about, hey, any claim, we're not talking just about tort claims. We're talking about breach of contract, failure to pay a bill is, even though that's a contract-based cause action, it doesn't make any difference. Any
MR. TROUT: That's correct. And the other jurisdictions that have looked at that issue or are uniformly of the same notion, and in fact we've cited three different cases to the court: City of Racine versus Waste Facility Siting Board, a Wisconsin decision. "Notice of claim is a necessary prerequisite to all actions, all actions, brought against the entity as listed in the statute, including governmental subdivision, whether tort or nontort, whether brought as an initial claim, counterclaim, or a cross claim."

Nassau County versus Wolfo. The fact that it was the county which first initiated this litigation does not relieve the defendant from complying with the notice of claim provisions where the defendant seeks affirmative relief by way of a counterclaim.

Department of Transportation versus PSC Resources. "Joining those other jurisdictions which have barred the assertion of counterclaims where the defendant has not previously complied with a notice of claim provision of municipal ordinances."

THE COURT: Where Idaho does not.

MR. TROUT: The Oregon case and the Oregon decision specifically says Idaho won't give deference to the federal statute. THE COURT: Where Idaho does not.


Mr. Walker, I wanted to give you another opportunity to respond, because Mr. Trout has been kind enough to put on the big screen here in the courtroom page 16 of the contract and the part that he has highlighted which reads: "Prior to providing any additional services, the construction manager, Petra in this case, shall notify the owner or the city of the proposed change in services and receive owner's approval for the change."

How would you respond to that? Failure of condition precedent.

MR. WALKER: Contrary to Mr. Trout's representation, there are affidavit testimony that we have submitted in support of our various motions which indicate that the notice was provided to the city prior to rendering any additional services. The court can review those affidavits. And so the condition precedent was met.

And in addition, it's important to point out and we point this out in our briefing is that paragraph 7 does not include the requirement that the notice be in writing, and that was intentional, and the argument is in our briefing with regard to that.

And the reason for that, Your Honor, is that this was a complex project where literally many, many decisions, maybe as many 50 or 100 decisions were made on a daily basis, including changes in Petra's responsibility as a construction manager.

So specifically, because it would have been impossible to build the building, if we had to give written notice every time there was going to be some additional service, the project would have never been built.

Secondly, with regard to either a change order is a claim or it's not. The city can't have it both ways. Well, regardless of what date we use, if you use July 30, 2007 as the date when Petra should have -- we don't agree with that but should have become aware -- Petra filed its official notice on November 5, 2007, which is within 180 days of July 30, '07.

And in addition, if November 5, 2007 is the operative date, Petra filed its change order number 2 on April 8, 2008, which is five months down the road, less than 180 days, Your Honor.

So irrespective of what the city's position is with regard to the start date, we...
think that it’s clear that the start date is
February 24. And our argument with respect to the
definition of claim is not a waiver argument.
It’s a definitional argument. The claim is
defined in the construction management agreement.
It’s defined in the custom and practice of the
industry. It is defined in the statute which is
important, and it is defined by the party’s course
of dealing.

With regard to providing service to the
city clerk, the court will review the cases that
we cited in our brief. For example, the Cox
matter with Keith Watts after Mr. Trout was
engaged. And I received an email from Mr. Trout
instructing that all communications should go
through Mr. Trout and not directly to the city.
And so we followed that rule which was
reasonable, I suppose, under the circumstances,

rebutter with respect to that last argument that
Mr. Walker made.

MR. TROUT: I do. I’ve now heard it not
less than four times in the hearings in this case,
and I think it’s time we put to bed what the real
answer to the question is. I keep hearing that
it’s not a waiver argument, but in fact it has to
act as a waiver. Otherwise, there can’t be
compliance because the notice was never served on
the city clerk as required by law.

And specifically section 10.17 says:

"This is the entire agreement between the parties
with respect to the matters covered herein,
supersedes all prior written and oral. Any
waivers hereunder must be in writing."

All of this discussion about affidavits
saying, “We changed this, we changed that, we
changed our duties under the contract,” none are
in writing, and there’s no waiver of the Idaho
Tort Claims Act and its requirements in writing.

Thank you, Judge.

THE COURT: Thank you. Hang on just a
second.

I have a question, Mr. Walker. The
March 16, 2009 demand --

and all of the communications from and after
March 16, 2009 were sent through Mr. Trout.
With regard to the wrongful act as
defined in the statute, our position, and we’ve
briefed this, Your Honor, is that the city
breached the construction management agreement
when it denied change order number 2, in which it
didn’t deny part of it. It just says, "We’re not
going to pay you, irrespective of the additional
services that you have rendered."

Thank you, Your Honor.

THE COURT: Thank you.

MR. WALKER: Do you want to hear on these
other two motions in limine that Petra has filed?

THE COURT: Hang on just a second.

Mr. Trout?

MR. TROUT: Well, one last point.

THE COURT: And I’m going to give you the
final word, because I think it’s fair enough,
Mr. Trout, that it’s your motion, and I think it’s
only fair that the person who brings the motion
gets the final word.

I asked Mr. Walker to address something
that I thought was appropriate to address, so I
want to give you the final word. If you have

MR. WALKER: Yes, Your Honor.

THE COURT: -- that you made. To whom was
that directed precisely?

MR. WALKER: William Nary, the city
attorney. At the time I knew that the city was
represented by the city attorney. And under the
professional code of professional responsibility,
I sent a letter to the city attorney, and we’ve
cited that in our brief, Your Honor.

THE COURT: Thank you.

Here is my ruling on this motion to
dismiss the Petra counterclaims against the City
of Meridian, based on the contention that the
claimant Petra failed to comply with the notice
requirement of the Idaho Tort Claim Act.

I’m going to deny the motion based on
this analysis. The cause of action didn’t accrue
fully until February 24, 2009 when the claim was
denied. That is when Petra was reasonably put on
notice that it had a claim.

Although the act specifies that notice
under the Tort Claim Act has to be given to the
secretary or the clerk of the agency involved in
this case, the entity, the city, was represented
by counsel, and notice was given to the city
I find that the provisions of the Tort Claim Act do cover all of the counterclaims, including the contract claims. Notice was complied with on March 16, 2009. Therefore, the motion to dismiss on the grounds stated is denied.

And at this point, I'm ready to hear the arguments on the two motions in limine, two motions filed by each side.

MR. WALKER: I don't think the city has filed any motions in limine.

MR. TROUT: Yes, we did.

THE COURT: Yeah. The city -- MR. WALKER: We didn't get them if they were filed.

THE COURT: The Lemley affidavit, right?

MR. WALKER: I thought those were motions to strike that the court has already ruled on.

MR. TROUT: No. They were motions in limine with respect to --

THE COURT: I'm going to hear those as well. Particularly the Bennett, Coughlin, and Frank affidavits were submitted in connection with the motion for summary judgment that I ruled upon.

MR. WALKER: Okay, Your Honor. Thank you.

I'll go ahead and start with the motion in limine. To exclude evidence of the city's damages.

As the court knows from our prior argument to date, the city filed its complaint on April 16, 2009. And in its compliant, it seeks damages for Petra's breach of contract.

Now we're just 65 days before trial, 17 months after the complaint was filed, and Meridian has not disclosed the critical factual information regarding its damages that Petra needs to defend against those claims.

And this is despite Petra's expansive discovery efforts, which included taking the depositions of Mayor Tammy de Weerd, the counsel president Charlie Roundtree, the city council liaison Keith Bird, Keith Watts, the city's authorized representative under the construction management agreement and the city's purchasing agent. Your Honor, we also deposed three of the city's experts: Steven Amento, Laura Knothe, and Todd Weltner.

Now, importantly, the city has not disclosed any experts who may testify regarding damages, and none of the deponents that we took.

MR. WALKER: Correct, Your Honor.

THE COURT: And since then -- and they were relied on for their -- they were admitted by the court and relied upon by the court based on the fact that they were admissible lay opinions as opposed to expert opinions.

Since that time, it appears to the court that the Defendant/Counterclaim Petra has identified those witnesses as experts and that you did that for trial and that you did that timely.

My understanding of the second motion in limine filed by Meridian now is that the city seeks to exclude those three affidavits and one other affidavit based on the -- well, based on the -- well, based on an additional argument.

So I do think that that's properly before the court today, and I'm going to give Mr. Trout an opportunity to argue in favor of his motion in limine with respect to those three witnesses, plus that fourth witness, plus Lemley's affidavit. Okay?

MR. WALKER: That's fine, Your Honor.

THE COURT: But in the meantime, I'll hear your argument on your two motions in limine.

Depositions of identify the city's damages theories or amounts.

And as the court knows, in order to defend against any damage claim, the defendant and in this case Petra needs to know first each element of alleged damage; second, the amount of the alleged damage arising with respect to each such element; third, the method of calculating the amount of the alleged damage with respect to each element; fourth, the assumptions underlying the calculation of the amount of the alleged damage arising with respect to each element; and fifth and importantly, the cause or the cause of the alleged damage.

Now, the city's opposition brief states, and I quote: "Petra simply cannot in good-faith assert that it did not receive the disclosure of Meridian's evidence of damages."

However, consistent with the strategy so far during discovery, the city's responsive brief doesn't cite a single reference to the record where either the court or Petra can find the theories, the amounts, how the amounts of damage were calculated.

And the reason for that, Your Honor, is...
that there is no evidence in the record.

THE COURT: Well, precisely what were their responses to those questions when you made requests for admission or — well, I suppose when you made your interrogatory, when you asked your question by way of interrogatory and you at some point said, "How much do you claim we owe you and how did you calculate that, and what's your theory here?"

And your contention is that there was never a response that would allow you to know enough about their claims, their claim or claims, that you could give to your expert to be ready to refute that.

MR. WALKER: Let me give you the answers. We asked them to identify their damage claim. The city responded in their response to our interrogatory: "At present the findings to date indicate that Petra's conduct, both its actions and it's failures to act are the cause of substantial but yet to be quantified damages to the City of Meridian under the legal theories expressed in the complaint."

We asked another interrogatory regarding legal and factual bases for the city's your reasonable discovery request by ever saying how much they wanted and specifically factually that was based on, that they should be precluded now from putting on any evidence that would support any specific claim for damages. And without a specific claim for damages, there's no way that you could be prepared to meet that?

MR. WALKER: That's correct, Your Honor, because we would have to have expert testimony. The deadline for our disclosure of experts has past. And in any event, we're just literally 60 days before trial, and we don't know what we did wrong or if we did anything wrong; what damage did it cause and in what amount and how did they calculate it. We don't have the answers to any of those questions.

Briefly then, Your Honor, I'll move on to the experts, and this is again a question of nondisclosure on the part of the City of Meridian. As the court knows, its scheduling order required the city to disclose its experts on or before July 28, 2010. It says the disclosure be made in compliance with Rule 26(b)(4), and the court is aware of the standards under 26(b)(4).

claims. And the city's response was: "The body of law comprising contract law as applicable to the facts and the law of torts, applicable to the facts supports the claims and defenses made by Meridian in this matter. The body of law comprising equitable principles supports the claims of defenses of Meridian in this matter."

THE COURT: So in short you're saying, you were asking how much, and they were saying we don't know yet.

MR. WALKER: And each and every one of their witnesses did not know. And specifically, the three experts said that they had never been asked — excuse me, the two experts, Amento and Knothe, said they had never been asked to make a damages calculation.

THE COURT: Now, this motion which you're couching in terms of a motion in limine is the whole ball game as far as their claim is concerned. You would agree with that, wouldn't you?

MR. WALKER: Yes. On damages, correct.

THE COURT: In other words, if this court grants your motion in limine and based upon your contention that Meridian failed to comply with

THE COURT: Now, you concede that out of the 12 experts, three of them complied.

MR. WALKER: Essentially. Not completely but essentially.

THE COURT: But there's nine others that you want me to say --

MR. WALKER: They're out. And because we don't -- we didn't have any information except on July 28 we received by fax a list of 12 names.

And recently they supplemented their discovery responses. However, the supplements did not meet the requirements of either Rule 26(b)(4) or respond to our interrogatory with regard to expert witness disclosures.

And specifically I've cited in our briefing our interrogatory dealing with the request of disclosure as to expert witnesses, and it's very precise. It asks for some additional information in addition to 26(b)(4). And as we've cited in our briefing, the Idaho Supreme Court in Schmechel versus Dille has held that Rule 26(e) unambiguously imposes a continuing duty to supplement responses to discovery with respect to the substance and subject matter of the expert's testimony where initial responses have been
Mr. Trout. Thank you, Judge. This is nothing more than a disguised effort on Petra to fail to comply with the Idaho Rules of Civil Procedure. Judge, you're aware that any requests under Rule 37(a) has to be met with a certification by counsel to meet and confer. There's no affidavit. There's no document. There's no letter. There's no effort with respect to meet and confer as required under 37(a)(2). "The motion must include a certification that the movant has in good-faith conferred or attempted to confer with a party not

Petra is not prepared to depose these people is unequivocally wrong. If I might approach? This is a deposition schedule, which I'm handing to the court, copy to counsel, in which every single one of these people have been discussed, and we have agreed to dates for deposition for every single one of these individuals, including Mr. Geiss, Mr. Cotton, Mr. Neidigh, Mr. Wetherholt, Mr. Anderson. A continued deposition of Laura Knothe who has been deposed once but whose deposition wasn't completed. Mike Simmonds, Tim Petsche, Todd Weltner, which is a continuation of his deposition which was taken once but not completed. Steve Amento whose deposition has been taken but not yet completed. Ted Baird whose deposition has been taken but not yet completed. And so every one of the people that we've identified is currently subject to a discovery date and deposition agreed to between counsel with respect to the information that they have in this matter.

THE COURT: How many days before trial are we today?

MR. TROUT: Judge, I haven't done the
the city is entitled to?

MR. TROUT: I have one precise figure, and I have some estimates. The one precise figure is with respect to the 30(b)(6) deponent that Petra has requested of us for a damages calculation, and we're going to name at least two individuals as the 30(b)(6) representatives to be deposed. They're included in this list of deponents. And so that discovery is underway as well, in compliance with the timeframes set forth in Petra's discovery response.

THE COURT: All right. I guess that's all.

MR. TROUT: Thank you, Your Honor.

THE COURT: Go ahead, counsel.

MR. WALKER: Thank you, Your Honor. With regard to the no effort to meet and confer, I filed an affidavit in opposition to the motion to dismiss under the Tort Claims Act. It's dated September 15. And Exhibit O to that affidavit is a letter that I wrote to Mr. Trout, a detailed letter pointing out the deficient answers. It is dated June 12, 2009, more than a year ago. The response I received to that was on June 16, 2009 from Mr. Trout's assistant, Kevin Kluckhorn. And Kevin writes: "Tom, Kim forwarded your June 12, 2009 letter to me regarding the discovery responses. We are currently preparing for a trial set to begin on Monday, June 22, 2009, and last five to ten days.

"We will be unavailable to meet and confer by that deadline you requested, and we will respond just as soon as you're able to meet after that trial."

Never heard another word from them.

But as we argue in our brief, our motion in limine is not a motion to compel.

THE COURT: Right, and I understand that.

MR. WALKER: And with regard to the depositions that have been served by Petra on Meridian until 45 days before trial to comply with the discovery request, which does contain the demand to have these opinions disclosed in any event no later than 45 days before trial.

There is no requirement on a motion in limine to exclude evidence to show that one of the parties brought a motion to compel anyway. And in any event, this isn't a motion to compel. And the meet and confer provision of Rule 37 of the Idaho Rules of Civil Procedure does not apply otherwise in motions to compel.

On the other hand, I will order the parties to meet and confer about two issues. One, and most importantly, the testimony that has been sought or rather the answers to interrogatories, and so forth, that have been aimed at obtaining information from the City of Meridian to support their claim for damages, and to do that within absolutely no later than 30 days before trial, to
I think by all rights and based on the 14 of these rulings is the bottom line ruling 13 think it's premature. 13 fight about the -- I think that the important part 11 think I need to do findings of fact and

I think by all rights and based on the 14 express language of the interrogatories, the first 16 set of interrogatories that the City of Meridian from putting on any evidence of damages 11 now, and I think that's pretty obvious from my 12 ruling on the other motion in limine, because I do 13 think it's premature.

And the fundamental problem we have is, 16 responses August 21, 2009. They have not been 18 specifically mention here on the bench today.

The fundamental problem we have is, 18 revisit the issue 17 court's rulings anything that I didn't 17 that he is not acting as the expert.

And the fundamental problem we have is, 19 pursuant to the court's order, as you'll recall 20 back in June, we asked for the opportunity to 21 conclude the depositions of Mr. Bennett and 22 Mr. Coughlin in response to the motion for summary judgment. We did conclude those depositions based 24 upon our understanding they were fact witnesses and they were not expert witnesses.
the very last paragraph. It's the one that is the
crux of the supposed opinion, and it doesn't say,
"This is my opinion."
This says, In Lemley, Lit's, Lemley
International's opinion, Petra exercised the care,
skill, and judgment, et cetera.
So our basis for the exclusion of
Mr. Lemley is, A, he is not a licensed
construction manager; B, this isn't his opinion.
It's the opinion of an entity, and under Rule 702,
experts are required to be witnesses. An entity
cannot be a witness, and as such, Judge,
Mr. Lemley is, A, not qualified; B, relying on
others; and C, not stating a personal opinion but
stating an opinion of an entity which cannot be
qualified as an expert witness under Rule 702.
THE COURT: Thank you.
And, Mr. Trout, I just want to make it
clear for the record, a moment ago when I made a
statement regarding my understanding of the
reasons underlying your motion to exclude
Jack Lemley as an expert, that was the court not
offering an opinion or making a finding of fact,
and just me saying this to let you know that
this is how far that — what I anticipate that
primarily they're rebuttal experts.
And with regard to the content of their
opinions, those are fully set forth in the
disclosure that conforms to the requirements of
Rule 24(b)(6) — or excuse me, 26(b)(4).
And so we think that for purposes of
trial, these gentlemen who have extensive decades
long experience in the construction industry can
give an opinion with respect to whether or not
Petra conformed its work to the standard of care.
Thank you, Your Honor.
THE COURT: Thank you.
MR. TROUT: Nothing further, Judge.
THE COURT: All right. I'm going to deny
both of these motions for this reason.
I believe that the Lemley affidavit and
opinion is purported to be the opinion of
Jack Lemley, who is a named expert in the case and
he was disclosed timely.
And although it wasn't argued, this
wasn't the precise basis of the argument at oral
argument today, my understanding was that when we
had our last hearing last week, well, today I
anticipated that the argument would focus on the
basis for Jack Lemley's affidavit which was the --
I wish to take the depositions of those three individuals to clear up any matters involving their expertise. I wouldn't anticipate those would be lengthy -- well, I won't say. I don't know how long those could take. But anyway, if Meridian believes that there is a need to retake the depositions of any or all of those three now expert witnesses, they may do so, but in any event no later than 45 days before trial.

MR. TROUT: Thank you, Judge.

THE COURT: And, Mr. Walker, you prepare the order with respect to those two motions in limine.

MR. WALKER: Yes, Your Honor.

THE COURT: Folks, do we have something else teed up next week?

MR. WALKER: On Monday, Your Honor.

THE COURT: Good. It wouldn't be Monday without a hearing on one of these matters, so I appreciate that. Anything else, folks?

MR. WALKER: That's it, sir.

THE COURT: Thank you. The court will be in recess until 4 p.m.

(Proceedings concluded.)

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Dianne E. Cromwell, Official Court Reporter CSR No. 21

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation, vs.

PETRA INCORPORATED, an Idaho corporation,

Plaintiff/Counterdefendant, Defendant/Counterclaimant.

Case No. CV OC 0907257

AMENDED NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF MERIDIAN, DUCES TECUM, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – DAMAGES

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEYS OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon
oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Steven J. Amento ("Amento"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the damages that the City has allegedly suffered as claimed in paragraph 22 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 20, 24, 38, 48, 53, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Amento is the person most knowledgeable regarding: (1) each element of damage, (2) the amount of damage arising with respect to each element, (3) the method of calculating the amount of damage arising with respect to each element, (4) the assumptions underlying the calculation of the amount of damage arising with respect to each element, and (5) the cause or causes of the damage arising with respect to each element. Further, according to the City, Amento is the most knowledgeable person regarding the unjust enrichment claim set forth in paragraph 29 of the City's proposed First Amended Complaint, including (1) each element of unjust enrichment, (2) the amount of unjust enrichment arising with respect to each element, (3) the method of calculating the amount of unjust enrichment arising with respect to each element, (4) the assumptions underlying the calculation of the amount of unjust enrichment arising with respect to each element, and (5) the cause or causes of the unjust enrichment arising with respect to each element. The primary objective of the Rule 30(b)(6) deposition is to inquire of Amento who may testify regarding the foregoing matters at trial.

The deposition will be taken on Thursday, November 4, 2010 beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.
The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires Amento to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims of damages and unjust enrichment.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 20, 2010. 

COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of October, 2010, a true and correct copy of the
within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.
Daniel L. Glynn, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile:
☐ E-mail:

[Signature]

THOMAS G. WALKER
SECOND AMENDED NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF MERIDIAN, *DUCES TECUM*, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – CLAIMS OTHER THAN DAMAGES

TO:  PLAINIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND THROUGH ITS ATTORNEYS OF RECORD

Case No. CV OC 0907257

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.
YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Theodore W. Baird, Jr. ("Baird"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the allegations by the City set forth in paragraphs 4 through 21 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 4 through 19, 23, 26 through 28, 31 through 37, 40 through 47, 50 through 52, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Baird is the person most knowledgeable regarding: (1) the facts the City claims support Petra's alleged breach of contract, (2) the facts the City claims support Petra's alleged breach of the covenant of good faith and fair dealing, (3) the facts the City claims support Petra's alleged unjust enrichment, (4) the facts the City claims support Petra's alleged fraud and fraud in the inducement, (5) the facts the City claims support Petra's alleged constructive fraud, (6) the facts the City claims support Petra's alleged gross negligence, and (7) the facts the City claims support Petra's alleged oppressive, malicious, fraudulent or outrageous conduct.

The primary objective of the Rule 30(b)(6) deposition is to inquire of Baird who may testify regarding the foregoing matters at trial.

