

3-18-2013

City of Meridian v. Petra Inc. Augmented Appellant's Brief 1 Dckt. 39006

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/
idaho_supreme_court_record_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

Recommended Citation

"City of Meridian v. Petra Inc. Augmented Appellant's Brief 1 Dckt. 39006" (2013). *Idaho Supreme Court Records & Briefs*. 3740.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3740

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT FOR THE STATE OF IDAHO

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

Plaintiff/Appellant,

v.

PETRA, INCORPORATED, an Idaho
Corporation,

Defendant/Respondent.

Supreme Court Docket No. 39006-2011

Ada County Case No. CV OC 09-7257

**APPELLANT'S AUGMENTED BRIEF ON APPEAL RE: ILLEGALITY OF THE
CONTRACT**

Appeal from the Fourth Judicial District, Ada County, Idaho

HONORABLE RONALD WILPER, Presiding

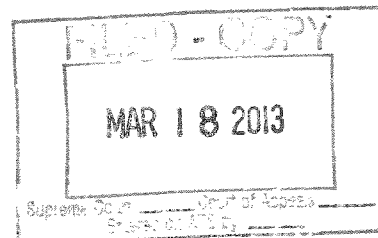
Kim J. Trout
Trout Law, PLLC
3778 N. Plantation River Dr., Ste. 101
Boise, ID 83703

Thomas G. Walker
MacKenzie Whatcott
Coshu Humphrey, LLP
Washington Group Plaza #4
800 Park Blvd., Ste. 790
Boise, ID 83712

J. Frederick Mack
Scott D. Hess
Holland & Hart, LLP
PO Box 2527
Boise, ID 83701

Attorneys for Plaintiff-Appellant

Attorneys for Defendant-Respondent



IN THE SUPREME COURT FOR THE STATE OF IDAHO

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

Plaintiff/Appellant,

v.

PETRA, INCORPORATED, an Idaho
Corporation,

Defendant/Respondent.

Supreme Court Docket No. 39006-2011

Ada County Case No. CV OC 09-7257

**APPELLANT'S AUGMENTED BRIEF ON APPEAL RE: ILLEGALITY OF THE
CONTRACT**

Appeal from the Fourth Judicial District, Ada County, Idaho

HONORABLE RONALD WILPER, Presiding

Kim J. Trout
Trout Law, PLLC
3778 N. Plantation River Dr., Ste. 101
Boise, ID 83703

Thomas G. Walker
MacKenzie Whatcott
Cosho Humphrey, LLP
Washington Group Plaza #4
800 Park Blvd., Ste. 790
Boise, ID 83712

J. Frederick Mack
Scott D. Hess
Holland & Hart, LLP
PO Box 2527
Boise, ID 83701

Attorneys for Plaintiff-Appellant

Attorneys for Defendant-Respondent

TABLE OF CONTENTS

INTRODUCTION1

SEVERANCE AND ENFORCEMENT OF THE BENIGN PORTIONS OF THE CONTRACT IS AN APPROPRIATE REMEDY.....2

FAILURE TO ENFORCE THE BENIGN PORTIONS OF THE CONTRACT MAY LEAD TO PERVERSE RESULTS CONTRARY TO PUBLIC POLICY4

CONCLUSION.....9

TABLE OF CONTENTS

Cases

<i>Barry v. Pac. W. Constr., Inc.</i> , 140 Idaho 827, 832-833, 103 P.3d 440, 445-446 (2004).....	4, 8
<i>Durant v. Snyder</i> , 65 Idaho 678, 151 P. 2d 776.....	3
<i>Farrell v. Whiteman</i> , 146 Idaho 604, 200 P. 3d 1153 (2009).....	2, 4, 5
<i>Hill v. Schultz</i> , 71 Idaho 145, 227 P.2d 586(1951).....	3
<i>In Re: Old Cutters, Inc.</i> , Idaho BR 11-41261-KDP, 2012 WL 6743815 (Bankr. D. Idaho December 31, 2012)	3
<i>Ingle v. Perkins</i> , 95 Idaho 416, 510 P.2d 480 (1973)	3
<i>Nelson v. Armstrong</i> , 99 Idaho 422, 426, 582 P. 2d 100, 1004(1978)	3

Statutes

I.C. §54-4512.....	6
I.C. §54-5402.....	8
I.C. § 54-4513	8
I.C. § 54-4508.....	8

KIM J. TROUT, ISB #2468
Trout Law, PLLC
3778 N. Plantation River Dr., Ste. 101
Boise, ID 83703
Telephone: (208) 577-5755
Facsimile: (208) 577-5767

Attorneys for Plaintiff/Appellant

IN THE SUPREME COURT FOR THE STATE OF IDAHO

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

Plaintiff/Appellant,

v.

