5-29-2012

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

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 BRIEF

Appeal from the Fourth Judicial District, Ada County, Idaho

HONORABLE RONALD WILPER, Presiding

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Petra Incorporated ("Petra"), by and through its attorneys of record, Thomas Walker and Erika K. Klein, of the law firm Cosho Humphrey LLP, and J. Fredrick Mack and Scott D. Hess, of the law firm Holland & Hart, LLP submits its response to Appellant's Brief.

I. COURSE OF PROCEEDINGS IN TRIAL COURT

This case arises out of work Petra performed as the construction manager for the construction of the new Meridian City Hall building and facilities and the City's failure to pay Petra its entitled fee. The City sought a Declaratory Judgment that Petra was not entitled to an equitable adjustment in its fee because it breached the terms of the Construction Management Agreement (hereinafter "CMA") and was negligent in managing the construction of the City Hall building and improvements. The City also sought damages allegedly caused by Petra's supposed breach of contract and negligence. In response to the City's Complaint, Petra filed an Answer and Counterclaim. In its Counterclaim Petra sought an equitable adjustment of its construction management fee, reimbursement of salaries and additional general conditions costs plus interest and litigation costs and attorneys fees.

After 59 days of trial, the court's consideration of 28,426 pages of exhibits, and the review of post-trial briefing, the District Court, on June 10, 2011 issued 198 comprehensive Findings of Fact and 21 Conclusions of Law. The Court denied relief to the City of Meridian with the exception of granting an offset, in the amount of $52,000, against Petra's recovery. The District Court awarded Petra Judgment in the amount of $324,808.00, which includes the deduction for the offset, plus prejudgment interest, costs, and attorneys fees.

II. SUMMARY OF ARGUMENT

On June 10, 2011, after a trial extending more than three months, the District Court entered its Findings of Fact and Conclusions of Law. In its Findings, the Court noted that it carefully considered all of the evidence that had been introduced, judged the credibility of the witnesses, and resolved the often conflicting evidence. Each Finding is supported by substantial evidence and the Conclusions of Law are consistent with applicable Idaho law. No basis,

whatsoever, exists to overturn the Judgment ultimately entered by the District Court.

On appeal, the City of Meridian (hereinafter the "City" or "Meridian") ignores the standard that must guide this Court in its review of the appellant issues that are presented:

> Review of a trial court's conclusions following a bench trial is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Benninger v. Derifield*, 142 Idaho 486, 488-89, 129 P.3d 1235, 1237-38 (2006) (citing *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 949, 812 P.2d 253, 256 (1991)). Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the creditability of the witnesses, this court will liberally construe the trial court's finding of fact in favor of the judgment entered. *Rowley v. Fuhrman*, 133 Idaho 105, 107, 982 P.2d 940, 942 (1999). This court will not set aside a trial court's findings of fact unless the findings are clearly erroneous. *Ransom v. Topaz Marketing, LP*, 143 Idaho 641, 643, 152 P.3d 2, 4 (2006); I.R.C.P. 52 (a).

Justad v. Ward, 147 Idaho 509, 511, 211 P.3d 118, 120 (2009).

Since the trial court based its findings on substantial evidence, even in those situations where the evidence was conflicting, the Supreme Court will not overturn those findings on appeal. *Benninger* 142 Idaho at 489, 129 P.3d at 1238. This Court will not substitute its view of the facts for that of the trial court. *Ransom* 143 Idaho at 643, 152 P.3d at 4. It is thus the long standing rule in Idaho that determining and weighing the credibility of the witnesses and their testimony offered at trial is a role that is left to the District Court Judge. *Worzala v. Worzala*, 128 Idaho 408, 413, 913 P.2d 1178, 1183 (1996). The Supreme Court will not second guess a District Court's findings unless they are wholly unsupported by the evidence in the record. *Elec. Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 822, 41 P.3d 242, 250 (2001).

Notwithstanding these well established principles, in its 77 page Opening Brief, the City does not address, or even acknowledge the substantial evidence considered by the District Court that fully supports each Finding and Conclusion. Rather, the City does little more than present its conflicting view of those facts, attempting to retry its case in this appellate court.