The deposition will be taken on Wednesday, November 3, 2010, beginning at the hour of 12:00 p.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.
The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires Baird to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian’s claims described above.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 21, 2010. COSHO HUMPHREY, LLP

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, Duces Tecum, was served upon:

Kim J. Trout, Esq.                     □ U.S. Mail
Daniel L. Glynn, Esq.                  □ Hand Delivery
Trout Jones Gledhill Fuhrman, P.A.     □ Overnight Courier
225 North 9th Street, Suite 820       □ Facsimile:
P.O. Box 1097                           □ E-mail;
Boise, Idaho 83701

THOMAS G. WALKER

SECOND AMENDED NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF MERIDIAN, DUCES TECUM, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – CLAIMS OTHER THAN DAMAGES
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho)
Municipal Corporation, ) Case No. CV OC 0907257
 )
Plaintiff/Counterdefendant, )
vs. )
PETRA INCORPORATED, an Idaho corporation, )
Defendant/Counterclaimant. )

AUDIO-VIDEO 30(b)(6) DEPOSITION OF STEVEN J. AMENTO

November 4, 2010
Boise, Idaho

Janet French, CSR #946, RPR
MR. WALKER: We are on the record.

This is the 30(b)(6) deposition of the City of Meridian, the City having designated Steven J. Amento as the person most knowledgeable with respect to its damages claims.

This deposition is being taken on behalf of the defendant, Petra Incorporated, in Case No. CV 09-7257, filed by the City of Meridian in the District Court of the Fourth Judicial District for the State of Idaho in and for Ada County.

This deposition is being taken on November 4, 2010, commencing at approximately 9:55 a.m., before Janet French of Associated Reporting, Inc.

The deposition is being taken at the offices of Cosho Humphrey, LLP, at 800 Park Boulevard, Suite 790, Boise, Idaho 83712.

I'm Thomas G. Walker of the Cosho Humphrey, LLP firm, and I'm here representing Petra Incorporated, the defendant in this lawsuit. I'm also the operator of the audiovisual equipment.

This deposition is being taken in accordance with the Idaho Rules of Civil Procedure, and there are no other stipulations that I'm aware of.

Would you please swear the witness, Janet French?
3 (Pages 6 to 9)

Associated Reporting Inc.
208.343.4004

Electronically signed by Janet French (101-258-315-6555) 5b5a6076-410d-4342-86fc-54fb2492121
Q. And what page are you looking at?

A. CM017065.

Q. And where on that page, page 17065, do you find a start date of August 1, 2006?

MR. TROUT: Object to the form of the question.

Q. (BY MR. WALKER) Okay. And, Mr. Amento, did you look at any of the subsequent master production schedules that were provided by Petra to the City?

MR. TROUT: Object to the form of the question.

Q. (BY MR. WALKER) THE WITNESS: If you look at ID No. 71, "Occupancy," it shows a start and finish date of August 1, 2008, for occupancy.

MR. TROUT: Object to the form of the question.

Q. (BY MR. WALKER) Okay. And, you look at any of the subsequent master production schedules that were provided by Petra to the City?

MR. TROUT: Object to the form of the question.

Q. (BY MR. WALKER) THE WITNESS: I've seen subsequent schedules, yes.

Q. (BY MR. WALKER) And are you aware, Mr. Amento, that subsequent to filing -- or subsequent to the execution of the Construction Management Agreement, Exhibit No. 2, that contaminated and unsuitable soils were discovered in greater quantities than anticipated on the site?

MR. TROUT: Object to the form of the question.

Q. (BY MR. WALKER) THE WITNESS: I've seen subsequent schedules, yes.

Q. (BY MR. WALKER) And did you review any of the documents that related to removal of those contaminated and unsuitable soils?

MR. TROUT: Object to the form of the question.

Q. (BY MR. WALKER) THE WITNESS: I believe I've seen some of the documents, were you able to conclude what, if any, consequence of the requirement that contaminated and unsuitable soils be remediated?

MR. TROUT: Object to the form of the question.

Q. (BY MR. WALKER) THE WITNESS: Yes, I recall there was a legal conclusion.

Amenta 30 (b) (6), Steven J. November 4, 2010 The Cit Meridian v. Petra, Inc., et al.
<table>
<thead>
<tr>
<th>Time</th>
<th>Page 14</th>
<th>Page 16</th>
</tr>
</thead>
<tbody>
<tr>
<td>10:28:03</td>
<td>1</td>
<td>sometimes used by people when they finally break the ground.</td>
</tr>
<tr>
<td>10:29:17</td>
<td>5</td>
<td>Q. (BY MR. WALKER) And that's item one to --</td>
</tr>
<tr>
<td>10:30:10</td>
<td>6</td>
<td>unrelated, in my opinion, irrelevant -- or excuse me -- not relevant to the performances of their contractors.</td>
</tr>
<tr>
<td>10:30:23</td>
<td>7</td>
<td>A. Yes, excavate basement.</td>
</tr>
<tr>
<td>10:30:58</td>
<td>8</td>
<td>and we were looking at the August '08 time frame.</td>
</tr>
<tr>
<td>10:31:01</td>
<td>16</td>
<td>Q. Okay. Why did you do that?</td>
</tr>
<tr>
<td>10:31:02</td>
<td>17</td>
<td>A. The 44 contractors were those that had a substantial completion date in their contract, and the substantial completion date that's listed on those warranty sheets.</td>
</tr>
<tr>
<td>10:31:05</td>
<td>18</td>
<td>Q. (BY MR. WALKER) And in looking at your affidavit, which is Exhibit No. 291, I believe, and where you made the calculation of the liquidated damages, you used $500; is that correct, per day?</td>
</tr>
<tr>
<td>10:31:16</td>
<td>19</td>
<td>MR. TROUT: Object to the form of the question.</td>
</tr>
<tr>
<td>10:31:20</td>
<td>20</td>
<td>Q. (BY MR. WALKER) Okay. Mr. Amento, I'm going to hand you what we've marked as Exhibit No. 326, and take your time to look through the documents included in Exhibit No. 326, and in particular, I'd like you to take a look at the substantial completion date that's listed on those warranty sheets.</td>
</tr>
<tr>
<td>10:31:22</td>
<td>21</td>
<td>I, 2008, date?</td>
</tr>
<tr>
<td>10:31:25</td>
<td>22</td>
<td>THE WITNESS: That was a -- I looked at the schedule in the Construction Management Plan, and that was, as I recall, consistent with other subsequent schedules, not particularly this schedule, which is unrelated, not relevant to the performances of their contractors.</td>
</tr>
<tr>
<td>10:31:29</td>
<td>23</td>
<td>Q. And it also called for an 18-month construction period.</td>
</tr>
<tr>
<td>10:32:12</td>
<td>25</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>10:32:23</td>
<td>26</td>
<td>THE WITNESS: I'm not sure I follow you. We were talking about my affidavit and the liquidated damages, and we were looking at the August '08 time frame.</td>
</tr>
<tr>
<td>10:32:28</td>
<td>28</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>10:32:30</td>
<td>29</td>
<td>Q. Okay. Why didn't you use May 7, 2007, as the initial date of May 7, 2007.</td>
</tr>
<tr>
<td>10:32:40</td>
<td>30</td>
<td>Q. Okay. Why didn't you use May 7, 2007, as the initial date of May 7, 2007.</td>
</tr>
<tr>
<td>10:33:02</td>
<td>36</td>
<td>Q. Okay. Why didn't you use May 7, 2007, as the initial date of May 7, 2007.</td>
</tr>
<tr>
<td>10:33:03</td>
<td>37</td>
<td>Q. Okay. Why didn't you use May 7, 2007, as the initial date of May 7, 2007.</td>
</tr>
<tr>
<td>10:33:04</td>
<td>38</td>
<td>Q. Okay. Why didn't you use May 7, 2007, as the initial date of May 7, 2007.</td>
</tr>
</tbody>
</table>

5 (Pages 14 to 17)

Associated Reporting Inc.
208.343.4004
Q. And the first item is -- it says, "Repair of clickers," should have been a warranty item."
A. Okay.
Q. And which contracts are you specifically referring to?
A. It is -- most of the items on this list are something that will be opined by Mr. Weltner.
Q. And so you're relying on Mr. Weltner for the facts supporting the calculation with respect to item 101, "Repair of clickers?"
A. Yes.
Q. In each of these instances, the contractors
A. I have not looked deeply into this. This is -- most of the items on this list are something that will be opined by Mr. Weltner.
Q. Okay. And so you're relying on Mr. Weltner for the facts supporting the calculation with respect to item 101, "Repair of clickers?"
A. Yes.
Q. In each of these instances, the contractors
A. I have not looked deeply into this. This is -- most of the items on this list are something that will be opined by Mr. Weltner.
<table>
<thead>
<tr>
<th>Time</th>
<th>Line 1</th>
<th>Line 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>10:40:43</td>
<td>1 calculation?</td>
<td>10:43:02</td>
</tr>
<tr>
<td>10:40:46</td>
<td>2 A. Again, this is an item that Mr. Weltner will</td>
<td>2 A. This is an item that Mr. Weltner will</td>
</tr>
<tr>
<td>10:40:46</td>
<td>3 testify about.</td>
<td>3 provide testimony.</td>
</tr>
<tr>
<td>10:40:49</td>
<td>4 Q. Did you review Buss Mechanical Change Order</td>
<td>4 Q. In order to short cut this, because I have a</td>
</tr>
<tr>
<td>10:40:50</td>
<td>5 No. 2?</td>
<td>5 sense from your previous answers that as to each of</td>
</tr>
<tr>
<td>10:40:52</td>
<td>6 A. Not recently.</td>
<td>6 these items 108 through -- at least 113, you are</td>
</tr>
<tr>
<td>10:40:55</td>
<td>7 Q. Do you recall what was included in Change Order No. 2?</td>
<td>7 relying on Mr. Weltner for the information that's</td>
</tr>
<tr>
<td>10:41:02</td>
<td>8 Order No. 2?</td>
<td>8 contained in the change orders; is that a fair</td>
</tr>
<tr>
<td>10:41:03</td>
<td>9 A. I do not.</td>
<td>9 statement?</td>
</tr>
<tr>
<td>10:41:08</td>
<td>10 Q. Moving on to item 105, Cobblestone, Change Order</td>
<td>10 A. It's fair for everything except 110.</td>
</tr>
<tr>
<td>10:41:10</td>
<td>11 Order No. 2, re-worked areas, $2,175.</td>
<td>11 Q. Okay. 110 is Rule Steel, Change Order</td>
</tr>
<tr>
<td>10:41:14</td>
<td>12 Why did you include item 105 in your damage?</td>
<td>12 No. 3, 30-day float was not set against weather</td>
</tr>
<tr>
<td></td>
<td>13 calculation?</td>
<td>13 extension, and then there is two question marks.</td>
</tr>
<tr>
<td>10:41:17</td>
<td>14 A. This is, again, something that Mr. Weltner</td>
<td>14 Are those your question marks?</td>
</tr>
<tr>
<td>10:41:19</td>
<td>15 will testify about.</td>
<td>15 A. No, those aren't my question marks. But</td>
</tr>
<tr>
<td>10:41:22</td>
<td>16 Q. Have you reviewed Cobblestone Change Order</td>
<td>16 the -- this is a change order that was issued to Rule</td>
</tr>
<tr>
<td>10:41:23</td>
<td>17 No. 2?</td>
<td>17 Steel by which Petra considered time extension</td>
</tr>
<tr>
<td>10:41:24</td>
<td>18 A. Not recently.</td>
<td>18 requests that were submitted by Rule Steel against the</td>
</tr>
<tr>
<td>10:41:27</td>
<td>19 Q. So as you sit here today, you can't recall</td>
<td>19 fact that Rule Steel was very late in completion of</td>
</tr>
<tr>
<td>10:41:30</td>
<td>20 what was included in Change Order No. 2?</td>
<td>20 their performed work, and in doing so, issued a change</td>
</tr>
<tr>
<td>10:41:31</td>
<td>21 A. I cannot.</td>
<td>21 order that netted out the amount of delays against</td>
</tr>
<tr>
<td>10:41:36</td>
<td>22 Q. Item 106, Commercial Painting, Phase 3,</td>
<td>22 some of the time extensions that Rule Steel had</td>
</tr>
<tr>
<td>10:41:42</td>
<td>23 Change Order No. 7, paint prep Rule Steel material,</td>
<td>23 requested.</td>
</tr>
<tr>
<td>10:41:43</td>
<td>24 $2,412.</td>
<td>24 What is not in there is any consideration for the 30-day</td>
</tr>
<tr>
<td>10:41:47</td>
<td>25 Why did you include item 106 in your damage</td>
<td>float provision provided in Rule</td>
</tr>
<tr>
<td>10:41:47</td>
<td>1 calculation?</td>
<td>10:44:37</td>
</tr>
<tr>
<td>10:41:49</td>
<td>2 A. Again, this is something that Mr. Weltner</td>
<td>10:44:43</td>
</tr>
<tr>
<td>10:41:51</td>
<td>3 will provide testimony on.</td>
<td>10:44:46</td>
</tr>
<tr>
<td>10:41:54</td>
<td>4 Q. Do you recall whether you reviewed</td>
<td>10:44:54</td>
</tr>
<tr>
<td>10:41:59</td>
<td>5 Commercial Painting, Phase 3, Change Order No. 7?</td>
<td>10:44:58</td>
</tr>
<tr>
<td>10:42:02</td>
<td>6 A. I have not reviewed it recently.</td>
<td>10:45:00</td>
</tr>
<tr>
<td>10:42:05</td>
<td>7 Q. So as you sit here today, you can't recall</td>
<td>10:45:05</td>
</tr>
<tr>
<td>10:42:08</td>
<td>8 what was included in Change Order No. 7, is that correct?</td>
<td>10:45:09</td>
</tr>
<tr>
<td>10:42:09</td>
<td>9 Q. That's correct.</td>
<td>10:45:12</td>
</tr>
<tr>
<td>10:42:10</td>
<td>10 Q. Item 107, Custom Glass, Phase 2, $1,704.</td>
<td>10:45:17</td>
</tr>
<tr>
<td>10:42:19</td>
<td>11 A. Again, this is an item that Mr. Weltner will</td>
<td>10:45:21</td>
</tr>
<tr>
<td>10:42:22</td>
<td>12 Why did you include item 107 in your damage</td>
<td>10:45:24</td>
</tr>
<tr>
<td>10:42:27</td>
<td>14 A. Again, this is an item that Mr. Weltner will</td>
<td>10:45:30</td>
</tr>
<tr>
<td>10:42:28</td>
<td>15 provide testimony.</td>
<td>10:45:34</td>
</tr>
<tr>
<td>10:42:32</td>
<td>16 Q. And as you sit here today, can you recall</td>
<td>10:45:36</td>
</tr>
<tr>
<td>10:42:37</td>
<td>17 reviewing Custom Glass, Phase 2, Change Order No. 2?</td>
<td>10:45:44</td>
</tr>
<tr>
<td>10:42:38</td>
<td>18 A. Not recently.</td>
<td>10:45:48</td>
</tr>
<tr>
<td>10:42:42</td>
<td>19 Q. I know you haven't reviewed it recently, but</td>
<td>10:45:53</td>
</tr>
<tr>
<td>10:42:45</td>
<td>20 can you recall whether you reviewed Change Order</td>
<td>10:45:58</td>
</tr>
<tr>
<td>10:42:46</td>
<td>21 No. 2?</td>
<td>10:46:02</td>
</tr>
<tr>
<td>10:42:46</td>
<td>22 A. I can't recall.</td>
<td>10:46:03</td>
</tr>
<tr>
<td>10:42:57</td>
<td>24 No. 2, rework to meet code, 4,197.</td>
<td>10:46:08</td>
</tr>
<tr>
<td>10:43:02</td>
<td>25 Why did you include item 108 in your damage</td>
<td>10:46:10</td>
</tr>
</tbody>
</table>

7 (Pages 22 to 25)
10:46:13 1 the extent it may call for a legal conclusion. The
10:46:18 2 contracts speak for themselves.
10:46:20 3 THE WITNESS: Every contract with the trade
10:46:24 4 contractors is the same, and they all have a 30-day
10:46:25 5 float provision in the contract.
10:46:30 6 Q. (BY MR. WALKER) So using your 44
10:46:33 7 contractors, if we multiply that times the 30-day
10:46:36 8 float, it would give us an allowance, to use your
10:46:40 9 term, that the project could be delayed before each of
10:46:43 10 the prime contractors were entitled to compensation;
10:46:44 11 is that your testimony?
10:46:46 12 MR. TROUT: Object to the form of the question.
10:46:49 13 THE WITNESS: The contracts speak for themselves, and I'll object on
10:46:53 14 the basis of any call for a legal conclusion.
10:46:55 15 Q. (BY MR. WALKER) I'm asking for your
10:46:58 16 opinion, Mr. Amento, as a construction professional.
10:46:59 17 MR. TROUT: Same objection.
10:47:01 18 THE WITNESS: Well, if you look at each
10:47:06 19 individual contract, it provides a 30-day float. So
10:47:12 20 if the contractor is delayed during their performance,
10:47:16 21 the owner does not have to issue a time extension or
10:47:19 22 provide additional compensation until that 30-day
10:47:22 23 float period has been exhausted. If you look at the payment applications you are referring to?
10:47:34 25 Q. (BY MR. WALKER) Okay. Now, I take it your answers to 109, 111, 112, and 113, would be as you
10:47:35 26... 2
10:47:39 1 responded to 101 through 108, is that correct?
10:47:54 3 Q. Okay. Then you have - let's look at 113,
10:47:59 4 "Tamoseal in lieu of PVC/S.S. attachments in entry pools."
10:48:01 5 A. Why did you include the 113 in your damage
10:48:04 6 calculation?
10:48:08 7 Q. Again, this is an item that Mr. Weimer will
10:48:09 9 provide testimony.
10:48:13 10 Q. Have you seen any change orders related to
10:48:18 11 the substitution of Tamoseal for the PVC liner?
10:48:21 12 MR. TROUT: Object to the form of the question.
10:48:22 13 THE WITNESS: I don't believe I have.
10:48:27 14 Q. (BY MR. WALKER) At least as you sit here
10:48:31 15 today, you don't recall seeing a change order for
10:48:36 16 substitution of Tamoseal for the PVC liner?
10:48:38 17 MR. TROUT: Same objection. Object to the form.
10:48:42 19 Q. (BY MR. WALKER) With regard to 114, winter
10:48:45 20 conditions, $40,000, why did you include that in your
10:48:46 21 damages calculation?
10:48:50 22 A. The $40,000 is an allowance that
10:48:57 23 included in the TMC contract, however, the
10:49:04 24 allowance, TMC was paid additional money above and
10:49:08 25 beyond their lump sum contract amount for winter