PETRA, INCORPORATED, an Idaho
Corporation,

Defendant/Respondent.

Docket No. 39006-2011

Case No. CV OC 09-7257

**APPELLANT'S AUGMENTED
BRIEF ON APPEAL RE:
ILLEGALITY OF THE CONTRACT**

Comes now the City of Meridian ("City"), which hereby submits the following Augmented Brief on Appeal re: Illegality of Contract.

INTRODUCTION

During the Oral Argument of this pending matter, the Justices of the Supreme Court, *sua sponte*, raised the issue of illegality of contract in relationship to the procurement of payment and performance bonds for the Meridian City Hall ("MCH") Project. The issue of whether a Licensed Construction Manager's failure to obtain the payment and performance bonds renders such contract illegal has no reported precedent.

As a backdrop to analyzing this matter of first impression, the inception of the MCH Project is important. The City, its Mayor, City Council, and City staff neither were, nor are,

in the business of managing the construction of major governmental buildings like the MCH.

Thus, the Mayor and City Council endeavored to do the right thing: The City put out a Request for Proposals seeking Licensed, professional, Construction Management services.¹ Petra responded, touting its professional expertise and that of Gene Bennett who purportedly was a professional Engineer in addition to holding an Idaho license as a construction manager.²

In addition, the City hired outside counsel seeking to obtain the necessary expertise in the creation of appropriate contract documents to establish the terms and conditions of this relationship within the parameters of the specialized construction management statutes and regulations.³ The City, by way of Frank Lee, and Petra, by way of Pat Kershisnik, actively negotiated the terms of the CMA.⁴ The City entered the contract with clean hands; in reliance on experts in the field of construction management and construction law, and it executed the contract in good faith.

SEVERANCE AND ENFORCEMENT OF THE BENIGN PORTIONS OF THE CONTRACT IS AN APPROPRIATE REMEDY

Under the unusual circumstances of this case, severance and enforcement of the benign, or legal portions of the contract is the appropriate remedy. In *Farrell v. Whiteman*, 146 Idaho 604, 200 P. 3d 1153 (2009), Justice Jim Jones writing for a unanimous Court stated:

Where a transaction is composed of both benign and offensive components and the different portions are severable, the unobjectionable parts are generally enforceable.” *Nelson v. Armstrong*, 99 Idaho 422, 426, 582 P.2d 1100, 1104 (1978).

¹ *See*, Ex. 501.

² *See*, Ex. 2001, p. 5.

³ Tr. pp. 31-35.

⁴ *Id.*

Similarly, Bankruptcy Judge James D. Pappas wrote in *In Re: Old Cutters, Inc.*, Idaho BR 11-41261-KDP, 2012 WL 6743815 (Bankr. D. Idaho December 31, 2012):

(e)ven absent a severability provision, whenever possible courts will enforce the valid parts of the valid parts of partially unlawful contracts.” (citing *Zaicek. v. KoolVent Metal Awning Corp.*, 283 F.2d 127, 133 (9th Cir. 1960)).

Here, the Construction Management Agreement (“CMA”) contains a severability clause at Section 10.18.⁵

10.18 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 o f 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.

The doctrine of severability has likewise been followed in other Idaho decisions. *See, Nelson v. Armstrong*, 99 Idaho 422, 426, 582 P. 2d 100, 1004(1978) involving severance of a sales agreement; *See, Ingle v. Perkins*, 95 Idaho 416, 510 P.2d 480(1973) involving severance of a pasturing agreement; *See Vaughn v. Vaughn*, 91 Idaho 544, 428 P. 2d 50(1967) involving severance of a divorce settlement agreement; *See also Hill v. Schultz*, 71 Idaho 145, 227 P.2d 586(1951) involving severance of a lending agreement and citing *Durant v. Snyder*, 65 Idaho 678, 151 P. 2d 776 for a detailed discussion of authority as to when a contract is severable and the right of a party to prevail if there is no necessity for reliance upon illegal provisions therein.