While this deficiency exists throughout the City's Brief and through each of its arguments, all of which will be addressed in this Brief, one particular aspect of the District Court's Findings merits emphasis. For reasons that have never been explained nor justified, the

City did not pursue its warranty claims against the prime contractors whose alleged malfeasance the City sought to impose on Petra. The District Court specifically found:

> 33. The parties agree that Petra was not responsible for any of the contractors' failure to carry out their work in accordance with the contract documents.
>
> 34. Petra did not guarantee the work of the contractors.
>
> 35. Each prime contractor gave the City a warranty.
>
> ...
>
> 65. The Project was completed on time despite unexpected delays, none of which were the fault of Petra.
>
> 66. Petra and LCA worked together to develop a punch list of items that needed corrected and all items were corrected.
>
> 67. Any items remaining after the punch list items were closed out were warranty items.
>
> 68. Every prime contractor gave the City a warranty for their workmanship and materials.
>
> 69. The City, LCA and Petra agreed to a unified substantial completion date of October 15, 2008 for purpose of warranties, utilities, and risk of loss. This had the effect of extending and maximizing warranty periods for the majority of the prime contractors.
>
> 70. City inspectors issued certificates of occupancy and the City took occupancy on October 15, 2008.[1]

Each of these Findings is supported by competent and substantial evidence.

The City finds fault with the performance of several of the prime contractors noting alleged deficiencies in their work, seeking to impose liability upon Petra, as construction manager, for the alleged deficient performance of the contractors notwithstanding the fact that:

> (1) As construction manager, under the CMA drafted by the City, Petra did not guarantee the work of the prime contractors;
>
> (2) In Section 9.2.5 of the CMA, the City assumed responsibility for inspections and testing that occurred with regard to the Project through its separately retained consultants, including LCA, MTI, Heery International, Stapley Engineering, and its own in-house City Inspectors;
>
> (3) Each of the prime contractors issued a warranty to the City and the alleged defects, to the extent they existed, fell within the warranty obligations of the prime contractors.

[1] R.8261. The District Court's Findings and Conclusions are referenced herein as "Findings" or "Conclusions".

The City seeks to impose liability upon Petra for alleged defects in the design of the Project notwithstanding the fact that the design was the responsibility of the City and LCA, an architectural firm separately retained by the City. As found by the District Court:

> 37. Petra agreed to assist, consult and coordinate with LCA as needed.
>
> ...
>
> 39. The City directed the design of the project with appropriate assistance from Petra throughout the course of the project.[2]

LCA designed the HVAC system.[3] As the District Court found, "criticism of the design of the system is more appropriately directed at LCA and the project engineer rather than Petra."[4]

LCA designed the roof; Western Roofing installed the roof; Versico manufactured the membrane that covered the roof. Versico warranted its product and Western Roofing warranted its installation. Any suggestion, as noted by the City, that the roof should have had "saddle flashings" does not implicate Petra—"LCA did not specify saddle flashings in the plans and specifications."[5] The City complains of "defective and deficient corner caps" and roof penetrations. App.Br.69.[6] The roof was inspected and was found to leak. It was repaired. LCA closed out Western Roofings punch list after the repairs were completed. Such complaints raise warranty concerns.

The water feature was designed by a subcontractor to LCA, Hatch-Mueller. The storage tank for the water feature was too small, which was "a design flaw and not a construction flaw" and thus not the responsibility of the contractor or Petra.[7] The City contends that Petra did not obtain piping shop drawing submittals and that the contractors did not pressure test the piping. App.Br.60-62. There is no evidence that Petra was contacted about the piping shop drawing submittals or pressure test issue during the warranty period. Further, the piping was inspected and approved by City inspectors; nothing deficient was included on a punch list; and if there was

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[2] Findings 37 and 39.
[3] Findings 114 and 122.
[4] Finding 125.
[5] Findings 127-132.
[6] Appellant's Brief will be hereinafter referred to as "App.Br."
[7] Finding 137.

a problem with piping it raised a warranty issue.

Buss Mechanical was the City's plumbing contractor. Check valves that were installed were fully compliant, and passed City inspection; seismic bracing of basement sewer pipes passed code and City inspection. All aspects of the building's sewer system were approved by the City's code inspector and were consistent with the plans and specifications. The City's project engineer prepared and closed out the punch list items for the sewer system.[8]

Buss Mechanical plumbed the roof drainage system for the building. One overflow drain was improperly constructed, but was repaired when identified and caused no damage to the building.[9]

The City contends that Petra was responsible for water leaking into the basement of the building. However, as found by the District Court:

> 158. There was a decorative metal scupper that the City installed after the building was finished. The City failed to properly connect it to the drain pipe. This caused storm water to leak inside the wall and into the basement. Damage caused was due to neither Petra nor Buss Mechanical. Had it been the fault of Buss, it would have been covered under Buss's warranty.[10]