8 (Pages 26 to 29)
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<tr>
<th>Time</th>
<th>Speaker</th>
<th>Text</th>
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<tbody>
<tr>
<td>10:52:42</td>
<td>Amento</td>
<td>I provide testimony in regards to all of these items.</td>
</tr>
<tr>
<td>10:52:45</td>
<td>Q.</td>
<td>And what about as to the amounts? Are there going to be amounts filled in at some point in time?</td>
</tr>
<tr>
<td>10:52:48</td>
<td>A.</td>
<td>Well, it's not my expectation it will be amounts, but these are additional -- this is just further evidence that the -- Petra failed in their duties to properly represent the owner's interests and make sure that the various contractors provided all of the -- all of these items to the owner in fulfillment with their contract.</td>
</tr>
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<td>10:53:16</td>
<td>Q.</td>
<td>And do you anticipate that you will be testifying at trial with respect to any of the amounts?</td>
</tr>
<tr>
<td>10:53:30</td>
<td>A.</td>
<td>I'm not sure amounts will be added to Tab 4, but, again, this is more evidence as to the care and custody or lack of -- not care and custody, but the standard of care that was -- the standard of care by which Petra conducted business on the project.</td>
</tr>
<tr>
<td>10:53:59</td>
<td>Q.</td>
<td>Okay. With regard to Tab 4, item 1, extra materials, what do you mean by that?</td>
</tr>
<tr>
<td>10:54:01</td>
<td>A.</td>
<td>The contract required that extra materials, unit pavers, in this case, had to be provided to the City. Extra materials, spare parts, et cetera, there in the case of breakage, they are to be provided by whichever contractor was responsible for the specific item.</td>
</tr>
<tr>
<td>10:54:29</td>
<td>Q.</td>
<td>And what is the letter &quot;N&quot; in the extra materials column, what does that mean?</td>
</tr>
<tr>
<td>10:54:37</td>
<td>A.</td>
<td>Apparently that means that they were not provided.</td>
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<td>10:54:41</td>
<td>Q.</td>
<td>And you are relying upon the representation or the testimony of Mr. Watts for that position?</td>
</tr>
<tr>
<td>10:54:49</td>
<td>A.</td>
<td>It would be Mr. Watts and/or Mr. Wettler, yes.</td>
</tr>
<tr>
<td>10:54:53</td>
<td>Q.</td>
<td>With regard to the next item down -- the tile, extra material. It says, &quot;LTD.&quot; What is your understanding of what that stands for?</td>
</tr>
<tr>
<td>10:55:01</td>
<td>A.</td>
<td>That looks like a limited amount was verified as to whether it was provided in its entirety provided, not the box as required.</td>
</tr>
<tr>
<td>10:55:16</td>
<td>Q.</td>
<td>And then we’ve got question marks on down under item 1. There is question marks for extra paint and extra stain, Do you know why the question marks are there?</td>
</tr>
<tr>
<td>10:55:26</td>
<td>A.</td>
<td>I think that item still has not been verified as to whether it was provided in its entirety as required by the referenced section 2.</td>
</tr>
<tr>
<td>10:55:41</td>
<td>Q.</td>
<td>And item 2 is entitled &quot;special warranties.&quot; What's your understanding of what that means?</td>
</tr>
<tr>
<td>10:55:50</td>
<td>A.</td>
<td>These are warranties that are provided -- or to be provided in accordance with the contract specifications by the various contractors performing the work.</td>
</tr>
<tr>
<td>10:55:58</td>
<td>Q.</td>
<td>So it's your understanding that the warranties haven't been delivered to the owner -- is that your understanding?</td>
</tr>
<tr>
<td>10:56:06</td>
<td>A.</td>
<td>Yes.</td>
</tr>
<tr>
<td>10:56:09</td>
<td>Q.</td>
<td>Do you know whether or not the City has submitted any warranty claims with respect to any of the items listed under item 2, special warranties?</td>
</tr>
<tr>
<td>10:56:13</td>
<td>A.</td>
<td>Mr. TROUT: Object to the form of the question to the extent it may call for a legal conclusion.</td>
</tr>
<tr>
<td>10:56:23</td>
<td>THE WITNESS:</td>
<td>I know on some of these, for instance, in regards to the roof, the City has been working with the roofing contractor, Western, on some defects and repairs on the roofs.</td>
</tr>
<tr>
<td>10:56:26</td>
<td>Q.</td>
<td>(BY MR. WALKER) Okay, Mr. Amento, are you aware of any of the contractors who have refused to perform warranty work because there was no warranty allegedly delivered to the owner.</td>
</tr>
<tr>
<td>10:56:30</td>
<td>A.</td>
<td>Yes. Again, these are documentations that are required incompletely, hence the entry for &quot;limited,&quot; some of which were not provided at all.</td>
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<td>10:56:35</td>
<td>Q.</td>
<td>(BY MR. WALKER) Okay. Let's turn to page CM114383, and on that page appears item 3, &quot;Submittals/closeout.&quot;</td>
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<td>10:56:38</td>
<td>A.</td>
<td>No do you know why those items were included in Tab 4?</td>
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<td>10:56:40</td>
<td>Q.</td>
<td>(BY MR. WALKER) Okay. Let's turn to page CM114385, which is Tab 5.</td>
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<tr>
<td>10:56:42</td>
<td>A.</td>
<td>Yes. Again, these are documents including certifications, O&amp;M manuals, balance reports, those types of documents that are required per specification. Some of which were provided incompletely, hence the entry for &quot;limited,&quot; some of which were not provided at all.</td>
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<td>10:56:50</td>
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<td>10:57:04</td>
<td>A.</td>
<td>These are costs which the City has incurred post completion of the project to perform repairs or adjustment to systems, or in the case of item 6, repairs that stem from defective or incomplete work.</td>
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<td>10:57:07</td>
<td>Q.</td>
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10 (Pages 34 to 37)
<table>
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<tr>
<th>Time</th>
<th>Page 38</th>
<th>Page 39</th>
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<tbody>
<tr>
<td>11:03:54</td>
<td>1 Petsche who has conducted an investigation and is in the process of preparing recommendations that in turn will be priced. And the preliminary estimate for those repairs is $250,000.</td>
<td>11:07:51</td>
</tr>
<tr>
<td>11:03:59</td>
<td>2 MR. TROUT: Object to the form of the question.</td>
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<td>18 MR. TROUT: Object to the form of the question.</td>
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<td>19 MR. TROUT: Object to the form of the question.</td>
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<td>20 MR. TROUT: Object to the form of the question.</td>
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<td>22 MR. TROUT: Object to the form of the question.</td>
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<td>23 MR. TROUT: Object to the form of the question.</td>
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<td>24 MR. TROUT: Object to the form of the question.</td>
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<td>11:05:12</td>
<td>25 MR. TROUT: Object to the form of the question.</td>
<td>11:08:39</td>
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11 (Pages 38 to 41)
11:11:27  1  A. He told me he was working on his report.
11:11:31  2  And part of his report, the observation portion, was
11:11:37  3  issued a day or two ago. I think I received it either
11:11:40  4  Tuesday or yesterday.
11:11:42  5  Q. Do you have that report with you, because I
11:11:45  6  don't think I've seen it.
11:11:47  7  MR. TROUT: It's been sent to you, Counsel.
11:11:52  8  There is an email message confirming receipt from Pam
11:11:56  9  in your office which we have in our files.
11:11:58 10  MR. WALKER: Okay. I just haven't seen it, I
11:12:03 11  was -- it has been served on us, Mr. Trout?
11:12:04 12  MR. TROUT: Yes.
11:12:06 13  MR. WALKER: Do you know when it was served on
11:12:08 14  us?
11:12:10 15  MR. TROUT: I don't for sure. I just remember
11:12:11 16  over the course of the last couple of days seeing the
11:12:14 17  confirmation back from Pam that it had been received.
11:12:15 18  MR. WALKER: Okay.
11:12:17 19  Q. (BY MR. WALKER) With regard to item 4,
11:12:22 20  "HVAC repairs/corrections, $250,000" - I recall your
11:12:24 21  testimony with regard to that number as being a range
11:12:27 22  of magnitude; is that your testimony?
11:12:29 23  A. Yes.
11:12:31 24  Q. What do you mean by range of magnitude?
11:12:32 25  A. It's an estimate.

11:12:36 1  Q. And it doesn't -- I mean, it looks like we
11:12:40 2  have got a fixed number here of $250,000. I don't
11:12:42 3  understand the use of the term "range."
11:12:46 4  A. Well, range of magnitude, I'm using the --
11:12:49 5  the term interchangeably with the preliminary
11:12:49 6  estimate.
11:12:57 7  Q. So is $250,000 the upper range or the lower
11:12:58 8  range?
11:13:02 9  A. I don't think it's a range. I think it's an
11:13:07 10  estimate, so range of magnitude may be misleading in
11:13:09 11  that regard.
11:13:16 14  Q. The contingency number of $40,000, how was
11:13:18 15  that arrived at, do you know?
11:13:21 16  A. Again, it's -- you know, a contingency can
11:13:26 17  be anywhere between 10 to 20 percent on a schematic
11:13:31 18  repair, so it's closer to 20 percent than 10 percent
11:13:35 19  Again, after the report is issued and the
11:13:39 20  contractor estimates are provided, then the
11:13:42 21  contingency can be revisited.
11:13:49 22  Q. And the remainder of the items 5, 6, and 7,
11:13:54 23  those, again, are estimates that you would anticipate
11:13:57 24  will be completed sometime within the next two weeks?

12 (Pages 42 to 45)
I think the lentels might be included...

WITNESS: Well, I know - excuse me - Yeah, Amenta 30 (b) (6), Steven J. November 4, 2010
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<td>11:27:02</td>
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<td>11:26:33</td>
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**Questions and Answers:**

1. Q. Do you know who -- do you know whether or not anyone has talked with Alpha Masonry with regard to anything having to do with the water feature?

2. MR. TROUT: Object to the statement.

3. THE WITNESS: I do not know.

4. Q. (BY MR. WALKER) Do you know -- do you know by name any entity that -- any person or entity that the City has contacted, aside from those that you already mentioned, having to do with the alleged defects with the water feature?

5. A. I do not.

6. Q. And do you know what that -- do you know how many round numbers, so they are just preliminary estimates; is that correct?

7. A. That is correct.

8. Q. And where did you get these preliminary estimates?

9. A. The largest estimate, the masonry repairs, is a number provided by Mr. Weltner.

10. Q. And do you know what that -- do you know how Mr. Weltner arrived at that number?

11. A. Yes.

12. Q. And does this million dollars include the removal of all of the brick and all of the stone?

13. A. I think it's removal and replacement of all the stone, and then some repairs -- topical repairs and changes to the brick.

14. Q. Now, with --

15. A. And also the grot throughout the building.

16. Q. Okay. With regard to the estimates that you -- and the "place holders," to use your term, on Tab 9, do you expect those to be resolved within the next couple of weeks?

17. A. Yes.

18. Q. Tab 10, "Plumbing." And, again, we are looking at round numbers. And can you tell me where you obtained these round numbers?

19. A. The work here is for the installation of clean outs that appear on the drawings but were not installed. And so the repair process is to locate -- find the locations where the clean out should have been installed, install the clean outs, and...

**Other Details:**

- Associated Reporting Inc.
- 208.343.4004

**Electronic Signature:**
- Janet French (101-258-315-6555)
- 5b5a6076-4f0d-4342-82ae-b6c704982121
11:30:36 1 unfortunately, that will require some invasive
11:30:41 2 investigation and work to wall and ceiling areas
11:30:42 3 throughout the building.
11:30:45 4 Q. And how is that you believe there are
11:30:46 5 missing clean outs?
11:30:51 6 A. I have not conducted an investigation, but
11:30:57 7 Mr. Weltner has. Looking at the project documents for
11:31:01 8 those clean outs, going physically to the location
11:31:04 9 where those clean outs should be located and finding
11:31:05 10 that they are not there.
11:31:07 11 Q. Is it your understanding that Mr. Weltner
11:31:11 12 did a complete inspection of the drain system to
11:31:14 13 determine whether or not the clean outs were missing?
11:31:15 14 A. MR. TROUT: Object to the form.
11:31:17 15 THE WITNESS: It is my understanding that he
11:31:20 16 conducted an investigation. I don't know what you
11:31:22 17 mean by "complete investigation." That can mean a lot
11:31:25 18 of different things, but he's investigated enough to
11:31:28 19 determine that the clean outs shown on the drawings
11:31:29 20 were not installed.
11:31:31 21 Q. (BY MR. WALKER) Do you know what his
11:31:34 22 investigation consisted of?
11:31:38 23 A. Not specifically. It is my understanding he
11:31:42 24 had a set of as built drawings that he relied upon
11:31:46 25 when he walked in various areas of the project.

11:31:53 1 Q. And do you anticipate that these estimated
11:31:55 2 costs and place holders will be completed within the
11:31:56 3 next couple of weeks?
11:31:57 4 A. Yes.
11:32:01 5 Q. Turning to Tab 11, "SW drain." In general, can you tell me what this is all about?
11:32:05 6 A. Yes. Oh, yes. This is a -- this is
11:32:28 7 property damage that occurred at least one
11:32:37 8 location. I think it is in the southwest corner of
11:32:40 9 the building, where the cow's tongue portion of the
11:32:46 10 roof drain was not properly connected to the pipe
11:32:49 11 forming the roof drain. Furthermore, the roof drain
11:32:53 12 and the overflow lines were cross connected, so roof
11:32:57 14 water from the overflow throughout the drain.
11:33:03 15 So instead of the water moving outside the
11:33:08 16 building, the cow's tongue is a -- sort of an odd term
11:33:11 17 for a device, but basically it is a device to divert
11:33:15 18 the water away from the wall instead of into the wall
11:33:18 19 As it flows out of the building it actually entered
11:33:22 20 into the wall causing damage inside the wall. And so
11:33:29 21 this item includes repair of the damaged wall, as well
11:33:34 22 as correcting the cross connection, and essentially
11:33:37 23 installing the system the way it should have been
11:33:39 24 installed to begin with.
11:33:42 25 Q. Do you know whether or not that work has

11:33:42 1 already been completed?
11:33:46 2 A. I think some of the work has. I think the
11:33:50 3 cross connections have. I'm not sure all the repairs
11:34:08 4 have been conducted or not. Let me check my notes.
11:34:13 5 I think some of the work has been installed -- or has
11:34:13 6 been performed.
11:34:16 7 Q. Is there a reason that you didn't include
11:34:21 8 the actual cost of the repairs that have already been
11:34:22 9 completed?
11:34:26 10 A. No. It just needs to be updated once the --
11:34:30 11 with the work that's been prepared -- or excuse me--
11:34:31 12 once it is completed.
11:34:36 13 Q. So you would anticipate, as in the other
11:34:38 14 instances, that this scheduled Tab 11 will be
11:34:42 15 completed within the next couple of weeks?
11:34:42 16 A. Yes.
11:34:48 17 Q. Turning to Tab 12 entitled "Basement M1E."
11:35:02 19 In general, can you tell me what this is all about?
11:35:07 20 A. It's my understanding this is two unrelated
11:35:14 21 items. One, there is a leak at the basement through a
11:35:17 22 place holders either eliminated or completed
11:35:20 23 within the next couple weeks? I think it is a fire control panel. And the great in
11:35:24 24 During the investigation, they observed lack
11:35:28 1 outside face of the concrete wall, or any means to
11:35:31 2 properly seal the annular space between the pipe
11:35:34 3 running through the wall and the actual sleeve portion
11:35:37 4 of the wall, which it explains, I guess, why the wall
11:35:38 5 has been leaking.
11:35:42 6 The other item has to do with a mechanical
11:35:51 7 pad located in the basement over an electrical panel. I think it is a fire control panel. And the great in
11:35:54 8 this pad supporting this panel is deteriorating.
11:35:59 9 I don't know that to be a fact, but that is typically
11:36:04 10 crumbling -- probably improper water cement ratio -- I
11:36:06 11 don't know that to be a fact, but that is typically
11:36:11 12 what happens when grout fails prematurely.
11:36:14 13 So the repair includes -- excuse me -- the
11:36:17 14 costs -- the estimate includes repair to the pad, as
11:36:25 15 well as work required to properly waterproof the wall
11:36:28 16 and fix any damage caused by the leaks.
11:36:31 17 Q. Okay. And as with the other items, you
11:36:35 18 expect that these cost estimates will be completed and
11:36:39 19 the place holders either eliminated or completed
11:36:41 20 within the next couple weeks?
11:36:42 21 A. Yes, I do.
11:36:45 22 Q. Turning to Tab 13, the "Mayor's reception."
11:36:47 23 In general, can you tell me what this is all about.
11:36:49 24 A. This item is the repair of an incomplete

Page 55
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<td>11:37:03</td>
<td>1 vapor barrier at the ceiling of the barrel vault area,</td>
<td>11:43:08</td>
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<td>11:37:07</td>
<td>2 the Mayor's reception. It is along the entire wall</td>
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<td>3 where you have a corrugated type ceiling. Every, I</td>
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<td>4 don't know, four inches or so there is a visible gap</td>
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<td>5 where air and -- exterior air can enter the building</td>
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<td>6 as well as insects.</td>
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<td>7 I think this item is either under</td>
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<td>8 construction or has been done at this point. Let me</td>
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<td>11:37:42</td>
<td>9 check my notes. Oh, the work right now is ongoing.</td>
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<td>11:37:45</td>
<td>10 Q. And who is doing the work?</td>
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<td>11 A. I believe Mr. Weltner is.</td>
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<td>12 Q. So he's the actual contractor doing the</td>
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<td>13 work?</td>
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<td>15 Q. And did Mr. Weltner bid that work?</td>
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<td>16 A. I don't know.</td>
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<td>17 Q. And as with the other items, do you expect</td>
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<td>18 these estimates and place holders on Tab 13 to be</td>
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<td>19 completed within the next couple of weeks?</td>
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<td>20 A. Yes.</td>
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<td>21 Q. Now, turning back to the face page of</td>
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<td>22 Exhibit No. 325, which is CM114377. It's the one with</td>
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<td>23 a sticker on it.</td>
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<td>11:38:45</td>
<td>24 A. I know. I'm just trying to find the one</td>
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<td>11:38:52</td>
<td>25 with the sticker on it. I'm trying to find the page.</td>
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| 11:38:55 | 1 Q. Just out of order. | | |
| 11:38:55 | 2 A. Yes. | | |
| 11:39:01 | 3 Q. Now, we've dealt with items 1 through 13, | | |
| 11:39:07 | 4 but I see on this face page we have items 14, Mike | | |
| 11:39:11 | 5 Simmonds report; item 15, supporting documentation; | | |
| 11:39:12 | 6 and 16, letters. | | |
| 11:39:14 | 7 With regard to item 14, what do you know | | |
| 11:39:15 | 8 about that? | | |
| 11:39:16 | 9 A. Well, these are the big items. | | |
| 11:39:22 | 10 Q. Well, where are they? I don't see any back | | |
| 11:39:22 | 11 up. | | |
| 11:39:23 | 12 A. Actually, I don't know. No, I -- in regards | | |
| 11:39:29 | 13 to 14, 15, and 16, I have not seen anything in regards | | |
| 11:39:30 | 14 to those items yet. | | |
| 11:39:34 | 15 Q. So you were being facetious when you said | | |
| 11:39:36 | 16 these are the big items? | | |
| 11:39:36 | 17 A. I was. I'm sorry. | | |
| 11:39:39 | 18 Q. Well, you caused my heart to jump. | | |
| 11:39:39 | 19 A. Okay. For joy? | | |
| 11:39:40 | 20 Q. Not really. | | |
| 11:39:40 | 21 A. Okay. | | |
| 11:39:43 | 22 MR. WALKER: Let's take a short break, and then I | | |
| 11:39:45 | 23 think I might be finished. | | |
| 11:43:04 | 24 (Recess taken from 11:39 a.m. to 11:43 a.m.) | | |
| 11:43:06 | 25 MR. WALKER: We are back on the record. | | |

16 (Pages 58 to 61)
REPORTER'S CERTIFICATE

JANET FRENCH, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of this action.

WITNESS my hand and seal this day of ____, 2010.

JANET FRENCH,
CSR, RPR and Notary Public in and for the State of Idaho.

My Commission Expires: 11-03-2016
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho)
Municipal Corporation, ) Case No. CV OC 0907257
) Plaintiff/Counterdefendant,

vs. )

PETRA INCORPORATED, an Idaho )
corporation,

Defendant/Counterclaimant. )

AUDIO-VIDEO 30(b)(6) DEPOSITION OF THEODORE W. BAIRD
November 3, 2010
Boise, Idaho

Janet French, CSR #946, RPR

Associated Reporting Inc.
208.343.4004

Electronically signed by Janet French (101-258-315-6555) 9fe76413-9b64-48f4-aecc-c41536e7125b
MR. WALKER: Okay. We are on the record. This is the 30(b)(6) deposition of the City of Meridian, and Theodore W. Baird Jr. is the designated representative of the City for purposes of this deposition. And it is being taken on behalf of the defendant, Petra Incorporated, in Case No. 11-27-527-featured by the City of Meridian in the District Court for the Fourth Judicial District for the State of Idaho in and for Ada County.

This deposition is being taken on November 3rd, 2010, commencing at approximately 12:00 o'clock noon before Janet French of Associated Reporting, Inc., the operator of the audio/visual equipment. I am here representing Petra Incorporated, the defendant in this lawsuit, and I am also the operator of the audio/visual equipment. This deposition is being taken in accordance with the Idaho Rules of Civil Procedure, and there are no other stipulations that I am aware of.

Do you agree, Mr. Trout?

MR. TROUT: Yes. I agree, Mr. Walker. But I don't know of any stipulations.

MR. WALKER: Okay. Ms. Trout, counsel for the City, is here, as well as Richard Kluckhohn, and Tom Coughlin, a consultant for our firm.

Janet, will you please swear the witness.

THEODORE W. BAIRD.

THEODORE W. BAIRD.

THEODORE W. BAIRD.

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THEODORE W. BAIRD.
12:03:12  1 Have you seen this document before.
12:03:13  2 Mr. Baird?
12:03:14  3 A. Yes, I have.
12:03:16  4 Q. And have you brought any documents with you regarding the
12:03:18  5 today in response to the request?
12:03:19  6 A. I have not.
12:03:21  7 Q. And I assume that you have not, because it
12:03:24  8 is your position that the City has produced all of the
12:03:26  9 documents that would be responsive.*
12:03:26 10 A. That's correct.
12:03:30 11 Q. And as I mentioned during the -- during the
12:03:33 12 introduction, you have been designated by the City as
12:03:35 13 the most knowledgeable person regarding the
12:03:38 14 allegations set forth in the City's complaint.
12:03:41 15 I'm also going to want to discuss the
12:03:45 16 proposed first amended complaint, because it contains
12:03:50 17 some more detail, which I suspect will be important in
12:03:52 18 order to proceed through this deposition in an orderly
12:03:53 19 fashion.
12:03:56 20 Q. And basically, I'm going to be asking you
12:04:00 21 for facts or proof that the City has in support of its
12:04:04 22 various claims as we have set forth in the notice of
12:04:05 23 deposition.
12:04:05 24 (Deposition Exhibit No 322 marked.)
12:04:10 25 Q. (BY MR. WALKER) I'm going to hand you what
12:04:16 26 we have marked as Deposition Exhibit No 322, which
12:04:19 27 I'll represent to you are excerpts out of the various
12:04:26 28 monthly reports from December of 2007 through November
12:04:30 30 A. Before we proceed, could I make a
12:04:31 31 clarification --
12:04:31 32 Q. Sure.
12:04:34 33 A. -- to your statement regarding my purposes
12:04:35 34 for being here,*
12:04:37 35 It is my understanding that I've been
12:04:40 36 designated as the representative regarding non
12:04:42 37 economic damages, and that the City has designated
12:04:46 38 someone else to give a deposition regarding the
12:04:47 39 economic damages.
12:04:49 40 Q. That's my understanding; yet
12:04:53 41 A. I just wanted to make sure we were clear
12:04:54 42 before proceeding.
12:04:58 43 Q. One of the issues I know, Mr. Baird, in this
12:05:02 44 case has been the substantial completion date. And I
12:05:10 45 want to direct your attention to the third page of
12:05:15 46 Exhibit No 322 -- excuse me -- the second page of
12:05:20 47 Exhibit No 322, which is marked as the "Master
12:05:26 49 Q. Do you see that?
12:05:27 50 A. Yes, I do.
12:05:30  1 Q. And in line 43 it indicates "occupancy and
12:05:32  2 move in."
12:05:33  3 Q. Do you see that at the bottom?
12:05:34  4 A. I do.
12:05:38  5 Q. And it indicates the duration will be five
12:05:41  6 days commencing on August 29, 2008.
12:05:41  7 Q. Do you see that?
12:05:41  8 A. Yes.
12:05:44  9 Q. And that anticipated finish date is
12:05:47 11 Q. And have you seen this master production
12:05:49 12 schedule or other master production schedules produced
12:05:55 13 with each of the monthly reports before?
12:05:55 14 A. Yes.
12:06:05 15 Q. Let's move on down, please, to -- if we'll
12:06:08 16 just page through these quickly. And I'm going to ask
12:06:11 17 you about the master production schedule for the
12:06:16 18 monthly report, 2008, and refer you, again, to line 43
12:06:22 19 indicating -- and it is dated January 4, 2008.
12:06:22 20 Q. Do you see that in the lower-left-hand
12:06:23 21 corner?
12:06:26 24 MR. TROUT: Which page, Counsel?
12:06:26 25 A. Yes.
12:06:32  1 Q. And moving on down to the next one, 2009,
12:06:32  2 which is CM073864.
12:06:32  3 Q. And again, line 43 indicates the occupancy
12:06:35  4 and move in, five days, starting on August 29th, 2008.
12:06:36  5 Q. Do you see that?
12:06:37  6 A. Yes.
12:06:37  7 Q. And then if we just move down a couple of
12:06:39  8 pages to the next one, February, and this one is
dated Friday, 2/11/08.
12:06:43  9 Q. Do you see that?
12:06:47 10 A. Yes.
12:06:50 11 Q. And then if we just move down a couple of
12:06:53 12 pages to the next one, February, and this one is
dated Friday, 2/11/08.
12:06:57 13 Q. Do you see that in the lower-left-hand
12:07:12 14 corner?
12:07:20 15 MR. TROUT: Just a moment, please.
12:07:20 16 A. Yes.
12:07:30 17 A. Yes.
12:07:36 18 Q. And this is CM073864. And, again, line 43
12:07:39 19 indicates that occupancy and move in, duration of
12:07:45 20 seven days, starting on Friday, 10/10/08.
12:07:46 21 Q. Do you see that?
12:07:47 22 A. Yes.
12:07:55 23 Q. Okay. And moving on down to the next one,
12:07:59 24 which is CM073924.
12:07:59 25 A. Yes.
12:07:59 26 Q. So you see that?
12:07:59 27 A. Yes.

