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City of Meridian v. Petra Inc. Respondent's Brief Dckt. 39006

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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho
corporation,

Defendant/Counterclaimant.

Supreme Court Docket No. 39006-2011

Ada County Case No. CV OC 09-7257

**RESPONDENT'S OBJECTION TO APPELLANTS "SECOND AUGMENTED BRIEF
ON APPEAL RE: ILLEGALITY OF A CONTRACT"**

Appeal from the Fourth Judicial District, Ada County, Idaho

HONORABLE RONALD WILPER, Presiding

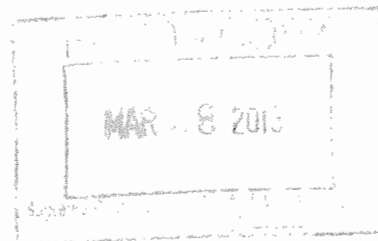
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COMES NOW Petra Incorporated ("Petra"), by and through its attorneys of record, Holland & Hart, LLP, and Cosho Humphrey, LLP, and submits its objection to the City of Meridian's Second Augmented Brief on Appeal Re: Illegality of a Contract.

I. INTRODUCTION

On March 20, 2013, the City filed its Second Motion to Supplement Briefing and Record pursuant to I.A.R. 34(f)(2) and 30 ("Second Motion"). Attached to the Second Motion was the proposed Supplemental Brief and Affidavit of Kim Trout. Pursuant to I.A.R. 34(f)(2), a Motion to Augment must be filed and considered under I.A.R. 32. Rule 32(d) provides, in part, that "any party may file a brief or statement in opposition to the motion within 14 days from service of the motion." This Brief contains Petra's objection to the Second Motion.

Petra acknowledges receipt of the Court's Order, dated March 26, 2013, granting the Second Motion. This Brief, however, is filed within the 14 days contemplated by I.A.R. 32. Accordingly, Petra respectfully requests the Court deny the City's Second Motion for the reasons stated herein, and strike Appellant's Second Augmented Brief on Appeal re: Illegality of the Contract including all papers filed therewith (together "Second Augmented Brief").

II. ARGUMENT

A. PETRA OBJECTS TO THE FILING OF AND SUBSTANCE CONTAINED WITHIN THE SECOND AUGMENTED BRIEF.

First, the City seeks to augment the appeal through argument and documentation that are not part of the appellate record and, as the City acknowledges (Second Augmented Brief at pg. 2, footnote 2), are not even part of the District Court record. There is no procedure within the Idaho Appellate Rules that allows a party to augment appellate briefing with argument or documents not put before and considered by the District Court. On this basis alone, the City's Second Motion should be denied, and the Second Augmented Brief should be struck.

I.A.R. 30(a) addresses augmentation of the record on appeal. As here relevant, Rule 30(a) provides that a motion to augment:

shall be accompanied by a statement setting forth the specific grounds for the request and attaching a copy of any document sought to be augmented to the original motion and to two copies of the motion, which document must have a legible filing stamp of the clerk indicating its date of filing, or the moving party must establish by citation to the record or transcript that the document was presented to the District Court.

The exhibits to Mr. Trout's Affidavit, which form the entire basis for the City's brief, were never presented to the District Court, and thus their submission on appeal violates Rule 30(a). This Court has considered documents that were not presented to the District Court in only the limited circumstance where such documents evidence events occurring after the District Court's final judgment. *See, e.g., Kock vs. Canyon City*, 145 Idaho 158, 163, 177 P3.d 372, 377 (2008); *Ameritel Inns, Inc. vs. Greater Boise Auditorium District.*, 141 Idaho 849, 851, 119, P.3d 624, 627 (2005).

Second, the issue that the City apparently seeks to raise by its Second Augmented Brief relates to which party was responsible for including certain language within the Construction Management Agreement ("CMA"). This issue was already addressed in the original briefing that the parties submitted to the Court¹ and the original augmented briefs that were submitted by both the City and Petra.

Third, the Second Augmented Brief seeks to go behind the language contained within the CMA, notwithstanding the agreement by both parties, accepted by the District Court, that the

¹ In its original Respondent's Brief, Petra argued in support of Judge Wilper's finding No. 6, that the CMA was drafted by counsel for Meridian, a contention that Meridian did not dispute in its opening or reply Brief on Appeal.

CMA was unambiguous.² The drafting history that leads to an unambiguous contractual document is simply not relevant to the Court's interpretation or construction of the plan language within the unambiguous contractual document.

Fourth, the City again cites to the deposition of Mr. Bennett (R5248-R5249). Mr. Bennett testified at trial. To the extent that the City contends, or contended, that his deposition testimony was inconsistent with the testimony Mr. Bennett presented at trial, the City had available full cross examination of Mr. Bennett.

Fifth, the actual documentation that the City requests this Court to consider does not establish the legal point that the City suggests. In fact, the email attached to counsel's Affidavit bearing bates number CM031626, from counsel for the City, specifically notes, in reference to proposed language that Petra will be reimbursed for the costs incurred in the event that owner requires payment and performance bonds:

FGL[Frank Lee] note: This provision is ok. Idaho State law (i.e., Idaho Code § 54-4512) requires the payment in performance bonds. They may be only providing professionals services not handling payment or non-professional services, so their work may not be bondable. If they do handle general conditions items, then they will need to provide a bond, which is ok, as it will be part of a general conditions expenses.

The issue addressed by the email exchange referenced in the City's Second Augmented Brief was "who" would pay for the bond. Petra advised the City that a bond was required, and the City's own attorney advised the City the same; the City knew a bond was required. The City agreed to pay the cost of the bond through its illusory promise "if" the City decided the work was bondable and "if" the City required a bond.

² Judge Wilper found in finding No. 10 that "[t]he City had the right to request that Petra provide payment and performance bonds, the cost of which would have been reimbursed by the City, but the City made no such request."

Sixth, in support of its argument contained in its Second Augmented Brief, the City contends that Petra owed it a “fiduciary duty,” an argument which the parties fully addressed in the original briefing that was submitted to this Court. However, the City’s current suggestion that a fiduciary duty extended to time frames that predated the execution of the CMA has never before been raised and fails any factual or legal scrutiny.

III. CONCLUSION

For the reasons stated herein, Petra respectfully requests that this Court deny the City’s Second Motion and strike the City’s Second Augmented Brief and the papers submitted therewith including the Affidavit of Kim Trout. The CMA is not an illegal contract and Judge Wilper’s decision should be affirmed.

DATED this 29 day of March, 2013.

HOLLAND & HART LLP

By: 

Scott D. Hess, of the firm

CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of March 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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