The City seeks to place responsibility on Petra for damage to the Mayor's suite allegedly due to the infiltration of air, water and insects. The District Court did not believe the City's evidence on the scope, extent, or cause of any such alleged damage, and further concluded that to the extent any such damage existed, it would be covered as a warranty item, not the responsibility of Petra:

> 166. A missing closure strip and inadequate caulking in the area of the Mayor's suite and reception area allowed air, water and insects to enter the interior of the building. Because these construction defects were in an area not readily accessible for inspection, they were missed and did not appear on any punch list.
>
> 167. When discovered, these defects would have been repaired under the contractor's warranty.
>
> 168. Although there was testimony offered and received at trial to the effect that the defect caused interior walls to buckle, the evidence presented failed to

[8] Findings 140-150.
[9] Findings 151-156.
[10] Finding 158.

persuade to court that such damage had occurred. If such had been the case, the damage would have been a warranty item.[11]

The City complains of "clickers" in the floor access panels. App.Br. 48-49. The Court noted that the evidence "was conflicting with respect to the extent that adjustments would be required,"[12] but concluded that it impacted no more than 2% of the panels.[13] The trial court further concluded that the cost of the necessary adjustments was either a warranty item, or was not attributable to Petra because the need for adjustment was "caused by inspection personnel or City personnel."[14] Finally, as the District Court found, the evidence regarding the cost to repair or adjust the panels was speculative.[15]

The City sought liquidated delay damages, contending that the project was delayed for 75 days. Since there were 44 contractors on the job, the City sought $500 for each day of delay multiplied by the number of contractors, resulting in a delay damage claim of $1.650 million. While the Court properly concluded that the method of calculation used by the City was not appropriate, the more important finding was that delay simply did not occur. The contract called for an 18 month construction time, and the City's occupancy on October 15, 2008 fell within that time frame. There were simply no delays properly chargeable as liquidated damages to Petra.

Each Finding of Fact and the resultant Conclusion reached by the District Court with regard to Petra's counterclaim is supported by the facts and the applicable legal principles. The Court found that the Project had increased in "size, scope, cost and complexity" all at the direction of the City[16]. The Court found that between August 2006 (when the CMA was signed) and August 2007, the project budget increased "from $12.2 million to slightly over $20.3 million."[17] The City "approved all the changes to the work" most of which related to changes in design, "which naturally caused an increase in the services that Petra had to perform and which

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[11] Findings 166-168.
[12] Finding 169.
[13] Finding 170.
[14] Finding 171.
[15] Finding 172.
[16] Finding 187.
[17] Finding 191.

formed the basis for Petra's request."[18] The Court found that on August 20, 2007, Petra disclosed its intention to seek an additional fee, and that on September 5, 2007, Keith Watts, the City's authorized representative "agreed on behalf of the City that Petra should wait to submit the formal proposal for an equitable adjustment in Petra's fees until the final value of the project was determined."[19] The District Court found that as of August 20, 2007, Petra had not provided "additional work", in part because the cost incurred on the project did not exceed $12.2 million, the original budget amount, until six months later in February, 2008.[20] Petra reasonably relied on Watts' representation, and on April 4, 2008 submitted its Change Order No. 2 requesting, under Section 7 of the CMA, an equitable adjustment in its fee in the amount of $376,808.00.[21]

With regard to the amount of the increased fee, the Court found that "Petra calculated the amount of its fee request by multiplying the cost of the project in excess of [the original budgeted amount of] $12.2 million by a factor of 4.7%; the same ratio Petra's original fee bore to the original budget."[22] Substantial factual support exists in the record for each of the District Court's Findings, both as to the process that was followed and the amount that was sought.

From these factual determinations, the District Court concluded that Petra was entitled to equitable adjustment in its fee "because of the increased services" that Petra performed; that the City "waived its right to pre-approve the request for equitable adjustment and is estopped from denying [the] fee request;" and that the amount of $376,808 is reasonable.[23] Each of these Conclusions directly flows from and are supported by the facts that the District Court found. No legitimate basis exists to overturn either the Findings or the Conclusions reached on Petra's counterclaim.

Moreover, the personal critique of Judge Wilper by the City should not be condoned. At page 46 of its Brief, the City states:

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[18] Finding 193.
[19] Findings 176 and 179.
[20] Findings 177-178.
[21] Finding 181.
[22] Finding 190.
[23] Conclusions I, J, K and L.