* Portions redacted per stipulation agreement.

** Portions redacted per stipulation agreement.
Q. Do you recall seeing the article that is dated April 3, 2008?
A. Uh-huh. Yes.

Q. Do you recall seeing the article that appeared in the newspaper of which this is a copy?
A. Yes. I have seen this document before.

Q. If you would turn to page 2 of the complaint, which is marked PETRA 95631, and in particular, look at paragraph 6, Paragraph 6 reads, "The agreement provides that prior to providing any services which would be subject to section 7, changes in the construction manager shall notify the City of the proposed change and receive the City's approval of the change."
A. Yes.

Q. What facts does the City rely on for the move on line 45, because it indicates different durations, one of five days on line 43, and one of nine days on line 45.
A. I don't know what they're referring to.

Q. Is it not the case that the construction manager shall notify the City of the proposed change and receive the City's approval of the change before the City makes a decision to go forward with the move?
A. Yes, that's right.

Q. Mr. Walker, do you see that?
A. Yes.

Q. Yes.

Q. It's dated Friday, 5/2/08.
A. Uh-huh.
Thodor 52

I wouldn’t have 18
During 1
the official notice that 4 6
have 2007?
Bettis goes on, 12
Yes, ma’am call fur 1
Not that 17
statement: What facts do you have to support that 12
Exhibit No. 327, which is marked CMOJ2799, and the 12:13:55 5
Mr. TRIM: I Object to the form of the question 12:13:25 5
I Object to the form of the question 12:13:25 5
I Object to the form of the question 12:13:25 5
Did I read that correctly? 12:13:25 5

---

Page 14

12:13:06 1 approval of Change Order No. 2?
12:13:08 2 MR. TRIM: Object to the form of the question to
12:13:12 3 the extent it may call for any form of legal
12:13:13 4 conclusion
12:13:15 5 You can answer.
12:13:16 6 THE WITNESS: Well, the City did not receive even
12:13:23 7 the advance notice of Change Order No. 2 until, I
12:13:27 8 believe it was November of 2007. And by that time,
12:13:31 9 the work that they are claiming would be subject to
12:13:35 10 Change Order No. 2 had already taken place.
12:13:37 11 Q. (BY MR. WALKER) So it’s your testimony that
12:13:43 12 Petra commenced work on the items that are included in
12:13:48 13 Change Order No. 2 prior to November 5th, 2007?
12:13:50 15 MR. TRIM: I Object to the form
12:13:52 16 Q. (BY MR. WALKER) What’s the basis for that
12:13:55 17 statement? What facts do you have to support that
12:13:56 18 statement?
12:14:03 19 A I probably would have to refer to the
12:14:09 20 timecards that they submitted in support of Change
12:14:19 22 And it is my recollection that those timecards went
12:14:22 23 back to a period that began before we received notice
12:14:24 24 of Change Order No. 2.
12:14:27 25 Q. Do you recall your earlier testimony in the

Page 15

12:14:31 1 deposition of -- that we conducted -- or the two
12:14:33 2 depositions that we conducted wherein we discussed the
12:14:36 3 timecards and when they -- and what they represented?
12:14:39 4 A I don't have a specific recollection.
12:14:51 5 Q. Okay.
12:14:56 6 (Deposition on Exhibit No. 327 marked.)
12:14:57 7 Q. (BY MR. WALKER) I'm going to take as
12:15:14 8 exhibit out of order and hand you what we've marked as
12:15:16 9 Exhibit No. 327. Take your time -- and this is an
12:15:19 10 email string. It commences on the second page of
12:15:24 11 Exhibit No. 327, which is marked CMO12799, and the
12:15:28 12 first page is marked CMO12798.
12:15:29 13 Do you see that?
12:15:29 14 A I do.
12:15:32 15 Q. Have you seen this email string before?
12:15:35 16 A I am not copied on it, so I wouldn't have
12:15:41 17 read it at the time that it was sent out. And to be
12:15:44 18 honest with you, I don't recall seeing it, so I would
12:15:48 19 like to go off the record here for a minute and read
12:15:51 20 it if you are going to ask me questions about it.
12:15:54 21 Q. Sure. Yes. Take your time.
12:15:56 22 MR. WALKER: Well go off the record.
12:15:58 23 (Off the record.)
12:16:26 24 Q. (BY MR. WALKER) Okay. We are back on the record.
12:16:28 25 Q. (BY MR. WALKER) Mr. Baird, I want you to

Page 16

12:17:31 1 look at the first email from Keith Watts, dated
12:17:34 2 September 5th, 2007, on page CMO12799.
12:17:38 3 Do you see that?
12:17:46 4 A Yes.
12:17:47 5 Q. And it reads -- and this is addressed to
12:17:51 6 Wesley Betty and Gene Bennett, who, I believe you
12:17:55 7 know were -- Wesley Bettis was an employee of Petra,
12:17:56 8 and Gene Bennett is a current employee of Petra.
12:18:07 9 Correct?
12:18:54 10 A. Yes, I'm aware of that.
12:18:55 11 Q. And it also lists Adam Johnson
12:18:57 12 Who is Adam Johnson?
12:19:01 13 A He was an employee of Petra.
12:19:03 14 Q And I read, "I got to go to Council last
12:19:05 15 night and talk about the change orders. During
12:19:09 16 discussion, Council agreed to finish the entire
12:19:12 17 building. That is, not leave any areas unfinished.
12:19:13 18 This is to be Petra's official notice of that decision
12:19:16 19 and to move forward accordingly. Council will be
12:19:20 20 receptive to any significant cost savings, but leaving
12:19:21 21 the building unfinished is off the table. I will
12:19:26 22 email you the minutes from the meeting as soon as they
12:19:26 23 are available."
12:19:29 24 Did I read that correctly?
12:19:29 25 A Yes.

Page 17

12:19:21 1 Q Have you had a discussion with Keith Watts
12:19:37 2 regarding the official notice that he’s giving here to
12:19:42 3 Petra of the decision and to move forward accordingly?
12:19:43 4 A Not that I recall.
12:19:45 5 MR. TRIM: Object to the form of the question.
12:19:52 7 Q (BY MR. WALKER) Moving on up to the next
12:19:59 8 email -- well, yeah -- the next email from Wesley
12:19:04 9 Bettis to Keith Watts, also dated September 5th, 2007,
12:19:08 10 and it reads, "Does thiS mean WIth or Without the wIre
12:19:11 11 partitions?"
12:19:14 12 Do you know what that is about?
12:19:20 14 THE WITNESS: I don’t. As I was reading through
12:19:21 15 this, my first question was, what were partitions? 
12:19:21 16 What’s a wire partition, and what are they talking
12:19:21 17 about? So I don’t know.
12:19:23 18 Q (BY MR. WALKER) Then Mr. Bettis goes on, 
12:19:27 19 "Anything else from the VE sheet or will this be in
12:19:28 20 the minutes?"
12:19:30 21 Did I read that correctly?
12:19:30 22 A Yes.
12:19:34 23 Q Do you know what the VE sheet is?
12:19:46 24 A I don’t know what they are talking about.
12:19:49 25 No. It would only be speculation if I were to --
November 3, 2010

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<table>
<thead>
<tr>
<th>Time</th>
<th>Statement</th>
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<tbody>
<tr>
<td>12:19:52</td>
<td>Q. Do you recall whether or not you attended the City Council meeting on Tuesday, September 4th, 2007?</td>
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<tr>
<td>12:20:00</td>
<td>A. I don't remember. There would be a record.</td>
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<thead>
<tr>
<th>Time</th>
<th>Statement</th>
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<tbody>
<tr>
<td>12:20:11</td>
<td>Q. Then moving up to the next email from Keith Watts to Wes Bettis, dated September 5, 2007, it refers to review the minutes as well for further discussion. The feeling was not to lessen the building by eliminating items. Re-engineering would be considered but not so much eliminating.</td>
</tr>
<tr>
<td>12:20:32</td>
<td>Q. (BY MR. WALKER) Do you recall discussions regarding not removing access floor HVAC system, but rather transitional design, no access floor, traditional box car roof top units, and just meet the minimum ICC energy codes, and do all the utilities above the roof?</td>
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<tr>
<th>Time</th>
<th>Statement</th>
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<tbody>
<tr>
<td>12:22:34</td>
<td>Q. Ceilings. But I think we are just a little bit pregnant to be making those changes now.</td>
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<tr>
<td>12:22:40</td>
<td>Q. Did I read that correctly?</td>
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<thead>
<tr>
<th>Time</th>
<th>Statement</th>
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<tbody>
<tr>
<td>12:23:13</td>
<td>Q. (BY MR. WALKER) Okay. Then moving up to the next email on the first page of Exhibit No. 327, Wes Bettis already points out here, talking about value engineering. They may have saved quite a bit of money by going to a traditional box car rooftop unit.</td>
</tr>
<tr>
<td>12:23:33</td>
<td>A. Sure. Or if you just want to adopt the prior testimony, we can save time and move on.</td>
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Associated Reporting Inc.

208.343.4004

Electronically signed by Janet French (101-258-315-6555) 9f676413-9b64-48f4-aecc-c41536e7125b
everythmg stays current and we do not create calls on thiS email. I don't recall seeing it correctly.'

I don't recall attending a meeting

with regard to the change order request on the

contaminated soils. That's the change order request

that we've identified -- was identified in the record

as Change Order No 1. It may have been Keith that

attended that meeting, but I don't recall being at a

meeting to discuss that.

Q (BY MR. WALKER) Mr. Bettis goes on and

writes, "I have an informal COR -- which I'll

represent to you stands for change order request --

for you to review on the change and project

complexity from $12.2 million, 80,000 square feet, to

$1.7 million, 100,000 square foot project, but thought

I would hold off formal submittal until the plaza is

bid and the final base contract value is determined as
THEODORE W. WATTS

1. Do you recall meeting with anyone at the City of Meridian with regard to Change Order No. 2 at any time after September 15, 2007, and before October of 2008?

2. A. Yes - we had lots of internal meetings. The record contains my -- or some City responses to the change order request that I would have been involved in drafting, so I'm sure that we had meetings regarding them.

3. But as far as sitting here today having any specific recollection, the one from October 2008 is the only one that stands out.

4. Q. Do you recall a meeting in August of 2008 with Gene Bennett and Tom Coughlin and you during which you'd discussed the substantiation that Petra was submitting to the City of Meridian in support of Change Order No. 2, as I sit here today, I'm thinking that is the one item that sticks out to my mind was the owner's criteria that were mentioned the owner's criteria and putting it together that March 2006. So it would make a lot more sense to have it in context of my review of Change Order No. 1 and Change Order No. 2.

5. A. I only recall one meeting, and I've been referring to that as the October 2008 meeting.

6. Q. Perhaps I'm confusing it with the documents that were received in October of 2008 that may have come out of the August -- it could have been August 2006. I haven't gone through that calendar to get those exact dates.

7. A. But that's the meeting that I'm referring to.

8. Q. Okay. Thank you. If you turn -- I'm back to the complaint, which is Exhibit No. 323.

9. A. Uh-huh.

10. Q. If you turn to the third page of the complaint, which is PETRA 6832, and paragraph 17 I just want to make a clarification. And paragraph 17 reads, "Petra began incurring costs related to the claim of Change Order No. 2 on or about July 1, 2006." Do you see that?

11. A. Yes, I do.

12. Q. Do you recall your testimony during your last deposition that that was probably an error and the year should be 2007?

13. A. That's correct. The only specific meeting that I recall was the meeting that took place in October of 2008 where we went over -- where Keith Watts, Gene Bennett, and myself -- and maybe Tom Coughlin was there -- where we went over the substantiation that they provided in support of Change Order No. 2. That's the only specific meeting that I remember as far as meeting with Petra to discuss Change Order No. 2.

14. Q. Do you recall meeting with anyone at the City of Meridian with regard to Change Order No. 2 at any time after September 15, 2007, and before October of 2008?

15. A. Boy, I'm sure we had lots of internal meetings. The record contains my -- or some City responses to the change order request that I would have been involved in drafting, so I'm sure that we had meetings regarding them.

16. Q. But as far as sitting here today having any specific recollection, the one from October 2008 is the only one that stands out.

17. A. I only recall one meeting, and I've been referring to that as the October 2008 meeting.

18. Q. Perhaps I'm confusing it with the documents that were received in October of 2008 that may have come out of the August -- it could have been August 2006. I haven't gone through that calendar to get those exact dates.

19. A. But that's the meeting that I'm referring to.

20. Q. Okay. Thank you. If you turn -- I'm back to the complaint, which is Exhibit No. 323.

21. A. Uh-huh.

22. Q. If you turn to the third page of the complaint, which is PETRA 6832, and paragraph 17 I just want to make a clarification. And paragraph 17 reads, "Petra began incurring costs related to the claim of Change Order No. 2 on or about July 1, 2006." Do you see that?

23. A. Yes, I do.

24. Q. Do you recall your testimony during your last deposition that that was probably an error and the year should be 2007?

25. A. That's correct. The only specific meeting that I recall was the meeting that took place in October of 2008 where we went over -- where Keith Watts, Gene Bennett, and myself -- and maybe Tom Coughlin was there -- where we went over the substantiation that they provided in support of Change Order No. 2. That's the only specific meeting that I remember as far as meeting with Petra to discuss Change Order No. 2.
2010 Meridian v. Petra Inc.

Any kind of an organizational chart that was produced was incomplete at Petra.

The Construction Management Plan that was created or attempted to create with this agreement was incomplete.

The relationship between Petra and the City was discussed with Petra.

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12:46:49 1 Mr. Watts regarding his discussion of the general conditions with anyone at Petra?
12:46:52 2 that period. I assume that most of those emails, if they are not privileged, that they would have been produced.
12:46:55 3 A. I'd have to go through my email chain during that time period. I assume that most of those emails, if they are not privileged, that they would have been produced.
12:47:00 4 Q. So is your testimony that emails between you and Mr. Watts would be privileged and would not be produced in this case?
12:47:14 5 A. No.
12:47:17 6 Q (BY MR. WALKER) Okay, Any other services that Petra failed to provide as alleged in paragraph 21 of the complaint?
12:47:21 7 A. Yes. I'm looking at section 4.7 of the Construction Management Agreement.
12:47:28 8 20 Construction Management Agreement. It is found on pages Bates Nos. CM002697 and CM002698, specifically paragraphs 4.7-9. It states, "Construction manager shall carefully observe work of each contractor and our discussions would be considered attorney work product.
12:47:36 9 Q (BY MR. WALKER) Okay. Any other services that Petra failed to provide as alleged in paragraph 21 of the complaint?
12:47:45 10 A. Okay. Of those items that you've just identified in paragraph 4.7-9, what did Petra fail to do that did not meet the requirements of the Construction Management Agreement?
12:48:09 11 A. They failed to protect the City from defective work. They failed to provide written reports of any observations that they didn't make the observations, or they didn't make observations or didn't give us reports on their observations.
12:48:36 12 Q. Let me stop you there. Have you read the field reports, the daily reports that were prepared by Petra with respect to the job during the course of construction?
12:49:26 13 A. Yes, I'm looking at section 4.7 of the Construction Management Agreement.
12:49:39 14 Q (BY MR. WALKER) And specifically what items are you referring to that did not meet specifications?
12:49:45 15 A. Okay. Of those items that you've just identified in paragraph 4.7-9, what did Petra fail to do that did not meet the requirements of the Construction Management Agreement?
12:50:09 16 A. They failed to protect the City from defective work. They failed to provide written reports of any observations that they didn't make the observations, or they didn't make observations or didn't give us reports on their observations.

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12:47:12 1 It's been asked and answered.
12:47:15 2 THE WITNESS: My allegation is contained more in the fact that we have a building that doesn't meet specifications and somehow that happened on Petra's watch.
12:47:20 3 A. Okay. Of those items that you've just identified in paragraph 4.7-9, what did Petra fail to do that did not meet the requirements of the Construction Management Agreement?
12:47:36 4 A. They failed to protect the City from defective work. They failed to provide written reports of any observations that they didn't make the observations, or they didn't make observations or didn't give us reports on their observations.
12:47:56 5 Q. Okay. Of those items that you've just identified in paragraph 4.7-9, what did Petra fail to do that did not meet the requirements of the Construction Management Agreement?
12:48:09 6 A. They failed to protect the City from defective work. They failed to provide written reports of any observations that they didn't make the observations, or they didn't make observations or didn't give us reports on their observations.
12:48:36 7 Q. Let me stop you there. Have you read the field reports, the daily reports that were prepared by Petra with respect to the job during the course of construction?
12:49:26 8 A. Yes, I'm looking at section 4.7 of the Construction Management Agreement.
12:49:39 9 Q (BY MR. WALKER) And specifically what items are you referring to that did not meet specifications?

Page 36

12:45:58 1 field reports, the daily reports that were prepared by Petra with respect to the job during the course of construction?
12:46:01 2 A. Yes, I'm looking at section 4.7 of the Construction Management Agreement.
12:46:04 3 Q (BY MR. WALKER) Object to the form of the question?
12:46:06 4 THE WITNESS: I have not. I'm basing my allegations on the fact that we have experts in this case who have identified portions of the building that don't meet specifications. It was Petra's job to detect deficiencies and make written reports of each -- of such observations to the owner?
12:46:31 5 A. Yes.
12:46:39 6 Q (BY MR. WALKER) Okay. Any other services that Petra failed to provide as alleged in paragraph 21 of the complaint?
12:46:43 7 A. Okay. Of those items that you've just identified in paragraph 4.7-9, what did Petra fail to do that did not meet the requirements of the Construction Management Agreement?
12:46:55 8 A. They failed to protect the City from defective work. They failed to provide written reports of any observations that they didn't make the observations, or they didn't make observations or didn't give us reports on their observations.
That's what it says.

Q. Okay. And you're -- also more specifically --

A. You've been indicated as the designated person with --

Q. Most knowledgeable about the facts the City claims.

A. Support Petra's alleged breach of contract.

Q. Do you see that?

A. I do.

Q. And do you consider the alleged failure of

A. Petra to meet the requirements that you've identified

in paragraph 4-7.9 as a breach of the contract?

Q. Object to the form of the question. To the extent that is a question, it's been asked and answered.

A. You can answer --

Q. MR. WALKER: Counsel, I'm going to object to your

continuous coaching of this witness.

A. MR. TROUT: I haven't told him what to say in any regard. Counsel.

Q. You don't need to know, you know, you're skilled in this. So, Mr. Trout, if you'd let us

just proceed, we'll be able to wrap this up. If he
doesn't have the information, that's all he has to

say. If he has the information, I want to know what

it is.

Q. OKAY. And you're also more specifically

asking about the plans and specifications, and Petra's precise responsibility to

conduct initial inspections to determine whether or not

the work meet plans and specifications, and best

construction practices according to the instructions.

Q. Mr. Baird -- I mean, Mr. Trout, would you mind shutting up, please.

A. MR. TROUT: Sir, if you are going to be so rude and uncivil to interrupt --

Q. MR. WALKER: It's your objections that are rude

and uncivil and are interrupting these proceedings.

Q. MR. TROUT: Well, excuse me, Mr. Walker --

A. Question if he has the information, I want to know what

he think.

Q. MR. WALKER: Mr. Baird -- I mean, Mr. Trout,

you're the one who is constantly referring to rules in this case about

conduc.

Q. Now, I've never interrupted your statements

made on the record in this case, and I'm not sure I

understand, Mr. Walker, why it is that you find it

important to interrupt me when I'm speaking in this

case.

Q. MR. WALKER: Go ahead and finish your objection,

please.

Q. MR. TROUT: Are you going to interrupt again?

A. MR. WALKER: I can't answer that until I hear

what your objection is.

Q. MR. TROUT: Well, my objection is that the

question has been asked and answered, and the --

A. MR. WALKER: Okay. Fine.

Q. (BY MR. WALKER) -- information related to the

question has all been provided to you in accordance

with the Rules of Civil Procedure.

Q. MR. WALKER: Fine. Thank you.

A. Q. (BY MR. WALKER) Mr. Baird, do you have any

proof that Petra did not observe the work each -- at

least each work day?

A. MR. TROUT: Object to the form of the question to

the extent it's vague and ambiguous.

Q. THE WITNESS: I would have to review any reports

that were prepared by Petra on that -- regarding that

in order to answer that question.

Q. (BY MR. WALKER) Let's turn to Exhibit

No. 324.