As in *Durant, supra*, whether a contract containing an illegal provision is severable, so as to authorize the enforcement of the legal portions thereof, must be determined from the

⁵ *See*, Ex. 2003, § 10.18.

subject matter of the agreement, and the language used therein controls. Here, the nature of the agreement was the management of the work of others (the Prime Contractors) toward the construction of a new MCH. Again, the City sought to do the right thing in engaging the services of outside professionals with the purported expertise to achieve the stated goal of constructing a new City Hall.⁶

It is also important to note, that all of the Prime Contracts for the actual physical construction of the City Hall were performed with the required performance and payment bonds required and obtained. Thus protecting the taxpaying public interest in the physical construction of the MCH.⁷

Thus the City respectfully requests that the Court sever Section 10.3, and enforce the balance of the CMA provisions, including Section 7 and Section 8 therein.

**FAILURE TO ENFORCE THE BENIGN PORTIONS OF THE CONTRACT
MAY LEAD TO PERVERSE RESULTS CONTRARY TO PUBLIC POLICY**

In the event that the Supreme Court engages in an analysis of the issues of illegality, it might begin with the statement of the law by the Supreme Court in *Farrell v. Whiteman*, 146 Idaho 604 (2008):

Idaho has long disallowed judicial aid to either party to an illegal contract. In most cases, the court will leave the parties to an illegal contract as it finds them.

(Internal citations omitted.)

This Court has held that in some circumstances a party to an illegal contract may obtain some relief due to public policy considerations. *Barry v. Pac. W. Constr., Inc.*, 140 Idaho 827, 832-833, 103 P.3d 440, 445-446 (2004). However, in *Farrell*, the Supreme Court

⁶ See, Ex. 2003, Section 3.1 p. 9: "Owner's objective for the Project is to develop a new cost efficient city hall facility and public plaza on the Site."

⁷ See, Ex. 2017, Sections 7.3.6.4, 9.10.3, 11.3.9 and 11.4.

engaged in an analysis which sought to balance the public policy interests to be served in that specific fact situation, and went on to state:

This Court has recognized situations in which relief to a party to an illegal contract is warranted to avoid unduly harsh results. In such instances, the Court has awarded damages based on the rationale that, although illegal contracts are unenforceable as a matter of public policy, **circumstances arise where denying a party relief would frustrate the public interest more than “leaving the parties where they lie.”** This Court has stated that, “[b]arring the strict application of the illegality doctrine, the central focus must be whether the ends of the law will be furthered or defeated by granting the relief requested.

Farrell, at 612. (Internal citations omitted.)

The *Farrell* Court, applying this balancing test, found that the public interest is not necessarily best served by the invalidation of a contract based on a failure to require credentials otherwise required by law:

The noncompliance with the statute may be nearly harmless. The real defrauder may be the defendant who will be enriched at the unlicensed party's expense by a court's refusal to enforce the contract.... **Justice requires that the penalty should fit the crime. Justice and sound policy do not always require the enforcement of licensing statutes by large forfeitures going not to the state but to repudiating defendants.** 15 CORBIN ON CONTRACTS § 88.3 (2003).

To refuse to award *Farrell* *some* damages would create a perverse incentive for developers to hire unlicensed architects in order to get buildings designed at no cost.

Farrell, at 612. (Emphasis added).

Likewise in the specific facts of the case at bar, the invalidation of the entire contract on the basis of the parties' failure to obtain bonds otherwise required by law would effect very perverse and unintended results which would not be in the public policy interests of Idaho.

Regardless of the terms of any contract, Petra as the licensed Construction Manager held an unqualified, express, legal duty to provide the performance and payment bonds under I.C. §54-4512. It's contractual duties aside, Petra was retained by the City because of its represented superior knowledge.⁸

If the contract is declared illegal, with the mutual loss of contractual enforcement rights as between these parties, then one of the questions is the public policy precedent to be set.

First, it is clear from the record in this case that Gene Bennett, as Petra's Idaho licensed construction manager, failed to advise the City that bonds were required.⁹ It is notable that between the date of Mr. Bennett's pre-trial deposition and the date of his trial testimony, Mr. Bennett claimed that he advised the City of the need for the bonds.¹⁰ The record further reveals that Petra's *expert* witness on Idaho construction management Richard Bauer,¹¹ was completely unaware of the CM's duty to obtain the bonds. If these licensed professionals¹² are unaware of the express statutory duties, to impose a penalty on the City and its taxpayers truly seems a perverse result.

Moreover, Petra and Bennett could have simply obtained the bonds and charged the City according to the CMA. In addition, Petra could have simply refused to perform their work until the bonds were obtained. Petra and Bennett did neither.

A further perversity is that Petra was paid over \$330,000 in personnel compensation, and an additional \$574,000 in CM Fee/profit for its work on this project. In addition Petra sought an additional \$376,808 as a CM Fee (a percentage of the total cost of work

⁸ *See*, Ex. 2001, p. 5.