However, had the DC exercised a bit of effort to ascertain the amount, the uncontroverted evidence provides the correct answer.

Nor is it appropriate to suggest that Judge Wilper's analysis is premised upon "naïve notion" resulting in "legal error." App.Br.52. A review of the 59 days of testimony considered by the District Court, the District Court's consideration of extensive, perhaps exhaustive pretrial motions, the District Court's consideration of literally hundreds of objections during the course of the trial, and the District Court's even handed approach to the consideration of each issue that was presented belies any substance to the accusation that the City directs at Judge Wilper.

Since the challenges asserted by the City on appeal present no meaningful issue on a question of law but simply invite this Court to second guess the District Judge on conflicting evidence, the appeal is frivolous.

III. STATEMENT OF FACTS

The overriding majority of the issues raised by the City on appeal challenge the District Court's Findings, and the Legal Conclusions that the Findings compel. In this section of its Brief, Petra will set forth the record of facts that support the District Court's Findings. In the "Argument" section of this Brief, Petra will address the narrow specific legal issues that are raised by the City.

A. The Contract Documents.

(1) The Construction Management Agreement.

In April 2006, the City sought proposals for construction management services "for the design, bidding, site demolition, and construction of a new approximately 80,000 sq. ft. Meridian City Hall...."[24] The City selected Petra.[25] The City hired outside counsel Frank Lee of Givens Pursley to draft the CMA.[26] The parties executed the CMA[27] effective August 1, 2006. The City

[24] Exhibit 501, p. 1; Testimony of Gene Bennett, at 4851:1.
[25] Testimony of Ted Baird, at 133-134.
[26] Testimony of Ted Baird, at 134-135.
[27] Exhibit 2003.

represented to Petra in the CMA, that the maximum budget for the Project was $12.2 million.[28]

Based on this representation and the scope of services, project size, schedule and the then anticipated complexity of the Project, Petra agreed to a fee of $574,000 or 4.7% of the total budget; not to exceed reimbursable staff expenses of $29,818 for preconstruction and $249,994 for construction based services at an established rate schedule; plus reimbursable general conditions expenses at the cost incurred by Petra. The representations made by the City upon which Petra relied in agreeing to its fee, proved to be inaccurate. By August 2007, the City along with its architect and design professional LCA, had substantially expanded the original Project to a 104,000 + square foot, LEED silver-certified three story stone and brick clad building with a large basement. Based on physical dimension alone, the Project increased in size by almost 30% over that originally contemplated by Petra at the time the CMA was signed.

The City ultimately signed prime contracts and issued purchase and work orders for the Project totaling $21,773,078.00. The CMA, at Article 7, allowed an increase in Petra's compensation if the size, complexity, schedule, budget or other aspects of the Project changed significantly. Based solely upon total costs, all of which costs were approved by the City, the Project increased by almost 78% over the original $12.2 million budget that formed the basis for Petra's original fee calculation set forth in the CMA.

The CMA provided a six month preconstruction phase and an 18 month construction phase but did not specify an actual completion date and schedule.[29] As of August 1, 2006, when the CMA was signed, no plans or final design existed for the Project.[30] Rather, the design was left to the City and its retained consultants and retained architectural firm, LCA.

The City hired Petra to manage the work of multiple prime contractors[31] all of which contracted directly with the City, not with Petra.[32] Petra had the duty set forth in the CMA

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[28] Exhibit 2003, pp. 9 and 18 (Sections 4.4(f) and 6.2.2(b) of the CMA); Testimony of Gene Bennett, at 5352.
[29] Exhibit 2003, p. 18 (Section 6.2.2(b) of the CMA).
[30] Testimony of Gene Bennett, at 5353:12-20.
[31] Exhibit 2003, p. 11; Testimony of Gene Bennett, at 5335:6-10.
[32] *See e.g.* Exhibit 2017; Testimony of Gene Bennett, at 5334-5335.

including the general conditions set forth in AIA A201/CMA-1992, general conditions.[33] Petra's scope of services included observing the work of the prime contractors. However, Petra did not guarantee the work of the prime contractors. Pursuant to Section 4.6.6 of the A201, Petra as construction manager was not "responsible for the contractor's failure to carry out the work in accordance with the contract documents."[34]

Section 1.2 of the CMA required the parties to name an "authorized representative."[35] The City appointed Keith Watts as its authorized representative.[36] The District Court found that Watts was the City's agent.[37]

(2) The Professional Services Agreement with LCA Architects.