Q. (BY MR. WALKER) Let's turn to Exhibit No. 324.
12:52:58 1 Q. Oh, I guess I better give it to you. I'm
12:52:60 2 sorry.
12:53:03 3 (Deposition Exhibit No. 324 marked.)
12:53:06 4 Q. (By MR. WALKER) It is the proposed first
12:53:08 5 amended complaint.
12:53:34 6 Do you have Exhibit No. 324 in front of you?
12:53:35 7 now, sir?
12:53:37 8 A. Yes.
12:53:37 9 Q. Have you seen this document before?
12:53:46 11 Q. I'm going to refer you to paragraph 10,
12:53:48 12 please, on the second page of the first amended
12:53:55 13 complaint. And, in particular, the last sentence
12:53:58 14 where the complaint alleges Change Order No. 2 was
12:54:00 15 ultimately denied.
12:54:01 16 Q. Do you see that?
12:54:01 17 A. Yes.
12:54:03 18 Q. Do you recall the date when the change order
12:54:05 19 was ultimately denied?
12:54:08 20 MR. TROUT: By the way, I'm going to object to any
12:54:11 21 questions regarding the proposed first amended
12:54:17 22 complaint. Until the Court grants us leave to file
12:54:20 23 it, I don't think it's appropriate for Counsel to
12:54:22 24 inquire with respect to the first amended complaint.
12:54:26 25 I'll allow questions to be asked, but I want
12:54:31 1 a standing objection to any questions related to it
12:54:33 2 Q. MR. WALKER: Thank you, Counsel. My only purpose
12:54:37 3 is to just use this as an outline and just move it
12:54:40 4 along, because it does provide us some structure.
12:54:42 5 Q. (By MR. WALKER) And I recognize that this
12:54:46 6 proposed first amended complaint has not been -- is
12:54:48 7 not part of the record at this point, so I just
12:54:51 8 using it as a guide.
12:54:54 9 A. Is that acceptable to you, Mr. Band?
12:54:56 10 MR. TROUT: I'm not to object and instruct the
12:54:57 11 witness not to answer that question.
12:55:00 12 He is here to respond pursuant to the
12:55:06 13 30(b)(6) notice and not to make any vague introspective
12:55:09 14 deals or acceptable arrangements with counsel for the
12:55:10 15 defendant regarding this matter.
12:55:12 16 MR. BAND: stands to any questions
12:55:16 17 regardless to the first amended complaint or proposed
12:55:19 18 first amended complaint. until such time as the Court
12:55:23 19 allows it or Counsel, you are willing to stipulate
12:55:25 20 in open
12:55:27 21 Q. MR. WALKER: I'm not stipulating to its filing.
12:55:29 22 Q. (By MR. WALKER) Mr. Band, do you recall
12:55:33 23 when Change Order No. 2 was ultimately denied?
12:55:36 24 A. I've testified in my prior depositions,
12:55:39 25 there was a letter that was sent by the Meridian City
12:55:43 1 Council signed by the Mayor and Council, and I believe
12:55:45 2 it was in February of 2009. It could be construed as
12:55:55 3 a denial, although it did contain an invitation for
12:55:59 4 Petra to come in and discuss it further with City
12:56:00 5 Council in executive session.
12:56:03 6 Q. And do you recall what Petra's response was
12:56:06 7 to the February 24th, 2009 letter?
12:56:08 8 MR. TROUT: Object to the form.
12:56:10 10 Q. (By MR. WALKER) Do you recall receiving or
12:56:14 11 seeing a letter dated March 16th, 2009, from me
12:56:16 12 requesting mediation?
12:56:24 13 A. I do. Although, I don't know if that was
12:56:26 14 specifically in response to that letter, but we -- the
12:56:33 15 next step in the process was mediation was requested
12:56:38 16 Q. What facts does the City have to support its
12:56:42 17 claim that's been made throughout this case that Petra
12:56:46 18 misrepresented the maximum price of the contract -- of
12:56:47 19 the project?
12:56:49 20 A. I'd like --
12:56:51 21 MR. TROUT: Object to the form of the question.
12:56:53 22 the extent it calls for a legal conclusion, and to the
12:56:58 23 extent it is in any way related to the proposed first
12:57:08 25 THE WITNESS: Again, I do recall discussing this
12:57:07 1 in my prior deposition.
12:57:09 2 Q. (By MR. WALKER) What document are you
12:57:10 3 referring to?
12:57:13 4 A. I've picked out Exhibit No. 10, Basset
12:57:18 5 No. CM024235
12:57:22 6 Q. Okay. And in what -- what point would you
12:57:26 7 like to make with respect to Exhibit No. 107?
12:57:28 8 MR. TROUT: Object to the form of the question.
12:57:30 9 THE WITNESS: That document is a project cost
12:57:33 10 summary, and I'm attempting to address your question
12:57:38 11 regarding Petra's misrepresentation of the -- was
12:57:43 12 it -- can you repeat your question now that we've gone
12:57:44 13 down this road.
12:57:46 14 Q. (By MR. WALKER) What -- well, if you want
12:57:49 15 to just adopt your prior testimony, that's fine with
12:57:49 16 me.
12:57:51 17 A. No. I want to make sure that the question
12:57:54 18 had to do with Petra's maximum fee
12:58:02 19 Was that the question?
12:58:20 20 Q. No. The question was --
12:58:22 21 MR. WALKER: Why don't you read the question
12:58:22 22 back, please, Janet.
12:58:22 23 (The question was read back.)
12:58:24 25 MR. WALKER: I'm sorry. It was a poor question.
they did Change Order No.2, which was an
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the
Ilf the
what
faded
to
JLJly
billed
It's
H'hJti(lll~hip
to back charge
Electronically signed by Janet French (101-258-315-6555) 9fe76413-9b64-48f4-aecc-c41536e7125b
Electronically signed by Janet French (101-258-315-6555) 9fe76413-9b64-48f4-aecc-c41536e7125b
THE WITNESS: Okay
Q (BY MR. WALKER) What facts does the City
THE WITNESS: Okay
Q (BY MR. WALKER) What facts does the City
the City relying upon for its claims that Petra failed to
define the general conditions?
A: I've never seen a definition of the general
conditions. I don't think it exists.
Q: Okay. What facts does the City have to
support its allegation that Petra did not properly
administer the prime contracts?
THE WITNESS: Object to the form of the question to
the extent it calls for a legal conclusion. It's
You can answer.
THE WITNESS: I'm going to refer back to Exhibit
No 2
Section 4.7.10 which states, "Construction
manager shall reject in writing any work of a
contractor that is not in compliance with the
construction documents unless otherwise directed by
owner in writing."
If we ended up with was a building with
defects, on which I'm relying on my experts to
establish, then there was defective work that was not
rejected by Petra as it was required under that
paragraph.
Q (BY MR. WALKER) Anything else? In any
other fashion did Petra fail to properly administer
the prime contracts?
THE WITNESS: Okay
Q (BY MR. WALKER) Okay
THE WITNESS: Okay. Are you aware -- you
are the designated person most knowledgeable by the
City with respect to the claims that are made in the
complaint. And throughout the case, there has been an
allegation that Petra misrepresented the maximum price
of the project.
THE WITNESS: Okay. Are you aware -- you
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<table>
<thead>
<tr>
<th>Time</th>
<th>Transcript</th>
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<tbody>
<tr>
<td>13:06:46</td>
<td>There someone else who is more knowledgeable than you?</td>
</tr>
<tr>
<td>13:06:49</td>
<td>That might be able to answer the question.</td>
</tr>
<tr>
<td>13:06:51</td>
<td>A I don't know. Maybe we've had some of our experts look at those and that might be contained in their reports.</td>
</tr>
<tr>
<td>13:06:55</td>
<td>4 Experts look at those and that might be contained in their reports.</td>
</tr>
<tr>
<td>13:06:56</td>
<td>5 their reports.</td>
</tr>
<tr>
<td>13:06:57</td>
<td>Q Do you know though as you sit here today</td>
</tr>
<tr>
<td>13:07:00</td>
<td>7 Whether or not those issues are addressed in any of the experts reports</td>
</tr>
<tr>
<td>13:07:01</td>
<td>8 the experts reports.</td>
</tr>
<tr>
<td>13:07:03</td>
<td>9 MR TROUT: Object to the form of the question.</td>
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<tr>
<td>13:07:06</td>
<td>10 THE WITNESS: I haven't fully reviewed those reports.</td>
</tr>
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<td>13:07:09</td>
<td>11</td>
</tr>
<tr>
<td>13:07:12</td>
<td>12 Q (BY MR. WALKER) What facts does the City have to support its own claims that Petra charged the City for its own errors and omissions?</td>
</tr>
<tr>
<td>13:07:17</td>
<td>14 the City for its own errors and omissions?</td>
</tr>
<tr>
<td>13:07:24</td>
<td>15 A Again, the Pac-West invoice is the example</td>
</tr>
<tr>
<td>13:07:26</td>
<td>16 That keeps coming to mind.</td>
</tr>
<tr>
<td>13:07:29</td>
<td>17 Q And as you sit here today, you can't recall</td>
</tr>
<tr>
<td>13:07:30</td>
<td>18 anything else?</td>
</tr>
<tr>
<td>13:07:36</td>
<td>20 Q What facts does the City have to support its own claims that Petra charged the City for its own errors and omissions?</td>
</tr>
<tr>
<td>13:07:42</td>
<td>21 claim that Petra billed for work which was incomplete?</td>
</tr>
<tr>
<td>13:07:44</td>
<td>22 MR TROUT: I'm going to object to the form of the question.</td>
</tr>
<tr>
<td>13:07:47</td>
<td>23 the question.</td>
</tr>
<tr>
<td>13:07:48</td>
<td>24 You can answer.</td>
</tr>
<tr>
<td>13:07:50</td>
<td>25 THE WITNESS: Well, I've already discussed</td>
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</tbody>
</table>

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<table>
<thead>
<tr>
<th>Time</th>
<th>Text</th>
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<tbody>
<tr>
<td>13:09:22</td>
<td>1. A Those are the examples that I have today.</td>
</tr>
<tr>
<td>13:09:40</td>
<td>2. Q Also in -- is our notice of deposition we</td>
</tr>
<tr>
<td>13:09:43</td>
<td>3. indicate that we are going to be inquiring of you</td>
</tr>
<tr>
<td>13:09:47</td>
<td>4. regarding the facts that the City claims support</td>
</tr>
<tr>
<td>13:09:54</td>
<td>6. Do you recall reading that in your notice?</td>
</tr>
<tr>
<td>13:10:01</td>
<td>8. Q And what facts does the City have to support</td>
</tr>
<tr>
<td>13:10:04</td>
<td>9. its claim that Petta was somehow unjustly enriched as</td>
</tr>
<tr>
<td>13:10:10</td>
<td>10. a consequence of its relationship with City?</td>
</tr>
<tr>
<td>13:10:17</td>
<td>11. A Well, the two examples I just gave of being</td>
</tr>
<tr>
<td>13:10:19</td>
<td>12. paid for work that the City alleges wasn't performed,</td>
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<tr>
<td>13:10:23</td>
<td>13. that that would be an unjust enrichment.</td>
</tr>
<tr>
<td>13:10:25</td>
<td>15. No. 1, they billed a straight percentage for general</td>
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<td>13:10:29</td>
<td>16. conditions resulting from the extra month of the</td>
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<tr>
<td>13:10:32</td>
<td>17. project, but they didn't present any bills for</td>
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<tr>
<td>13:10:36</td>
<td>18. anything that was procured, so they were paid just a</td>
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<td>13:10:39</td>
<td>19. flat rate under that change order for items that we</td>
</tr>
<tr>
<td>13:10:43</td>
<td>20. don't know what they are at this point. Looking back</td>
</tr>
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<td>13:10:47</td>
<td>21. on it it was paid by the City, but in my opinion</td>
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<td>13:10:49</td>
<td>22. looking at that today, I don't think that should have</td>
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<tr>
<td>13:10:54</td>
<td>23. been paid. I think that constitutes an unjust</td>
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<td>13:10:56</td>
<td>24. I believe it was in the amount of about</td>
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<td>13:10:57</td>
<td>25. $11,000.</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Time</th>
<th>Text</th>
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<tbody>
<tr>
<td>13:10:58</td>
<td>1. Q Anything else?</td>
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<tr>
<td>13:11:02</td>
<td>2. A Those are the examples that I have today.</td>
</tr>
<tr>
<td>13:11:14</td>
<td>3. Q What facts does the City have to support its</td>
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<tr>
<td>13:11:16</td>
<td>4. claim that Petta acted as a construction manager</td>
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<td>13:11:21</td>
<td>5. but rather as a general contractor?</td>
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<td>13:11:31</td>
<td>6. A Uh, as I've already mentioned today, the</td>
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<tr>
<td>13:11:34</td>
<td>7. organizational chart that is contained in the</td>
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<td>13:11:41</td>
<td>8. Construction Management Plan, the way that's</td>
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<td>13:11:45</td>
<td>9. lined out, that's more of a transitional general</td>
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<tr>
<td>13:11:48</td>
<td>10. contractor. As I already testified, it wasn't the</td>
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<td>13:11:51</td>
<td>11. relationship of the construction manager that we</td>
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<tr>
<td>13:11:56</td>
<td>12. trying to create. That was early on</td>
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<td>13:11:59</td>
<td>13. And then throughout the project, on various</td>
</tr>
<tr>
<td>13:12:04</td>
<td>14. documents they refer to themselves as the general</td>
</tr>
<tr>
<td>13:12:07</td>
<td>15. contractor. They referred to our prime contractors as</td>
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<tr>
<td>13:12:12</td>
<td>16. the subs. Those are all, you know, sort of a course</td>
</tr>
<tr>
<td>13:12:17</td>
<td>17. of conduct that says to us, they really don't get it.</td>
</tr>
<tr>
<td>13:12:20</td>
<td>18. They don't understand what we are trying to get them</td>
</tr>
<tr>
<td>13:12:24</td>
<td>19. to do. They are just treating us like a general</td>
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<td>13:12:26</td>
<td>20. construction, and not -- they are not representing the</td>
</tr>
<tr>
<td>13:12:29</td>
<td>21. City as the City's construction manager.</td>
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<tr>
<td>13:12:29</td>
<td>22. Q Anything else?</td>
</tr>
<tr>
<td>13:12:30</td>
<td>23. A Those are the examples that I have</td>
</tr>
<tr>
<td>13:12:59</td>
<td>24. MR. WALKER: Let's go off the record for a second</td>
</tr>
<tr>
<td>13:13:00</td>
<td>25. and take a little break.</td>
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</tbody>
</table>

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<table>
<thead>
<tr>
<th>Time</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>13:18:34</td>
<td>1. (Recess taken from 11:20 p.m. to 11:50 p.m.)</td>
</tr>
<tr>
<td>13:18:36</td>
<td>2. MR. WALKER: Back on the record</td>
</tr>
<tr>
<td>13:18:39</td>
<td>3. I don't have any other questions. Thank</td>
</tr>
<tr>
<td>13:18:41</td>
<td>4. you, Mr. Baird</td>
</tr>
<tr>
<td>13:18:44</td>
<td>6. MR. TROUT: Janet, I'd like a portion of the</td>
</tr>
<tr>
<td>13:18:48</td>
<td>7. transcript that should be pretty easy to find where</td>
</tr>
<tr>
<td>13:18:53</td>
<td>8. Mr. Walker requested that I shut up. That's going to</td>
</tr>
<tr>
<td>13:19:01</td>
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**Page 57**

**VERIFICATION**

1. STATE OF _____________, ____________
2. I, THEODORE W. BAIRD, being first duly sworn on
3. my oath, depose and say:
4. That I am the witness named in the foregoing
5. deposition taken on the 3rd day of November, 2010,
6. consisting of pages numbered 1 to 54, inclusive,
7. that I have read the said deposition and know the
8. contents thereof; that the questions contained
9. therein were propounded to me; that the answers to
10. said questions were given by me; and that the answers
11. as contained therein (or as corrected by me therein)
12. are true and correct.
13. Corrections Made: Yes____ No____
14. 15. I, THEODORE W. BAIRD, being first duly sworn on
15. my oath, depose and say:
16. That I am the witness named in the foregoing
17. deposition taken on the 3rd day of November, 2010,
18. consisting of pages numbered 1 to 54, inclusive,
19. that I have read the said deposition and know the
20. contents thereof; that the questions contained
21. therein were propounded to me; that the answers to
22. said questions were given by me; and that the answers
23. as contained therein (or as corrected by me therein)
24. are true and correct.
25. Subscribed and sworn to before me this ______ day of, ______, 2010, at ______, Idaho.
26. Signature requested. Notary Public for Idaho
27. Residing at ______, Idaho.
28. My Commission Expires ______.

15 (Pages 54 to 57)
REPORTER'S CERTIFICATE

STATE OF IDAHO)
COUNTY OF ADA )

JANET FRENCH, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify
That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth.
That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction.
And that the foregoing transcript contains a full, true and verbatim record of said deposition.
I further certify that I have no interest in the event of this action.

WITNESS my hand and seal this __________ day of November, 2010.

JANET FRENCH,
CSR, RPR and Notary Public in and for the State of Idaho.

My Commission Expires: 11-03-2016
Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above-entitled matter, by and through its attorneys of record, Cosho Humphrey, LLP, moves this Court pursuant to Rules 7(b), 26(e)(1) and (2) of the Idaho Rules of Civil Procedure, for an order in limine to exclude the admission of testimony and documents regarding Meridian’s claimed damages.
This motion is based on the pleadings, records and files in this case and Petra’s Memorandum in Support of its Renewed Motion in Limine to Exclude Testimony and Documents Regarding Meridian’s Claimed Damages, Affidavit of Thomas G. Walker dated November 9, 2010 and Affidavit of Ginny Sam dated November 9, 2010.

Oral argument is requested on this motion and is currently scheduled November 22, 2010 at 1:30 p.m.

DATED: November 9, 2010.

By: THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9th day of November, 2010, a true and correct copy of
the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

U.S. Mail
Hand Delivery
Overnight Courier
Facsimile:
E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

PETRA INCORPORATED, an Idaho corporation, ("Petra"), in the above-entitled matter, by
and through its attorneys of record, Cosho Humphrey, LLP, moves this Court pursuant to Rules
7(b) and 26(e) of the Idaho Rules of Civil Procedure, for an order in limine to exclude testimony
and documents by Meridian’s Experts.

PETRA INCORPORATED’S RENEWED MOTION IN LIMINE TO EXCLUDE
TESTIMONY AND DOCUMENTS BY MERIDIAN’S EXPERTS
This motion is based on the pleadings, records and files in this case and Petra's Memorandum in Support of its Motion in Limine to Exclude Testimony and Documents by Meridian's Experts, Affidavit of Thomas G. Walker dated November 9, 2010 and Affidavit of Ginny Sam, dated November 9, 2010.

Oral argument is requested on this motion and is currently scheduled November 22, 2010 at 1:30 p.m.

DATED: November 9, 2010.

COSHO HUMPHREY, LLP

By: THOMAS G. WALKER

Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9th day of November, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

THOMAS G. WALKER
Thomas G. Walker (ISB No. 1856)
Erika Klein (ISB No. 5509)
Mackenzie Whatcott (ISB No. 6774)
Matthew B. Schelstrate (ISB No. 8276)

COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518

Direct Phone: (208) 639-5607
Cell Phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: twalker@cosholaw.com; mwhatcott@cosholaw.com;
eklein@cosholaw.com; mschelstrate@cosholaw.com

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

STATE OF IDAHO )

) ss.

County of Ada )

I, GINNY SAM, being first duly sworn upon oath, depose and state:

AFFIDAVIT GINNY SAM DATED NOVEMBER 9, 2010.
1. I am a paralegal employed by Cosho Humphrey, LLP and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. I submit this affidavit in support of Petra’s Renewed Motion in Limine to Exclude Testimony and Documents regarding Meridian’s Claimed Damages and Renewed Motion in Limine to Exclude Testimony and Documents by Meridian’s Experts.

3. Attached hereto as Exhibit A is a spreadsheet prepared by me from my review of the deposition transcripts in this matter, in which I calculated the number of objections raised by Mr. Trout during the depositions of Steve Amento, taken August 17, 2010 and Ray Wetherholt, taken October 26, 2010 and Theodore Baird taken November 3, 2010.

GINNY SAM

SUBSCRIBED AND SWORN to before me this 9th day of November, 2010.

Pamela R. Carson
Notary Public for Idaho
Residing at Eagle, Idaho
My commission expires: March 31, 2016.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of November, 2010, a true and correct copy of
the within and foregoing document was served upon:

Kim J. Trout, Esq.
Daniel Loras Glynn
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

Hand Delivery

THOMAS G. WALKER

AFFIDAVIT GINNY SAM DATED NOVEMBER 9, 2010.
638241
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The above-named Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP submits this memorandum in support of its renewed motion in limine to exclude testimony and documents by the Plaintiff City of Meridian's ("City") experts.
1. Introduction

After months of depositions and discovery requests, Petra has the only been provided with “estimated” damage amounts based on guesswork and speculation. The City’s alleged damages are based upon claims that Petra was professionally negligent in not protecting the City from construction defects. Thus, the City must make its case via expert testimony. The City has recently provided various expert affidavits and reports. Petra has attempted to conduct meaningful depositions of the City’s experts. The City has purportedly supplemented its responses to Petra’s discovery requests. Under Rule 26(b)(4), the City’s experts are limited to the content of their disclosures. The entire universe of expert opinion on damages is now set. The City is limited to its conglomeration of receipts, speculative cost estimates, and foundationless opinion testimony.

First, under the Court’s Order Setting Procedures and Trial, all the City’s expert disclosures must be in compliance with Rule 26(b)(4). At the September 27, 2010 hearing, the Court stated: “To the extent these named experts fail to have their opinions and the basis for their opinions, and so forth, by 45 days before trial, they’ll be excluded.” This is consistent with the case law: “Typically, failure to meet the requirements of Rule 26 results in exclusion of the proffered evidence.” Radmer v. Ford Motor Co., 120 Idaho 86, 89, 813 P.2d 897, 900 (1991).

The City has failed to disclose any expert testimony speaking to causation, an essential element of its case. None of the City’s experts have opined as to how Petra as construction manager caused any of the alleged defects in the Project. No City expert has discloses how he or
she arrived at any of the damage amounts listed by the City. Therefore, Petra seeks an order precluding the City from offering any expert testimony purporting to explain or provide a foundation for the various cost estimates or damage amounts listed in Exhibit 1 to counsel’s affidavit.¹

Second, the City’s expert Amento’s opinion on liquidated damages is unreliable, lacks a valid methodology or reasoning process, and should be excluded under I.R.E. 702 and 703.