⁹ *See*, R. 005248, Tr. p. 64, L. 4 - p. 66, L. 1

¹⁰ *See*, Tr. p. 6255, L. 14 - p. 6257 L. 3.

¹¹ Bauer is an employee of Lemley International, Inc., the Construction Management firm performing the CM work on the rebuilding of the Idaho State Capital Building.

¹² This group includes the City's outside counsel relied upon by the City to prepare the contract.

performed by others)¹³ as additional compensation work Project. If the work performed were found to be the fruit of an illegal contract, equity would require that the CM Fee realized by Petra be tainted with illegality as well.

Moreover, Petra would retain a windfall in *overcharges* as a result of its failure to comply with its statutory obligation to obtain the required bonds.

Additionally if, as in *Farrell*, Petra would be allowed *an additional* windfall of proceeding on a claim of unjust enrichment for services provided under an illegal contract. If allowed to proceed before the original District Court on that claim, Petra would almost surely receive another \$376,808 again, as a result of its failure to obtain the required bonds.

If 'the central focus must be whether the ends of the law will be furthered or defeated by' declaring the contract illegal, then a *windfall* of this proportion to the party charged by law with the statutory duty to obtain the bonds, all at taxpayer expense, seems wholly inconsistent with the underlying premise that I.C. § 54-4512 which is intended to protect those same taxpayers.

Such a perverse result would encourage unscrupulous construction managers and general contractors to *fail* to obtain bonds; perform the illegal work; seek extra compensation for claimed additional services; overcharge the public; and then, when subjected to suit for claims under the contract, seek to have the contract declared illegal to deny the public enforcement of the public's claims while having retained the bounty of their own malfeasance. Such a perverse result cannot possibly serve public policy, or the ends of justice.

¹³ Petra's total cost claim was based upon a percentage of the cost of the work performed by the Prime Contractors on the MCH Project, not upon any accounting for the claimed *additional services* performed by Petra.

If the question is one of public policy, and a balancing of the respective fault is undertaken, the substance and purpose of the Public Works Construction Management Licensing Act provides guidance:

54-4502. LEGISLATIVE INTENT. **In order to protect the public welfare and to promote the highest degree of professional conduct** on the part of persons providing construction management services, the provisions of this chapter provide for the licensure of individuals and regulation of persons providing construction management services for public works projects.

I.C. §54-5402. (Emphasis added).

The statute's intent to "protect the public welfare" and to regulate the "persons providing construction management services for public works projects" is indicative that the duty of provision of the bond falls directly on the Construction Manager. The penalty of I.C. § 54-4513 is directed at the CM, as are the disciplinary proceedings of I.C. § 54-4508. As noted during Oral Argument, there is no excuse for the failure of the exercise of the statutory duties of Petra, and Mr. Bennett as the person actually holding the CM license.¹⁴

As such, and under the rationale of *Barry v. Pac. W. Const. Inc.*, 140 Idaho 827, 103 P. 3d 440(2002), the City and Petra were not truly *in pari delicto* as the statutory duty of compliance was held by Petra and Mr. Bennett as the licensee.

Further, the public policy of promoting "the highest degree of professional conduct on the part of persons performing construction management services" may only be best served in the following fashion:

1. Severing that portion of the City's breach of contract claim as it relates to the procurement of the bonds;
2. On the grounds that Petra and Bennett failed in the performance of their express statutory duty, requiring Petra to disgorge the CM Fee it received under the illegal

¹⁴ See, Ex. 2001, p. 5.

contract (\$574,000).

3. Requiring that Petra disgorge overcharges, rather than realize a windfall as the result of a finding of illegality.

4. Dismissal of any “claim” retained by Petra under tort/equitable principles, due to failure to provide notice pursuant to I.C. §§50-219 and 6-906..

CONCLUSION

If public policy, and the public interests are to be served, the City respectfully requests the Supreme Court consider the foregoing in its deliberations on this matter.

RESPECTFULLY SUBMITTED this 18th day of March, 2013.

TROUT LAW, PLLC

A handwritten signature in black ink, appearing to be 'Kim J. Trout', written over a horizontal line.

Kim J. Trout
Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on Marcxh 18, 2013 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

J. Frederick Mack
Scott Hess
HOLLAND & HART, LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, ID 83701
Fax: (208) 343-8869

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

Theodore William Baird Jr.
Meridian City Attorney's Office
33 E. Broadway Avenue
Meridian, ID 83642
Fax: (208) 489-0483

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email



Kim J. Trout