The City hired LCA as Project architect.[38] LCA and the City signed a contract 20 days prior to the CMA's effective date.[39] The CMA states "the owner has retained LCA Architects, PA...to provide professional architectural services for the Project" and Petra shall "consult and coordinate with architect as needed to fulfill its duties hereunder and shall assist architect as needed for architect to fulfill its duties to owner under the architectural agreement."[40]

Section 4.6.1 of LCA's contract states "architects shall perform those duties, obligations, and responsibilities set forth in the construction agreement between owner and each contractor ("construction contracts")."[41] Pursuant to this section, LCA had all the duties of "architect" as defined in the A201.[42] The City contracted directly with LCA, did not assign LCA's contract to Petra and expressly retained sole authority to direct the design of the Project and to direct LCA.[43] LCA made its pay requests directly to the City not through Petra, and Petra did not review LCA's

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[33] Exhibit 2003.
[34] Exhibit 2017, p. 28 (Section 4.6.6 of the A201 General Conditions).
[35] Exhibit 2003, p. 6.
[36] Testimony of Gene Bennett, at 5350:1-3; Testimony of Tom Coughlin, at 8673:2-8674:3; Testimony of Steve Christiansen, at 8213:20-23; Testimony of Steve Simmons, at 7180:25-7181:13; Exhibit 609, p. 11; Exhibit 535.
[37] Finding 36.
[38] Testimony of Ted Baird, at 172:17-25.
[39] Exhibit 2003.
[40] Exhibit 2003.
[41] Exhibit 2002, p. 13.
[42] Exhibit 2002, p. 13.
[43] Exhibit 2136, p. 12.

pay requests.[44] The City thus directed and was responsible for the Project design, not Petra.[45]

(3) The Construction of the Project and Petra's Performance.

Petra achieved the City's goal. The City took beneficial occupancy of Meridian City Hall on October 15, 2008, including a new cost efficient City Hall and Public Plaza built consistent with the design established by the City and LCA.[46] All punch list items identified were addressed and resolved. Petra timely completed the Project for less than the final cost estimate.[47] Petra insured that each prime contractor gave the City a warranty.[48]

The City's Complaint sought a Declaratory Judgment that it did not owe Petra an equitable adjustment in its construction management fee because, as alleged by the City, Petra failed to give timely notice of its request for an equitable adjustment of its contract management fee; that Petra breached terms and conditions of the CMA; and that Petra was negligent in managing the construction of the Project. The District Court issued factual Findings, supported by substantial evidence, concluding that Petra was entitled to an equitable adjustment, that Petra did not breach the terms of the CMA and that the City did not prove that Petra breached its duty to the City or that the City suffered damage proximately caused by any alleged breach.

i. Petra's Performance of its Duties Under the Construction Management Agreement Met the Applicable Standard of Care.

Richard K. Bauer of Lemley International testified as a construction management expert during the trial. He testified about Petra's performance of its duties and responsibilities under the CMA based on his knowledge of the prevailing standards applicable to construction managers as

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[44] Testimony of Steve Simmons, at 7209:6-19.
[45] Testimony of Gene Bennett, at 5336:1-11; Testimony of Steve Simmons, at 7167:9-22; Testimony of Richard K. Bauer, at 9449:2-8; 9575:15-24.
[46] Exhibit 599.
[47] Compare Exhibit 561 (Final Cost Estimate of $21,773,078) with Testimony of Gene Bennett, at 5493:20-5494:3 (detailing total approvals for the City Hall of $21,395,962.13).
[48] Exhibit 545A; Testimony of Ted Frisbee, Jr., at 6849:17-21; Testimony of Tim McGourty, at 7703:24-25; Testimony of Rob Drinkard, at 7906:6-7907:13; Testimony of Lenny Buss, at 8634:5-23.

well as his own experience and expertise in this area.[49]

Bauer testified within a reasonable degree of professional certainty that Petra performed its work in accordance with the applicable standard of care contained in Section 1.1 of the CMA by exercising reasonable and ordinary care with the same degree of professional skill, diligence and judgment as is customary in this community among construction managers of similar reputation performing work for projects of a size, scope and complexity similar to the Project.[50] This evidence supports the District Court's Findings and Conclusions that Petra discharged its duties and responsibilities under the CMA.

Bauer confirmed that the "construction contracts" referred to in the CMA included the A101[51], and the A201[52]. Regarding the A201, Bauer testified that it was reasonable for Petra to rely on Sections 4.6.4, 4.6.6, 4.6.21, and 4.6.22 in conducting its work on the Project.[53] These provisions specifically limited the scope of Petra's obligations and confirm that the City, both at trial and on this appeal, erroneously sought to expand Petra's duties under the CMA.