Therefore, Petra requests an order excluding the City’s experts from testifying at trial on (1) causation of damages; (2) the methodology, reasoning, or foundation for the damage figures or cost estimates. Any such testimony at trial would constitute undisclosed testimony, a violation of the Court’s orders and Rule 26(b)(4). Petra also seeks an order precluding the City’s expert Steve Amento from testifying regarding liquidated damages, as his opinion violates I.R.E. 702 and 703.

2. Law and Argument

2.1 Amento’s opinion on liquidated damages is based on a flawed methodology and should be excluded under I.R.E. 702 and 703.

The City alleges Petra failed to assess all appropriate liquidated damages during construction and claims damages of $1,650,000.² This is supported by an unfiled affidavit of Steven J. Amento, a supplement to Amento’s previously disclosed expert opinions.³ Amento describes Petra’s alleged failure to adjust substantial completion dates for 44 prime contractors; a

² See Walker Affidavit, at Exh. 2.
³ Id.
claim that Petra inserted into each of these prime contracts a unified substantial completion date of August 28, 2008; and a claim that the architect failed to issue Certificates of Substantial Completion. All of which allegedly hindered the City’s ability to assess liquidated damages against the prime contractors with whom it had entered into contracts.

Setting aside the factual and legal defects of the City’s position, the focus of this motion is on the City’s claim for damages arising from the foregoing conduct attributed to Petra by the City. Amento gives the sum total of his opinion on how the City suffered damages arising from this conduct of Petra and how he arrived at $1,650,000. Proceeding from the premise that the Project experienced a delay of 75 days, Amento states:

It is possible that each of the 44 Prime Contractors is jointly responsible for the delay; thus the City would assert an aggregate claim of $1,650,000 (44 contractors x 75 days x $500/day) for liquidated damages.

Amento goes on to assert that Petra’s failure to adjust the substantial completion dates provided the prime contractors with a defense to the City’s claims for liquidated damages. Ostensibly, the City, therefore, lost the ability to assess liquidated damages of $1,650,000. Amento is unsure of how much the City might actually be awarded if it litigated with each of the 44 contractors.

Amento’s opinion is unsupported by any reliable reasoning or methodology and is wholly speculative. Under I.R.E. 702 and 703, an expert opinion is only admissible if it is based on valid “reasoning and methodology.” See Coombs v. Curnow, 148 Idaho 129, __, 219 P.3d 453,

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4 Again, Petra contests this allegation, but sets that aside for purposes of the present Motion. Factually, there were no other contractor caused days of delay other than those caused by Rule Steel, which led to the liquidated damages settlement with Rule Steel.
5 Walker Affidavit at Exh. 2, at CM114404.
464 (2009). Expert opinion that is speculative or conclusory is inadmissible. *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1998). “Expert opinion that merely suggests possibilities would only invite conjecture and may be properly excluded.” *Id.* (citing *Elce v. State*, 110 Idaho 361, 716 P.2d 505 (1986)). Courts do not allow a damages expert to simply offer a figure without scrutinizing how the expert arrived at the figure. “Admissibility . . . depends on the experts reasoning and methodology, rather than his or her ultimate conclusion.” *Id.* “The information, theory or methodology upon which the expert’s opinion is based need not be commonly agreed upon by experts in the field, but it must have sufficient indicia of reliability.” *City of McCall v. Seubert*, 142 Idaho 580, 585, 130 P.3d 1118, 1123 (2006) (emphasis added).

Under the applicable rules, it is not what the expert arrived at, but how the expert arrived at it that matters. See *J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford*, 146 Idaho 311, 315, 193 P.3d 858, 862 (2008). In *J-U-B Engineers*, the Supreme Court affirmed the trial court’s ruling that an expert opinion on damages was inadmissible because it was conclusory. In that case, the expert opined that the plaintiff, as a result of the defendant’s actions, had been damaged “in an amount of at least five thousand ($5,000) and up to four hundred thousand dollars ($400,000) as a result of increased litigation burdens resultant from reputation damages.” The trial court ruled this opinion on damages inadmissible because the expert offered no basis for his opinion.
This Court is faced here with the same conclusory opinion. Although Amento purports to give a basis for the $1,650,000 figure, his reasoning and methods in arriving at $1,650,000 do not withstand scrutiny. Thus, his ultimate damage amount has no reliable foundation. As a matter of construction law, his opinion has no legal basis and is directly contrary to industry practice regarding liquidated damages: liquidated damages are assessed on a per-day basis against the entity responsible for causing the delay. It defies logic to assume a set of circumstances where 44 contractors each caused 75 days of delay. Amento’s calculation of “44 contractors x 75 days x $500/day” is based on an assumption that all 44 contractors could be responsible for all 75 days of delay. This is an inherently flawed calculation.

Therefore, the figure of $1,650,000 is pure speculation. Amento theorizes the City would sue each contractor for 75 days of delay for an aggregate of $1,650,000. The City is free to take that course. But once the contractor(s) who caused the delay is ascertained, the City would be limited to multiplying the days of delay by $500, i.e. 75 x $500. Therefore, the outside figure under any reasonable view of the circumstances is $37,500, not $1,650,000. In any event, it is pure speculation to opine as to what the City might recover in such hypothetical litigation.

In sum, Amento did not arrive at his opinion via a reliable process. The figure of $1,650,000 has no legal basis and is speculative. Therefore, Amento’s opinion fails to comply with I.R.E. 702 and 703 and should be excluded.
2.2 The City has failed to disclose any expert testimony as to how Petra caused any claimed damages and should be precluded from doing so at trial

The City has failed to disclose any expert testimony speaking to causation of damages. The City’s experts have likewise failed to disclose any methodology, reasoning, or explanation for the various damage amounts. Moreover, with regard to some of the elements of claimed damage, particularly the administration of certain prime contracts, the City’s experts do not opine that Petra even breached a contractual duty with regard to any of the change orders, much less caused the City damage. Any testimony at trial as to causation of damages, foundation for the various damage amounts, and any further opinion as how Petra allegedly breached the Construction Management Agreement, would exceed the scope of the City’s current expert witness disclosures, and violate the Court’s orders.

After denying Petra’s original Motion to Exclude Expert Testimony, the Court ruled that “to the extent that any of these named experts fail to have their opinions and the basis of their opinions, and so forth, by 45 days before trial, they’ll be excluded.” Under this ruling, the Court’s Order Setting Proceedings and Trial, and I.R.C.P. 26(b)(4), the City is precluded from offering undisclosed opinions at trial. Since any opinion as to causation of damages and any opinion as to the basis for the damage amounts has yet to be disclosed, Petra requests an order excluding any expert testimony on these subjects at trial.

6 See Walker Affidavit at Exh. 5., p. 53.
As documented below, the City’s claimed damages are unsupported by expert testimony, without which the City’s damages cannot be proven. It is insufficient in a breach of contract and professional negligence case to simply claim damages without providing a causal link, which must be in the form of expert testimony. This is not a case of strict liability. The City has merely juxtaposed baseless “cost estimates” with various contract terms and opinions as to Petra’s various duties under the Construction Management Agreement.

2.2.1 Petra did not improperly approve change orders or charges to the City.

The City alleges Petra improperly approved certain change orders or charges to the City. The City lists 14 change orders or charges to the City, corresponding dollar amounts, adds up the amounts, and lists $97,917.04 as a total amount of claimed damages. The City provides no explanation, much less an expert opinion, as to how Petra as construction manager fell below the applicable standard of care in approving each of these change orders or charges. Without expert testimony, all we have is a disparate set of documents. Therefore, the City should be precluded from offering at trial any expert testimony on causation and any expert testimony purporting to provide a basis for these claimed damages.

2.2.2 The closeout warranties and extra materials were provided to the City.

Next, the City submits a list of various closeout warranties and extra materials. No dollar amounts are listed. The only support for this particular set of apparent damage allegations consists of 76 pages of documents. The City has not provided any expert testimony as to how
Petra as construction manager fell below the standard of care with regard to the closeout warranties and extra materials. Without expert testimony, all we have are various lists and seemingly unrelated documents.

Thus, Petra requests an order excluding any expert testimony on this topic at trial. Additionally, as addressed in Petra’s *Renewed Motion to Exclude Evidence of Damages*, the City should be precluded from introducing any dollar amounts at trial to correspond to the list. The deadline has passed for the City to disclose its evidence of claimed damages.

### 2.2.3 The Sewage Incident

Next, the City claims as damages costs arising from cleaning up an overflow of sewage in the first floor women’s restroom. This incident occurred during the Spring of 2010, some 18 months after the City occupied the new City Hall building. The City lists $43,790 in damages. As support for the apparent allegation that Petra is responsible for the costs, the City provides 510 pages of documents, including invoices for the cleanup from the incident, the insurance company reimbursement and several hundred invoices, statements, and other unrelated information.

The City offers no expert testimony as to (1) how Petra’s performance as construction manager fell below the applicable standard with respect to this sewage overflow incident and (2) how Petra’s performance, if deficient, caused any of the claimed $43,790 in damages. Without expert testimony, all we have are invoices, letters, and other documents. Therefore, the City
should be precluded from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

2.2.4 The City’s claim of defects in the plumbing are not supported by admissible evidence.

The City alleges defects in the plumbing system in the amount of $66,500, including $31,500 of fees and contingencies. This claim is apparently based on allegedly missing sewer line cleanouts. In fact, the close out of the plumbing punch lists and the City Plumbing Inspector’s acceptance of the sewer lines as being code compliant irrefutably rebuts any belated claim by the City regarding sewer line deficiencies. Notably, the City provides no explanation as to how Petra’s performance caused any of these alleged defects. The only support for this alleged damage is a series of drawings. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

2.2.5 Defects in the southwest roof drain, if any, are not attributable to Petra’s performance of its duties under the Construction Management Agreement.

With regard to the southwest roof drain, the City claims damages in the amount of $49,000, including $29,000 in contingencies. There is no expert opinion as to how Petra’s performance, or lack thereof, caused any of these alleged defects. In fact, there is no expert opinion at all, just a series of photos. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.
2.2.6 Defects in the basement mechanical and electrical, if any, are not attributable to Petra’s performance of its duties under the Construction Management Agreement.

With regard to the basement mechanical and electrical, the City alleges damages of $114,000, with $39,000 in fees and contingencies. There is no expert opinion as to how Petra’s acts or omissions caused any of these alleged defects. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

2.2.7 Alleged problems with the Mayor’s reception area are not attributable to anything that Petra did or failed to do.

With regard to the Mayor’s reception area, the City alleges damages in the amount of $44,000, including $26,500 in fees and contingencies. There is no expert testimony as to how Petra’s performance, or lack thereof caused any of these alleged defects. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

2.2.8 There is no proof of damage to support an allegation that Petra failed to provide a report on the owner’s criteria.

Lastly, the City lists the lack of a report on the owner’s criteria as an element of claimed damages. The City provides no expert testimony regarding anything that Petra did or failed to do as the construction manager with regard to the owner’s criteria. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.
2.2.9 Alleged defects in the HVAC, if any, are not attributable to Petra’s performance of its duties under the Construction Management Agreement

The City lists $382,500 in damages allegedly stemming from occupancy comfort issues and chiller vibrations related to the HVAC system. The City’s expert Tim Petsche lists various alleged defects with the system. Petsche does not state that Petra caused any of these problems by failing to discharge a duty under the Construction Management Agreement. The City has not disclosed any expert testimony regarding how Petra’s performance fell below industry standards and caused these defects in the HVAC system. This is not just a technical deficiency. There are a multitude of reasons the HVAC system may have problems, including being improperly maintained and operated by untrained City personnel. The Petsche report was prepared well over a year after the City occupied the City Hall building. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

2.2.10 Alleged defects in the roof, if any, are not attributable to Petra’s performance of its duties under the Construction Management Agreement

The City alleges $160,000 in damage to the City Hall roof. The City has disclosed an expert report by Wetherholt & Associates that outlines various issues with the roof. This report is based on site inspections conducted on January 14, 2010 and July 23, 2010.

Much like the Petsche report, the Wetherholt report does not address how Petra breached any duty as a construction manager or how any failure on the part of Petra led to the alleged
problems with the roof. Considering the length of time between when Wetherholt conducted his study and the City’s occupancy date of October 15, 2008, it is more likely than not that the alleged damage was caused by City personnel or other third persons after the roof punch list was closed. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

2.2.11 Alleged defects in the water features, if any, are not attributable to Petra’s performance of its duties under the Construction Management Agreement

The City alleges $462,500 in damages related to the water features. The City has disclosed a report by Anderson & Associates. This report does not address how Petra breached any duty as a construction manager or how any failure on the part of Petra led to the alleged problems with the water features. The report in fact expressly refrains from offering any opinion as to who may have caused any of the alleged defects. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

In sum, the City’s disclosures with regard to its damage claims are unsupported by expert testimony as to how Petra’s performance or failure to perform a required duty caused any damage to the City. In light of the Court’s rulings and Rule 26, Petra respectfully requests an order precluding any expert testimony as to causation and any expert testimony attempting to explain or provide a foundation for the above damage claims. This would be surprise testimony.
and would result in prejudice to Petra due to the inability to adequately prepare a rebuttal of the City's testimony.

3. Conclusion

In conclusion, the City belatedly submitted the entirety of its disclosure on damages. However, even these tardy disclosures fail to support its damage claims. There is little, if any, expert opinion as to how Petra caused any of the alleged damage. The admission of any such opinions at trial would constitute surprise testimony in violation of the rules. Furthermore, Amento's opinion is the product of an unreliable and flawed methodology and is inadmissible under I.R.E. 702 and 703.

Therefore, Petra seeks an order (1) excluding the City's experts from testifying at trial on causation of damages; (2) the methodology, reasoning, or foundation for the damage amounts or "cost estimates;" and (3) the claimed damage amounts. Petra also seeks an order excluding Amento from offering his opinion on liquidated damages.

DATED: November 9, 2010.

COSHOUMPHREY, LLP

THOMAS G. WALKER
Attorneys for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9th day of November, 2010, a true and correct copy of

the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF 
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

NOTICE OF HEARING

PLEASE TAKE NOTICE, That the undersigned, attorneys for Petra Incorporated, ("Petra"), the Defendant/Counterclaimant in the above-entitled matter, will bring before the Honorable Ronald J. Wilper of the above-entitled Court, for hearing at the Ada County Courthouse, 200 West Front Street, Boise, Idaho 83702, on Monday, the 22nd day of
November, 2010, at the hour of 1:30 p.m. or as soon thereafter as counsel can be heard, Defendant/Counterclaimant, Petra Incorporated’s Renewed Motion in Limine to Exclude Testimony and Documents Regarding Meridian’s Claimed Damages and Petra Incorporated’s Renewed Motion in Limine to Exclude Testimony and Documents by Meridian’s Experts.

DATED: November 9, 2010.

COSHO HUMPHREY, LLP

By: THOMAS G. WALKER
Attorneys for Defendant/Counterclaimant, Petra Incorporated
CERTIFICATE OF SERVICE

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Boise, Idaho 83701

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[signature]

THOMAS G. WALKER
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Erika K. Klein (ISB 5509)  
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Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,  
Plaintiff/Counterdefendant,  

vs.  

PETRA INCORPORATED, an Idaho corporation,  
Defendant/Counterclaimant.

The above-named Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP moves this Court pursuant to Rule 7(b)(3) of the Idaho Rule of Civil Procedure for an Order shortening the required period for hearing Petra’s Renewed Motion in Limine to Exclude
Testimony and Documents regarding Meridian's Claimed Damages and Renewed Motion in Limine to Exclude Testimony and Documents by Meridian's Experts.

This motion is made because there is insufficient time to give the notice required by Rule 7(b)(3) prior to the hearing scheduled on these motions for Monday, November 22, 2010 at 1:30 p.m.

DATED: November 9, 2010.

PETRA INCORPORATED'S MOTION TO SHORTEN TIME

COSHO HUMBERREY, LLP

By: THOMAS G. WALKER
Attorneys for Defendants/Counterclaimant
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9th day of November, 2010, a true and correct copy of
the within and foregoing document was served upon:

Kim J. Trout, Esq.
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Boise, Idaho 83701

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THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,
Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,
Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF HEARING

PLEASE TAKE NOTICE, That the undersigned, attorneys for Petra Incorporated, ("Petra"), the Defendant/Counterclaimant in the above-entitled matter, will bring before the Honorable Ronald J. Wilper of the above-entitled Court, for hearing at the Ada County Courthouse, 200 West Front Street, Boise, Idaho 83702, on Monday, the 22nd day of
November, 2010, at the hour of 1:30 p.m. or as soon thereafter as counsel can be heard, Defendant/Counterclaimant, Petra Incorporated’s Motion to Shorten Time for Hearing.

DATED: November 9, 2010.

COSHO HUMPHREY, LLP

By: ____________________________

THOMAS G. WALKER
Attorneys for Defendant/Counterclaimant, Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9th day of November, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9th Street, Suite 820  
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Boise, Idaho 83701

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THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

COMES NOW, the Plaintiff/Counterdefendant, City of Meridian, ("City"), by and through their counsel of record, Kim J. Trout of Trout Jones Gledhill Fuhrman Gourley, P.A., pursuant to Rules 7(b)(1), 16(i), 26(e)(4) and 37(b)(2)(B), moves in limine for an Order of this Court that the testimony of the witnesses which were disclosed in Defendant's Supplemental Response dated October 29, 2010 in response to the City First Interrogatories and Requests for Production of Documents to the Defendant Petra, Incorporated, ("Petra"), is inadmissible and that counsel and all witness be instructed not to refer to, mention, or comment on the testimony of said late disclosed witnesses on the grounds that these witnesses were not disclosed to the City until 30 days before trial.
In the alternative, Plaintiff is moving this Court to vacate trial and reset to a time convenient to all parties in order to allow additional time to depose the late disclosed witnesses.

This Motion is supported by the Affidavit of Kim J. Trout, and Memorandum in Support of Plaintiff’s Motion in Limine and/or In the Alternative Motion to Vacate Trial filed contemporaneously herewith.

DATED this 12th day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By: ___
Kim J. Trout
Daniel Loras Glynn
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
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Kim J. Trout
KIM J. TROUT, ISB #2468
DANIEL LORAS GLYNN, ISB #5113
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225 North 9th Street, Suite 820
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Telephone: (208) 331-1170
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho
Corporation,

Defendant.

STATE OF IDAHO )
County of ADA )

KIM J. TROUT, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the
   matters set forth herein.

2. I am a member of the law firm of TROUT • JONES • GLEDHILL • FUHRMAN •
   GOURLEY, P.A., representing the Plaintiff in this matter, and I make the following statements based
   upon my own personal knowledge.

AFFIDAVIT OF KIM J. TROUT IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE AND/OR IN THE
ALTERNATIVE MOTION TO VACATE TRIAL

006952
3. On July 22, 2009, the City of Meridian served “Plaintiff’s First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions to Defendant Petra Incorporated” upon the Defendant. The instructions contained within this original discovery request unequivocally state: “These Requests are continuing in nature and require supplementation pursuant to Idaho Rule of Civil Procedure Rule 26(e), anytime before trial, and in no event later than 45 days before trial.” 45 days prior to trial was October 17, 2010. Attached hereto and marked as Exhibit “A” is a true and correct copy of the pertinent portion of “Plaintiff’s First Set of Interrogatories, Requests for Production of Documents and Requests for Admission to Defendant Petra.”

4. On August 21, 2009, Petra served “Petra Incorporated Response Dated August 21, 2009 to the City of Meridian’s First Set of Interrogatories, Requests for Production of Documents and request for Admissions to Defendant Petra Incorporated” upon Plaintiff. In its response to interrogatory number 1, which requested Petra to “identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge,” Defendant listed 41 names which were primarily either City employees or Petra employees (present or former). Attached hereto and marked as Exhibit “B” is a true and correct copy of the pertinent portion of “Petra’s Response Dated August 21, 2009 to the City of Meridian’s First Set of Interrogatories, Requests for Production of Documents and request for Admissions to Defendant Petra Incorporated.”

5. On October 2, 2009, Petra served “Petra Incorporated’s Clerical Amendments and Supplemental Response Dated October 2, 2009 to the City of Meridian’s First Interrogatories and
Request for Production of Documents to Defendant Petra Incorporated" upon Plaintiff. Petra supplemented Interrogatory No. 1 with an additional 5 names. Attached hereto and marked as Exhibit “C” is a true and correct copy of the pertinent portion of “Petra Incorporated’s Clerical Amendments and Supplemental Response Dated October 2, 2009 to the City of Meridian’s First Interrogatories and Request for Production of Documents to Defendant Petra Incorporated.”

6. On October 29, 2010, Petra served “Petra Incorporated’s Supplemental Response Dated October 29, 2010 to the City of Meridian’s First Interrogatories and Requests for Production of Documents to Defendant Petra Incorporated.” In this supplemental response, Petra lists an additional 28 names, many of which are either Prime Contractors or Suppliers who worked on or supplied material for the City of Meridian City Hall project. Additionally, Petra also indicates in it’s response that the contractors are expected to testify regarding their work on the project and offer rebuttal testimony as necessary. Attached hereto and marked as Exhibit “D” is a true and correct copy of the pertinent portion of “Petra Incorporated’s Supplemental Response Dated October 29, 2010 to the City of Meridian’s First Interrogatories and Requests for Production of Documents to Defendant Petra Incorporated.”

7. This late disclosure will require the City to conduct numerous depositions in order to prepare this matter for trial and to defend itself against Defendant’s counterclaims.

8. Those depositions will necessarily have to be reviewed by the City’s experts in order to provide rebuttal testimony.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, PA

By: [Signature]

Kim J. Trout

AFFIDAVIT OF KIM J. TROUT IN SUPPORT OF PLAINTIFF’S MOTION IN LIMINE AND/OR IN THE ALTERNATIVE MOTION TO VACATE TRIAL - 3
Subscribed and sworn to before me this 12th day of November, 2010.

[Signature]

Notary Public, State of Idaho
Residing at: Meridian, ID
My commission expires: November 3, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Hand Delivered
U.S. Mail
Fax
Email

Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,                  Case No. CV OC 09-7257

       v.                                                     PLAINTIFF THE CITY OF MERIDIAN

PETRA, INCORPORATED, an Idaho Corporation,                                     FIRST SET OF INTERROGATORIES,
                                                                                      REQUESTS FOR PRODUCTION OF
                                                                                      DOCUMENTS AND REQUEST FOR
                                                                                      ADMISSIONS TO DEFENDANT PETRA
                                                                                      INCORPORATED

Defendant.

Plaintiff, by and through its counsel of record, Trout Jones Gledhill Fuhrman, P.A., and pursuant to Rules 26, 33, 34, and 36 of the Idaho Rules of Civil Procedure and in accordance with the definitions and instructions set forth below, requests that the Defendant, Petra, Incorporated, (hereinafter "Petra" or "Defendant"), answer the following Interrogatories, Requests for Production of Documents, and Requests for Admissions in writing, under oath, and within thirty (30) days. These Requests are continuing in nature and require supplementation pursuant to Idaho Rule of Civil Procedure Rule 26(e), anytime before trial, and in no event later than 45 days before trial.
GENERAL INSTRUCTIONS

Your answers and responses must be based both on documents and/or information in your possession, custody, or control, and on any documents or information available to Petra, Incorporated, (hereafter “Petra”), including documents and information in the possession of your agents, attorneys, accountants, or employees.

No document requested to be identified or produced or otherwise relevant to this dispute can be destroyed or disposed of by virtue of a record retention program or for any other reason. If any document requested to be identified or produced, was but no longer is in your possession, available to you, subject to your control, or in existence, please state whether it is: (1) missing or lost; (2) has been destroyed; (3) has been transferred, voluntarily or involuntarily, to others; or (4) otherwise disposed of. In each instance, please explain the circumstances surrounding the authorization of such disposition or destruction, the date authorization was given, as well as the date of destruction.

With respect to each document which is required to be identified or produced and which you presently contend you are not required to disclose because of any alleged "privilege" (which you are not presently prepared to waive), in lieu of the document identification or production called for, please identify each such "privileged" document in a "privilege log" and provide the following information: (1) give the date of each such document; (2) identify each individual who was present when it was prepared; (3) identify the individual or individuals responsible for preparing each such document; (4) identify the purpose for each such document's preparation; (5) identify each individual to whom a copy was sent; (6) identify each individual who has seen it; (7) identify each individual who has custody of it; (8) identify each and every document which refers to, discusses, analyzes, or comments upon it, in whole or in part, or which contains any or all of its contents; (9) describe the format of each document (including but not limited to letter, memorandum, computer...
database, etc.) and; (10) state the nature of the privilege(s) asserted (including but not limited to attorney-client, work-product, etc.).

DEFINITIONS AND INSTRUCTIONS

Unless otherwise indicated, the following definitions shall apply to these and subsequent discovery requests:

1. The words "and," "and/or," "or" refers to both their conjunctive and disjunctive meanings, being construed as necessary to bring within the scope of the discovery request all information and documents which would otherwise be construed as being outside the request.

2. "Claims made by Petra" or "Your Claims" mean the claims and causes of action set forth in the Answer and Counterclaim dated May 6, 2009.


4. The term "communication" means any contact, oral or written, formal or informal, at any time or place, and under any circumstances whatsoever, whereby information of any nature was recorded, transmitted or transferred.

5. The term "computer" includes, but is not limited to, microchips, microcomputers (also known as personal computers), laptop computers, portable computers, notebook computers, palmtop computers (also known as personal digital assistants or PDAs), minicomputers, any phone capable of receiving, or sending or keeping a document or communication and mainframe computers.

6. The term "Defendant" shall mean Petra, Incorporated.

7. "Defenses asserted by Defendant" or "Petra's Defenses" mean the defenses asserted by Defendant in its Answer to Plaintiff's Complaint.

8. "Defenses asserted by Plaintiff or Meridian's Defenses" mean the defenses asserted by Plaintiff in its Answer to Defendant's Counterclaim.

9. "Document" or "documents" means the original, all copies and drafts of papers and writings of every kind, description and form, whether handwritten or typed, and all mechanical, magnetic media and electronic recordings (including but not limited to, hard disks, floppy disks, compact disks, and magnetic tapes of any kind), records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memoranda, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries, calendars, date books, appointment books, day-timers, intra-or inter-office communications, memoranda, reports, canceled checks, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone

PLAINTIFF THE CITY OF MERIDIAN FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED - 3

006958
statements, calendar and diary entries, desk calendars, appointment books, job or transaction files, books of account, ledgers, bank statements, promissory notes, invoices, charge slips, working papers, graphs, charts, lab books, lab notes, lab journals or notebooks, evaluation or appraisal reports, pleadings, transcripts of testimony or other documents filed or prepared in connection with any court or agency or other proceeding, deeds, mortgages, deeds of trust, contracts, agreements, assignments, instruments, charges, opinions, official statements, prospectuses, appraisals, feasibility studies, trust, releases of claims, charters, certificates, licenses, leases, invoices, computer printouts or programs, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

10. The term "electronic data" means the original (or identical duplicate when the original is not available) and any nonidentical copies (whether non-identical because of notes made on copies or attached comments, annotations, marks, transmission notations, or highlighting of any kind) of writings of every kind and description whether inscribed by mechanical, facsimile, electronic, magnetic, digital or other means. Electronic data includes, by way of example only, computer programs (whether private, commercial or work-in-progress), programming notes or instructions, activity listings of electronic mail receipts and/or transmittals, output resulting from the use of any software program, including word processing documents, spreadsheets, database files, charts, graphs and outlines, electronic mail, operating systems, source code of all types, peripheral drivers, PDF files, batch files, ASCII files, and any and all miscellaneous files and/or file fragments, regardless of the media on which they reside and regardless of whether said electronic data consists in an active file, deleted file or file fragment. Electronic data includes any and all items stored on computer memories, hard disks, floppy disks, CD-ROMS, removable media such as ZIP disks, Jaz cartridges, Bernoulli Boxes, and their equivalent, magnetic tapes of all types, microfiche, punch cards, punched tape, computer chips, including but not limited to EPROM, PROM, RAM and ROM, on or in any other vehicle for digital data storage and/or transmittal. The term electronic also includes the file, folder tabs and/or containers and labels appended to or associated with, any physical storage device associated with each original and/or copy.

11. The term "electronic format" means "electronic data" generated by a "computer."

12. "Identify" when used with respect to a document, item or thing means to provide the following information relating to such document, item or thing:

A description of the nature and contents of the document in such a manner that the custodian of the document would be able to locate it in response to a subpoena or request for product;

The date the document was made or entered into and the name, address, telephone number, occupation, job title and employer of each person whose testimony could be used to authenticate such document and lay the foundation for its introduction into evidence;

The identity of the person(s) to whom the document was sent, and who received each and every copy of the document; and

The name, address, telephone number, occupation, job title, and employer of the present custodian thereof.

13. The term "Identify" when used in reference to any electronic data or electronic media, means to state the software and/or operating system under which the data was created, title PLAINIF THE CITY OF MERIDIAN FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED - 4
and author, the type of data (i.e., word processing documents, spreadsheet, database, application, program, etc.), file formats such data can be converted into, all other necessary information to identify and access such data, and its present or last known location or custodian. If any such electronic data was, or no longer is, in the possession, custody, or control, state what disposition was made of it and the reason for such disposition.

14. The term "Identify" when used with respect to a person that is not a natural person means, to the extent applicable, to provide the same information required as though the entity were a natural person and:
   - The nature of the entity;
   - The identity of the person or persons who are its partners, owners, or hold controlling interests.

15. The term "Identify" when used with respect to a fact or allegation means that you provide a full and complete description of the fact or allegation, whether you admit that the fact or allegation is true, correct and complete, and if you do not so admit, describe fully the reason or reasons why you do not or cannot so admit that the fact or allegation is true, correct and complete.

16. "Identify" when used with respect to a natural person means that you provide the following information with respect to the person:
   - The name;
   - The residence address and telephone number; and
   - The name of employer or business with whom the person was associated and the person's title and position at the time relevant to the identification.

17. "Including" means including, but not limited to the specific items identified after the word "including."

18. "Intra-company" shall mean any document by or between any officer, any present and former employees, any person acting or purporting to act on Petra's behalf, agents, representatives, personnel, attorneys, accountants, consultants, experts, investigators, independent contractors, or contractors and any persons identified herein.

19. "Meridian" means The City of Meridian, the Plaintiff.

20. The term "person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, or trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.


22. "Plaintiff" means The City of Meridian "Meridian".

23. "Produce" means to provide the originals or, if the originals are not available, true, correct, complete and legible Bates numbered copies of each and every document identified by You.

24. "Project" shall mean Owner desire to abate and demolish the existing structures on the Site and develop a new city hall facility thereon consisting of a four story structure with

PLAINTIFF THE CITY OF MERIDIAN FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED - 5
approximately 80,000 square feet of standard Class A office space and related improvement with surface parking.

25. The words "relate to" or "relating to" mean and include the following terms: regards, describes, involves, compares, correlates, mentions, connected to, refers to, pertains to, contradicts, or compromises.

26. The term "relevant period" or "relevant period of time" means the period commencing on January 1, 2006, and continuing to the present.

27. "You," "your," "yours," shall mean Petra or any person acting or purporting to act on Petra's behalf, including without limitation, all present and former employees, officers, agents, representatives, personnel, attorneys, accountants, consultants, experts, investigators, independent contractors, or other persons.

28. "Construction Management Agreement," "the Agreement," "Agreement" shall mean the specific written agreement between the City of Meridian and Petra Incorporated for the New Meridian City Hall dated August 1, 2006.

29. State the basis" for a claim, allegations or denial means to provide the complete factual summary of each of the elements of the claim, allegation, or denial. The summary should chronologically describe each and every fact, action, and occurrence that related to the particular claim, allegation or denial. In describing each such fact, action, and occurrence, (i) do so in accordance with the definitions of these terms set forth herein, (ii) identify each individual, entity, and organizational unit claimed to be involved therein, and (iii) in each instance, identify the source from which the information set forth in your response with respect to that particular fact, action, occurrence, document, individual, entity, and/or organizational unit, was obtained.

30. In the event you assert any form of objection or privilege as a ground for not answering an Interrogatory or any part of an Interrogatory, set forth the legal grounds and facts upon which the objection or privilege is based. If the objection relates to only part of the Interrogatory, the balance of the Interrogatory should be answered in full.

31. Defendants, pursuant to Rule 34 of the Idaho Rules of Civil Procedure, request the production for inspection and copying of the documents within the time provided by law. In lieu of production, Plaintiffs may provide copies of such documents within the time provided by law.
INTERROGATORIES

INTERROGATORY NO. 1: Identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

INTERROGATORY NO. 2: Identify each and every person known to Petra who has given a statement, affidavit or declaration regarding anything having to do with (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

INTERROGATORY NO. 3: Identify each and every investigation and/or interview and/or accounting with respect to (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian undertaken by You; identify the reasons why each such investigation and/or interview and/or accounting was undertaken; identify the dates of each such investigation and/or interview and/or accounting; identify the person who was responsible for each investigation and/or interview and/or accounting; identify the manner in which each investigation and/or interview and/or accounting was pursued; identify the findings of each investigation and/or interview and/or accounting; and identify each and every document, tape, transcript, memorandum, or correspondence relating to each such investigation and/or interview and/or accounting, as well as the location of each document.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2009, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker                             Hand Delivered
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518
Fax: (208) 639-5609

Kim J. Trout

Hand Delivered
U.S. Mail  X
Fax
Fed. Express
Email

PLAINTIFF THE CITY OF MERIDIAN FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED - 30
PETRA INCORPORATED RESPONSE DATED AUGUST 21, 2009 TO THE CITY OF MERIDIAN'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED

Petra Incorporated ("Petra"), by and through its undersigned counsel, pursuant to Rules 33, 34 and 36 of the Idaho Rules of Civil Procedure, responds to Plaintiffs City of Meridian’s (Meridian) First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions, served on or about July 22, 2009 as follows:

Petra Incorporated

P. O. Box 9518
Boise, Idaho 83707-9518

Direct Phone: (208) 639-5607
Cell Phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: twalker@cosholaw.com; mwhatcott@cosholaw.com

Attorneys for Defendant, Petra Incorporated
GENERAL OBJECTIONS

1. Petra objects to each Interrogatory, Request for Production and Request for Admission to the extent that it seeks to elicit information subject to and protected by the attorney-client privilege and the attorney work-product doctrine. Nothing contained in these responses is intended to be or should be construed as a waiver of the attorney-client privilege or attorney work-product protection, or any other applicable privilege, protection or doctrine.

2. Petra objects to each Interrogatory, Request for Production and Request for Admission to the extent it seeks documents that contain confidential information, or which would impinge on the constitutionally or statutorily protected right of individuals.

3. Petra objects to each Interrogatory, Request for Production and Request for Admission to the extent that it attempts to place a burden on Petra that exceeds the duties set forth in the Idaho Rules of Civil Procedure.

4. Petra objects to each Interrogatory, Request for Production and Request for Admission to the extent the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other sources, including but not limited to Plaintiff, that is more convenient, less burdensome, or less expensive. Petra also objects to each Interrogatory and Request for Production of Documents to the extent the burden or expense of the discovery sought outweighs its likely benefit.

5. These responses are made solely for the purpose of discovery in this action. Nothing herein is intended to waive the following objections, which are expressly reserved: all objections as to competency, relevancy, authenticity, propriety, materiality, and admissibility of
the subject matter of the discovery requests; all objections as to vagueness, ambiguity, or undue burden; all objections on any ground as to the use of any information provided in response to these discovery requests; all objections on any ground to any request for further responses to these or other discovery requests; and any and all other objections and grounds that would or could require or permit the exclusion of any document or statement there from evidence, all of which objections and grounds are reserved and may be interposed at the time of trial.

Subject to the foregoing objections and such other objection as may be noted below, Petra responds as follows:

The definitions previously provided in Petra’s discovery requests and responses are incorporated herein. In addition, the subject Meridian City Hall project is referred to as the “Project” and the City of Meridian is referred to as the City, Meridian, and the Plaintiff.

INTERROGATORIES

INTERROGATORY NO. 1: Identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

RESPONSE:

1. Jerry Frank, Petra Incorporated, who may be contacted through Petra’s counsel. Mr. Frank is expected to testify consistent with the responses set forth herein.
2. John Quapp, Petra Incorporated, who may be contacted through Petra’s counsel. Mr. Quapp is expected to testify consistent with the responses set forth herein.

3. Eugene Bennett, Petra Incorporated, who may be contacted through Petra’s counsel. Mr. Bennett is expected to testify consistent with the responses set forth herein.

4. Arthur Stevens, Petra Incorporated, who may be contacted through Petra’s counsel. Mr. Stevens’ testimony is not presently known to Petra.

5. Thomas R. Coughlin, Petra Incorporated, who may be contacted through Petra’s counsel. Mr. Coughlin’s testimony is not presently known to Petra.

6. Debbie Gorski, Petra Incorporated, who may be contacted through Petra’s counsel. Ms. Gorski’s testimony is not presently known to Petra.

7. Monica Pope, Petra Incorporated, who may be contacted through Petra’s counsel. Ms. Pope’s testimony is not presently known to Petra.

8. Nick Ploetz, Petra Incorporated, who may be contacted through Petra’s counsel. Mr. Ploetz’s testimony is not presently known to Petra.

9. Barbara Crawford Petra Incorporated, who may be contacted through Petra’s counsel. Ms. Crawford’s testimony is not presently known to Petra.

10. Connie Creager – former Petra employee; 1627 W Georgia Ave Nampa 83686. Ms. Creager’s testimony is not presently known to Petra.

11. Cleve Cushing – former Petra employee; 4681 W Moonlake Dr Meridian 83646 Ph. (208) 288-0366. Mr. Cushing’s testimony is not presently known to Petra.
12. Pat Kershisnik – former Petra employee; address and telephone number unknown. Mr. Kershisnik’s testimony is not presently known to Petra.

13. Pat Child – former Petra employee; 674 Tiffany Dr Meridian 83642 Ph. (208) 884-3127. Mr. Child’s testimony is not presently known to Petra.

14. Scott Trepagnier – former Petra employee; 1691 NW 11th Ave Meridian 83646. Mr. Trepagnier’s testimony is not presently known to Petra.

15. Wes Bettis – ESI, 12400 W. Overland Road, Boise, ID 83709 Ph: 208-362-3040; 14602 River Rd Caldwell 83607. Mr. Bettis’s testimony is not presently known to Petra.

16. Jon Anderson – ESI, 12400 W. Overland Road, Boise, ID 83709 Ph: 208-362-3040; 14475 Elmspring Boise 83713 Ph. (208) 939-4626. Mr. Anderson’s testimony is not presently known to Petra.

17. Jack Vaughn – Northcon, Inc, 4662 Henry Street, Suite A, Boise, ID 83709 Ph: 208-344-4000; 3355 N Five Mile #231 Boise 83713 Ph. (208) 585-2147. Mr. Vaughn’s testimony is not presently known to Petra.

18. Adam Johnson – ESI, 12400 W. Overland Road, Boise, ID 83709 Ph.: 208-362-3040; 4384 S Corbari Ave Boise 83709 Ph. (208) 919-4891. Mr. Johnson’s testimony is not presently known to Petra.

19. Drew Brown – Hill Construction, 760 E King St Ste 107, Meridian, ID 83642, (208) 898-9910; 7986 W Grubstake Ave Boise 83709, (559) 381-0993. Mr. Brown’s testimony is not presently known to Petra.
20. Steve Simmons – LCA; 1221 Shoreline Ln, Boise, ID 83702; Ph: 208-345-6677. Mr. Simmons’s testimony is not presently known to Petra.

21. Steve Christiansen – LCA; 1221 Shoreline Ln, Boise, ID 83702; Ph: 208-345-6677. Mr. Christiansen’s testimony is not presently known to Petra.

22. Brent Pitts – LCA; 1221 Shoreline Ln, Boise, ID 83702; Ph: 208-345-6677. Mr. Pitt’s testimony is not presently known to Petra.

23. Russ Moorhead – LCA; 1221 Shoreline Ln, Boise, ID 83702; Ph: 208-345-6677. Mr. Moorhead’s testimony is not presently known to Petra.

24. Tammy de Weerd – COM, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mayor de Weerd’s testimony is not presently known to Petra.

25. Keith Bird – COM Council, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Bird’s testimony is not presently known to Petra.

26. Keith Watts – Meridian Council, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Watt’s testimony is not presently known to Petra.

27. Will Berg – former Meridian employee. Neither Mr. Berg’s location nor his testimony is presently known to Petra.

28. Ted Baird – COM, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Baird’s testimony is not presently known to Petra.

29. Bill Nary – COM, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Nary’s testimony is not presently known to Petra.
30. Brad Watson – former COM employee. Neither Mr. Watson’s testimony nor his location is presently known to Petra.

31. Charlie Roundtree – COM Council, 33 E Broadway St, Meridian, ID 83642; Ph.: 208-888-4433. Mr. Roundtree’s testimony is not presently known to Petra.

32. David Zaremba – COM Council, 33 E Broadway St, Meridian, ID 83642; Ph.: 208-888-4433. Mr. Zaremba’s testimony is not presently known to Petra.

33. Brad Hoaglun – COM Council, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Hoaglun’s testimony is not presently known to Petra.

34. Joseph Borton, Esq. – former Meridian Council, Rose Law Group, 6223 North Discovery Way, Ste. 200, Boise, Idaho 83713. Mr. Anderson’s testimony is not presently known to Petra.

35. Kathy Wanner – Meridian, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Ms. Wanner’s testimony is not presently known to Petra.

36. Stacy Kilchenmann – Meridian, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Ms. Kilchenmann’s testimony is not presently known to Petra.

37. Ed Ankerman – former Meridian employee. Neither Mr. Ankerman’s testimony nor his location is presently known to Petra.

38. Tom Jackson – Meridian, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Jackson’s testimony is not presently known to Petra.

39. Tom Barry – Meridian, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Barry’s testimony is not presently known to Petra.
40. Elioy Huff – Meridian, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Huff's testimony is not presently known to Petra.

41. Frank Lee, Givens Pursley LLP, 601 West Bannock Street, Boise, ID 83702, (208) 388-1200 - Mr. Lee’s testimony is not presently known to Petra.

INTERROGATORY NO. 2: Identify each and every person known to Petra who has given a statement, affidavit or declaration regarding anything having to do with (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

RESPONSE: None. This response will be supplemented as required by the Idaho Rules of Civil Procedure and orders of the Court.

INTERROGATORY NO. 3: Identify each and every investigation and/or interview and/or accounting with respect to (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian undertaken by You; identify the reasons why each such investigation and/or interview and/or accounting was undertaken; identify the dates of each such investigation and/or interview and/or accounting; identify the person who was responsible for each investigation and/or interview and/or accounting; identify the manner in which each investigation and/or interview and/or accounting was pursued; identify the findings of each investigation and/or interview and/or accounting; and identify each and every document, tape, transcript, memorandum, or
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of August, 2009 a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile:
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant.

Petra Incorporated ("Petra"), by and through its undersigned counsel, pursuant to Rule 34 of the Idaho Rules of Civil Procedure, amends and supplements its response to Plaintiff's City of Meridian's (Meridian) First Requests for Production of Documents, served on or about July 22, 2009 as follows:

INTERROGATORY NO. 1: Identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

SUPPLEMENTAL RESPONSE:

42. Jerry Dillon – Former Petra employee, address and telephone number unknown.
43. Mike Wisdom – Engineering Inc., 2222 Broadway, Boise, ID 83706, Ph: 208-343-3663;
44. Jan Welch – Stapley Engineering, 8702 W. Hackamore Drive, Boise, ID 83709; Ph: 208-375-8240;

CLERICAL AMENDMENT TO RESPONSE DATED AUGUST 21, 2009, Item No. 34.
Should correctly state: "Mr. Borton's testimony is not presently known to Petra."
CLERICAL AMENDMENT TO RESPONSE DATED AUGUST 21, 2009, Item No. 37:
Should read: Ed Ankenman.

INTERROGATORY NO. 4: Identify each and every written and oral agreement by and between Petra and Meridian entered into during the relevant period of time with respect to (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian.

AMENDED RESPONSE TO ITEM NO. 4:

INTERROGATORY NO. 11: Identify each and every lawsuit in which Petra has been a party since January 1, 1999.

SUPPLEMENTAL RESPONSE: In addition to the cases previously identified in response to Interrogatory No. 11 served August 21, 2009 and Supplemental Response dated September 30, 2009, Petra has identified the following case numbers with regard to the following:

- Precision Interiors v. Petra Incorporated
- BHM & Assoc v. Petra Incorporated JV et al.
- Petra Incorporated v. Boise Associates – Ada County Case No. CV OC 9800867D;
- Silver Creek Computer Co v. Petra Incorporated – Ada County Case No. 9900246D;
- Petra Incorporated v. Hruza – Canyon County Case No. 99-04005
- Advanced Heating & Cooling v Petra Incorporated – Ada County Case No. 9907049D
- Petra Incorporated v. Advanced Stucco & Painting – Ada County Case No. 0005217D
- Bellomy Inc v. Petra Incorporated – Ada County Case No. 05001418
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 2nd day of October, 2009 a true and correct copy of the
within and foregoing document was served upon:

Kim J. Trout, Esq.
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

[Signature]

THOMAS G. WALKER
Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant.

Petra Incorporated ("Petra"), by and through its undersigned counsel, pursuant to Rules 33 and 34 of the Idaho Rules of Civil Procedure, supplements its response to Plaintiff City of Meridian's (Meridian) First Set of Interrogatories and Requests for Production of Documents, served on or about July 22, 2009 as follows:
INTERROGATORY NO. 1: Identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

SUPPLEMENTAL RESPONSE: The following persons are added to Petra's response:

47. Jack K. Lemley, Lemley International, 604 North 16th Street, Boise, Idaho 83702;
48. Richard Bauer, Lemley International, 604 North 16th Street, Boise, Idaho 83702;
49. Keith Pinkerton, Hooper Cornell, PLLC, 250 Bobwhite Court, Suite 300, Boise, Idaho 83706;
50. Dennis Reinstein, Hooper Cornell, PLLC, 250 Bobwhite Court, Suite 300, Boise, Idaho 83706;
51. Darrell Coleman, Alpha Masonry;
52. Tim McGourty, TMC Masonry Contractors;
53. Mike Miller, M.R. Miller;
54. Tom Zabala or other representative of ZGA Architects;
55. Glenn Hickey, Custom Precast;
56. Rob Drinkard, Western Roofing Contractors;
57. Jeff Brewer, Western Roofing Contractors;
58. Ted Davis, Western Roofing Contractors;
59. Jay Goodsen, Tri State Electric;
60. Randy Frisbee, Hobson Fabricating, Inc.
61. Ted Frisbee, Sr., Hobson Fabricating, Inc.
62. Ted Frisbee, Jr., Hobson Fabricating, Inc.
63. Pat Clover (Hobson Fabricating, Inc.)
64. Dell Hatch, Hatchmueller Landscape Architects;
65. Chuck Hum, Heery International;
66. Troy Kunas, Heery International;
67. Lenny Buss, Buss Mechanical;
68. John Buss, Buss Mechanical
69. One or more representatives of Yamas (HVAC equipment);
70. One or more representatives of Versico (regarding roofing materials);
71. Sheldon Morgan, Custom Glass;
72. Randy Pierce, American Wall Covering;
73. Stewart Jensen, D&A Door;
74. Dave Cram, MTI

Mr. Lemley and Mr. Bauer are expected to testify consistent with their affidavit and deposition testimony given in this matter.
Mr. Pinkerton and Mr. Reinstein are expected to testify consistent with their deposition testimony to be given in this matter.

Contractors are expected to testify regarding their work on the project and offer rebuttal testimony as necessary.

Petra also reserves the right to call any person identified by the Plaintiff either in Petra’s case-in-chief or on rebuttal.

INTERROGATORY NO. 2: Identify each and every person known to Petra who has given a statement, affidavit or declaration regarding anything having to do with (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

RESPONSE: See Petra’s Supplemental Response to Interrogatory No. 1. Petra may also offer testimony by Jerald Frank, Eugene Bennett, Thomas Coughlin and John Quapp consistent with the affidavits filed in this matter and with regard to Frank, Bennett and Coughlin, consistent with their respective deposition testimony.

INTERROGATORY NO. 3: Identify each and every investigation and/or interview and/or accounting with respect to (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian undertaken by You; identify the reasons why each such investigation and/or interview and/or accounting was
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 29th day of October, 2009 a true and correct copy of

the within and foregoing document was served upon:

Kim J. Trout, Esq.  U.S. Mail
Trout Jones Gledhill Fuhrman, P.A.  X Hand Delivery
225 North 9th Street, Suite 820  Overnight Courier
P.O. Box 1097  Facsimile:
Boise, Idaho  83701  E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF LATE DISCLOSED WITNESSES AND/OR IN THE ALTERNATIVE MOTION TO VACATE TRIAL

The Plaintiff/Counterdefendant, City of Meridian, ("City"), submits the following memorandum in support of its Motion in Limine to Exclude Testimony of Late Disclosed Witnesses and/or In the Alternative A Motion to Vacate Trial.

INTRODUCTION

On July 22, 2009, the City of Meridian served "Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions to Defendant Petra Incorporated" upon the Defendant. The instructions contained within this original discovery request unequivocally state: "These Requests are continuing in nature and require supplementation

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF LATE DISCLOSED WITNESSES AND/OR IN THE ALTERNATIVE MOTION TO VACATE TRIAL-1
pursuant to Idaho Rule of Civil Procedure Rule 26(e), anytime before trial, and in no event later than 45 days before trial.” 45 days prior to trial was October 17, 2010.

On August 21, 2009, Petra served “Petra Incorporated Response Dated August 21, 2009 to the City of Meridian’s First Set of Interrogatories, Requests for Production of Documents and request for Admissions to Defendant Petra Incorporated” upon Plaintiff. In its response to interrogatory number 1, which requested Petra to “identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge,” Defendant listed 41 names which were primarily either City employees or Petra employees (present or former).

On October 2, 2009, Petra served “Petra Incorporated’s Clerical Amendments and Supplemental Response Dated October 2, 2009 to the City of Meridian’s First Interrogatories and Request for Production of Documents to Defendant Petra Incorporated” upon Plaintiff. Petra supplemented Interrogatory No. 1 with an additional 5 names.

On October 29, 2010, Petra served “Petra Incorporated’s Supplemental Response Dated October 29, 2010 to the City of Meridian’s First Interrogatories and Requests for Production of Documents to Defendant Petra Incorporated.” In this supplemental response, Petra lists an additional 28 names, many of which are either Prime Contractors or Suppliers who worked on or supplied material for the City of Meridian City Hall project. Additionally, Petra also indicates in it’s response that the contractors are expected to testify regarding their work on the project and offer rebuttal testimony as necessary.
ARGUMENT

When a party tardily discloses the identity of a witness, the district court should consider the importance of the testimony, the time necessary for the other party to prepare, and the possibility of a continuance. McKim v. Horner, 143 Idaho 568, 571, 149 P.3d 843, 846 (Idaho 2006) (citing Viehweg v. Thompson, 103 Idaho 265, 271, 647 P.2d 311, 317 (App. 1982)).

This matter concerns a construction project that spanned two and a half years. During the construction which Petra oversaw there were approximately forty prime-contracts for various components of the construction. Thus, Petra was well aware of all the contractors who worked on this project. A substantial amount of discovery has already been conducted by the City in order to properly prepare this matter for trial and to defend itself against Defendant's Counterclaims. After all this effort and expense on the City's behalf, and with trial less than one (1) month away, Petra has “sandbagged” the City with the disclosure of these additional 28 witnesses which it previously knew about and should have previously disclosed. This late disclosure will require the City to conduct numerous depositions in order to properly prepare this matter for trial and to defend itself against Defendant's Counterclaims. Those depositions will necessarily have to be reviewed by the City's experts in order to provide rebuttal testimony. Due to this fact, the City is requesting that Court impose the sanction of excluding these witnesses or in the alternative grant the City a continuance in order to depose these late disclosed witnesses.

CONCLUSION

For the reasons stated, the City respectfully requests that this Court grant its Motion in Limine, or in the alternative, grant its Motion to Vacate Trial.
DATED this 12th day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By:  

Kim J. Trout  
Daniel Loras Glynn  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609  
Hand Delivered  
U.S. Mail  
Fax  
Email

Kim J. Trout
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho Corporation,

Defendant.

Case No. CV OC 09-7257

MOTION TO SHORTEN TIME FOR HEARING

COMES NOW Plaintiff, the City of Meridian ("City"), by and through its attorney of record, Kim J. Trout of the law firm of TROUT • JONES • GLEDHILL • FUHRMAN • GOURLEY, P.A., and hereby moves this Court, pursuant to Rule 6(b) of the Idaho Rules of Civil Procedure, for an order shortening the time for notice of hearing on Plaintiff's Motion in Limine and/or in the Alternative Motion to Vacate Trial.

DATED this 12th day of November, 2010.

TROUT • JONES • GLEDHILL • FUHRMAN • GOURLEY, P.A.

By: KIM J. TROUT
Attorneys for Plaintiff
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker
MacKenzie Whatcott
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P.O. Box 9518
Boise, Idaho 83707-9518
Direct Facsimile: (208) 639-5609

Hand Delivered ☒
U.S. Mail ☐
Fax ☐
Email ☐

Kim J. Trout

MOTION TO SHORTEN TIME FOR HEARING - 2

006987
Thomas G. Walker (ISB No. 1856)
Erika K. Klein (ISB No. 5509)
Mackenzie Whatcott (ISB No. 6774)
Matthew B. Schelstrate (ISB No. 8276)
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
P. O. Box 9518
Boise, Idaho 83707-9518
Direct Phone: (208) 639-5607
Cell Phone: (208) 869-1508
Direct Facsimile: (208) 639-5609
E-mail: twalker@cosholaw.com; eklein@cosholaw.com;
mwhatcott@cosholaw.com; mschelstrate@cosholaw.com

Attorneys for Defendant/Counterclaimant, Petra Incorporated

In the District Court Of The Fourth Judicial District Of
The State Of Idaho, In And For The County Of Ada

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

Plaintiff/Counterdefendant,

v.

PETRA, INCORPORATED, an Idaho
Corporation,

Defendant/Counterclaimant

Case No. CV OC 09-7257

MEMORANDUM IN SUPPORT OF
PETRA'S OPPOSITION TO CITY'S
MOTION TO DISMISS DEFENDANT'S
CLAIM FOR LOST PROFITS AND/OR
BUSINESS DEVASTATION PURSUANT
TO THE IDAHO TORT CLAIMS ACT

The above-named Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP submits this memorandum in opposition to the City's Motion to Dismiss Petra's claims for lost profits and earnings pursuant to the Idaho Tort Claims Act.
1. Introduction

The City’s attempt to gain a dismissal of Petra’s damage claim for lost profits rests on a mischaracterization of the factual record and should be denied. The City has been on notice since May of 2009 that Petra seeks consequential damages of “lost past and future earnings and benefits” flowing from Meridian’s breach of contract and breach of the covenant of good faith and fair dealing. Petra identified these damages in its original counterclaim and in its amended counterclaim. Each of these counterclaims was filed within 180 days of the accrual of Petra’s claim on February 24, 2009. Each of the counterclaims met the notice requirements of the Idaho Tort Claims Act (“ITCA”) and Idaho Code § 50-219. A claimant is not required to submit a full-fledged expert report setting out every detail of its claim within 180 days of the accrual of the claim. Furthermore, Petra is not alleging a separate claim for business devastation. Petra seeks consequential damages flowing from the City’s breach of contract and breach of the covenant of good faith and fair dealing, which include lost past and future earnings and benefits.

2. Law and Argument

As the Court knows, after more than 16 months of litigation, the City claims it was not given sufficient notice of Petra’s counterclaim. The Court has already ruled that Petra’s claim arose on February 24, 2009, and that counsel for Petra’s March 16, 2009 letter served as sufficient notice under the Act. After the City sued, Petra counterclaimed on May 6, 2009 for its remaining construction manager’s fee and for “lost past and future earning and benefits” caused

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1 See Affidavit of Thomas G. Walker dated Nov. 15, 2010 at ¶¶ 8, 9.
by the City’s breach of contract and breach of the covenant of good faith and fair dealing. Petra then amended its counterclaim on August 21, 2009. Each of these pleadings was filed within 180 days of February 24, 2009. The counterclaim and the amended counterclaim put the City on notice that Petra was seeking consequential damages flowing from the City’s breach of contract. Contrary to the City’s allegation, Petra then supplemented its discovery responses with regard to its lost profits and earnings by the October 29, 2010 deadline. 2

The City’s argument mischaracterizes the record. The City states: “... Petra has known about this lost profits and/or business devastation claim since April 16, 2009. Accordingly, Petra was required to provide the City with proper notice of Petra’s claim no later than October 19, 2009 ... Petra, however, did not allege its claim for lost profits and/or business devastation until producing the expert report on October 22, 2010 ...” 3 This is factually inaccurate. Petra filed its counterclaim, original and amended, within 180 days of accrual of the claim. Each counterclaim alleged consequential damages for lost earnings and benefits.

The City appears to argue that Petra is asserting a stand-alone claim for business devastation. This is not true, as the pleadings indicate. Likewise, there is no logic to the argument that Petra is required to commission an expert report on its damages within the 180-day timeframe. The City greatly overstates the type of notice the ITCA requires. The 180-day notice requirement of the ITCA contemplates notice; the ITCA does not require that a litigant

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2 Id. at ¶¶ 3-6.
3 See Memorandum in Support of Plaintiff’s Motion to Dismiss Defendant’s Claim for Lost Profits and/or Business Devastation pursuant to the Idaho Tort Claims Act, pp. 4-5.

MEMORANDUM IN SUPPORT OF PETRA’S OPPOSITION TO CITY’S MOTION TO DISMISS DEFENDANT’S CLAIM FOR LOST PROFITS AND/OR BUSINESS DEVASTATION PURSUANT TO THE IDAHO TORT CLAIMS ACT

Page 3

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with a municipality have its entire case ready for trial within 180 days of the accrual of its claim. See Smith v. City of Preston, 99 Idaho 618, 621, 586 P.2d 1062, 1065 (1978) (holding letter sufficient notice that did not specify a damage amount, which had yet to be determined, and where the City was not misled to its injury).

The primary purpose of the notice requirement of the ITCA is to "put the governmental entity on notice that a claim against it is being prosecuted and thus apprise it of the need to preserve evidence and perhaps prepare a defense." Blass v. County of Twin Falls, 132 Idaho 451, 452-53, 974 P.2d 503, 504-05 (1999) (quoting Smith, 99 Idaho at 621, 586 P.2d at 1065)). It is clear this purpose has been fulfilled in this case. Petra's correspondence, its counterclaims, and the circumstances that exist here where a governmental entity is the plaintiff, all demonstrate the purpose of the notice requirement has been satisfied.

Furthermore, there is no published Idaho decision holding that the notice requirements of the Idaho Tort Claims Act are not satisfied by a counterclaim. Petra has briefed this issue in response to the City's first Motion to Dismiss under the ITCA, which the Court denied. Petra will not repeat its briefing here.

Lastly, the City's argument that it lacked notice of Petra's claim for lost profits is not only a technical argument that ignores reality, it ignores governing law. The ITCA states: "A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is

\[4\] See Petra's Memorandum in Opposition to Meridian's Motion to Dismiss (Idaho Tort Claims Act) filed with the Court on September 9, 2010.
show that the governmental entity was in fact misled to its injury thereby.” I.C. § 6-907 (emphasis added); see Cox v. City of Sandpoint, 140 Idaho 127, 132, 90 P.3d, 352, 357 (citing Smith, 99 Idaho at 621, 586 P.2d at 1065). The Supreme Court has stated its policy is to “take a liberal approach to interpreting the notice requirement of the Idaho Tort Claims Act.” Farber v. State, 102 Idaho 398, 630 P.2d 685, 689 (1981). The City has not presented any evidence it was “misled to its injury.” The City does not attempt to make this argument in its brief.

3. Conclusion

The City’s Motion to Dismiss lacks merit and should be denied. Petra’s original and amended counterclaim each sought relief in the form of consequential damages arising from lost profits and earnings. Petra filed each counterclaim within 180 days of accrual of its claim. The City has been on notice for over a year of Petra’s claims and the nature of its damages.

DATED: November 15, 2010

COSHO HUMPHREY, LLP

By: THOMAS G. WALKER
Attorney for Petra Incorporated
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November, 2010, a true and correct copy of

the within and foregoing document was served upon:

Kim J. Trout, Esq.
Daniel Loras Glynn
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☒ Facsimile: 331-1529
☐ E-mail:

THOMAS G. WALKER
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

AFFIDAVIT OF THOMAS G. WALKER DATED NOVEMBER 15, 2010 IN SUPPORT OF OPPOSITION TO CITY’S MOTION TO DISMISS DEFENDANT’S CLAIMS FOR LOST PROFITS AND/OR BUSINESS DEVASTATION PURSUANT TO THE IDAHO TORT CLAIMS ACT

I, THOMAS G. WALKER, being first duly sworn upon oath, depose and state:

AFFIDAVIT OF THOMAS WALKER DATED NOVEMBER 15, 2010.
1. I am one of the attorneys of record for the Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above-entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. I submit this affidavit in support of Petra’s Opposition to the City’s Motion to Dismiss Defendant’s Claim for Lost Profits and or Business Devastation Pursuant to the Idaho Tort Claims Act.

3. This discovery cutoff in this matter was September 29, 2010, making all responses and supplemental responses due no later than October 29, 2010.

4. On October 29, 2010, Defendant Petra Incorporated served its Supplemental Response dated October 29, 2010 to the City of Meridian’s First Interrogatories and Requests for Production of Documents.

5. Attached as Exhibit A is a true, correct and complete copy of Petra Incorporated’s Supplemental Response dated October 29, 2010.

6. A Notice of Service of Supplemental Discovery Response was filed with the Court on October 29, 2010. Attached as Exhibit B is a true, correct and complete copy of the Notice of Service with Court filing stamp.

7. The facts recited in Plaintiff’s most recent Motion to Dismiss do not accurately recite the facts.

8. In Petra’s Counterclaim dated May 6, 2009, paragraph 98 states as follows:
98. Damages suffered by Petra include compensatory damages, plus interest at the statutory rate of 12% as provided in Idaho Code §28-22-104(1), plus such additional amounts as are proved in these proceedings to put Petra in the same position it would have occupied had Meridian not breached. Such damages consist of, *inter alia*: (i) $512,427 – the remaining amount owed by Meridian; (ii) lost past and future earnings and benefits Petra would have realized had Meridian not breached; (iii) lost business and investment opportunities, and (iv) other interest and finance charges.

9. On August 21, 2009, Petra Incorporated filed its Answer and First Amended Counterclaim. In its First Amended Counterclaim at paragraph 99 Petra again alleges its damages claim as follows:

99. Damages suffered by Petra include compensatory damages, plus interest at the statutory rate of 12% as provided in Idaho Code §28-22-104(1), plus such additional amounts as are proved in these proceedings to put Petra in the same position it would have occupied had Meridian not breached. Such damages consist of, *inter alia*: (i) $512,427 – the remaining amount owed by Meridian under Change Order #2; (ii) $155,992.81 – the remaining amount owed by Meridian under the basic Agreement; (iii) lost past and future earnings and benefits Petra would have realized had Meridian not breached; (iv) lost business and investment opportunities, and (v) other interest and finance charges.

**AFFIDAVIT OF THOMAS WALKER DATED NOVEMBER 15, 2010.**

SUBSCRIBED AND SWORN to before me this 15th day of November, 2010.

Notary Public for Idaho
Residing at Eagle, Idaho
My commission expires: March 31, 2016.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.
Daniel Loras Glynn
Trout Jones Gledhill Fuhrman, P.A.
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivery
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☒ Facsimile
☐ E-mail:

THOMAS G. WALKER

AFFIDAVIT OF THOMAS WALKER DATED NOVEMBER 15, 2010.
Petra Incorporated ("Petra"), by and through its undersigned counsel, pursuant to Rules 33 and 34 of the Idaho Rules of Civil Procedure, supplements its response to Plaintiff City of Meridian’s (Meridian) First Set of Interrogatories and Requests for Production of Documents, served on or about July 22, 2009 as follows:
INTERROGATORY NO. 1: Identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

SUPPLEMENTAL RESPONSE: The following persons are added to Petra’s response:

47. Jack K. Lemley, Lemley International, 604 North 16th Street, Boise, Idaho 83702;
48. Richard Bauer, Lemley International, 604 North 16th Street, Boise, Idaho 83702;
49. Keith Pinkerton, Hooper Cornell, PLLC, 250 Bobwhite Court, Suite 300, Boise, Idaho 83706;
50. Dennis Reinstein, Hooper Cornell, PLLC, 250 Bobwhite Court, Suite 300, Boise, Idaho 83706;
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52. Tim McGourty, TMC Masonry Contractors;
53. Mike Miller, M.R. Miller;
54. Tom Zabala or other representative of ZGA Architects;
55. Glenn Hickey, Custom Precast;
56. Rob Drinkard, Western Roofing Contractors;
57. Jeff Brewer, Western Roofing Contractors; 
58. Ted Davis, Western Roofing Contractors; 
59. Jay Goodsen, Tri State Electric; 
60. Randy Frisbee, Hobson Fabricating, Inc. 
61. Ted Frisbee, Sr., Hobson Fabricating, Inc. 
62. Ted Frisbee, Jr., Hobson Fabricating, Inc. 
63. Pat Clover (Hobson Fabricating, Inc.) 
64. Dell Hatch, Hatchmueller Landscape Architects; 
65. Chuck Hum, Heery International; 
66. Troy Kunas, Heery International; 
67. Lenny Buss, Buss Mechanical; 
68. John Buss, Buss Mechanical 
69. One or more representatives of Yamas (HVAC equipment); 
70. One or more representatives of Versico (regarding roofing materials); 
71. Sheldon Morgan, Custom Glass; 
72. Randy Pierce, American Wall Covering; 
73. Stewart Jensen, D&A Door; 
74. Dave Cram, MTI 

Mr. Lemley and Mr. Bauer are expected to testify consistent with their affidavit and deposition testimony given in this matter.