Bauer also testified regarding his close examination of Petra's performance of each phase identified in the CMA, including the Development Strategies Phase, the Site Preparation Phase, the Preliminary Design Phase, the Construction Documents Phase, the Bidding Phase, and the Construction Phase.[54] Based on that examination and his review of the Project records, other data and information he gathered, and interviews he conducted all of which are of the type relied upon by construction managers in providing opinions and evaluating the performance of contractors and construction managers, his opinion, to a reasonable degree of professional certainty, was that Petra's performance met the applicable standard of care.[55] Bauer's testimony provides substantial evidentiary support for the Court's Findings.

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[49] Bauer has more than 40 years of experience in construction, construction management and engineering. Bauer's credentials and integrity are above question. One of Bauer's most recent assignments was as a program director for construction management services on the Idaho State Capital restoration and expansion program.
[50] Testimony of Richard K. Bauer, at 9463:10-21; 9474:12-21.
[51] Exhibit 2002.
[52] Exhibit 2007.
[53] Testimony of Richard K. Bauer, at 9435:1-9440:1.
[54] Testimony of Richard K. Bauer, at 9463:22-9474:18; Exhibit 951.
[55] Testimony of Richard K. Bauer, at 9446:22-9447:1; 9617:7-23; 9500:25-9501:8; 9519; 9474:12-21; 9561-9562.

ii. Petra Did Not Fail to Guard Against Defects in Construction.

At trial, as one of its principle issues, the City contended that Petra breached the CMA and was therefore negligent because it failed to guard against defective construction and failed to ensure that the construction of the Project, by the prime contractors, was in accordance with the plans and specifications. The District Court rejected this contention, through specific Findings supported by the record. The District Court correctly found that the CMA did not obligate Petra as a guarantor of the work of the prime contractors.

iii. Development Strategies Phase.

During this phase, LCA, the City, and Petra participated in multiple design coordination meetings.[56] LCA designed the Project with "minimal" assistance from Petra.[57] The City and LCA developed the design of the Project largely independent of Petra.[58] Steve Simmons, an LCA architect, testified LCA was "responsible" for managing the design of the Project,[59] Petra ensured the design packages were kept on schedule.[60] Item 0003 of the Procedures and Processes meeting minutes state: "The City has the contractual relationship with the Design Team, and while the CM will maintain a strong and proactive relationship with the Design Team to maintain an effective triangle relationship, the City is the one with the authority when it comes to directing the Design Team."[61] Petra's role with regard to the design included reviewing conceptual designs for constructability in order to make value engineering suggestions.[62] Petra met its responsibility by engaging in a collaborative effort with LCA and the City during the Development Strategies Phase and throughout the course of the Project.[63]

Petra met the standard of care during the Development Strategies Phase, a conclusion

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[56] Testimony of Steve Simmons, at 7167:18-7171;Testimony of Steve Christiansen, at 8198:18-8200:17.
[57] Testimony of Steve Simmons, at 7166:23-7167:1.
[58] Testimony of Richard K. Bauer, at 9575:16-24.
[59] Testimony of Steve Simmons, at 7242:12-16.
[60] Testimony of Steve Simmons, at 7167:13-17.
[61] Exhibit 2136, p. 12 (emphasis added); *see also* Testimony of Richard K. Bauer, at 9449:2-8.
[62] Exhibit 2136, p. 12.
[63] Testimony of Richard K. Bauer, 9446:22-9447:1; Testimony of Gene Bennett, 5353:21-5355:16.

finding full factual support in the record.[64]

iv. Site Preparation Phase.

In February and March of 2007, contaminated soil was discovered on the Project site. Petra managed the remediation of the soil contamination.[65] Gene Bennett reported to the City regarding Petra's management of the soil abatement process.[66] Petra protected the City from environmental liability and managed the successful remediation of the Project site.[67]

Abatement of contaminated soils lasted from March 5 to May 14, 2007.[68] The soil contamination was unforeseen and delayed the anticipated Project schedule.[69] Although the City expressed some concern about Petra's performance during March 2007, Petra and the City met and those concerns were satisfactorily addressed.[70] Petra met the standard of care during the Site Preparation Phase.[71]

v. Preliminary Design Phase.

On October 4, 2006, Petra personnel discussed how the schedule would be updated throughout the Project: "The evolving schedule will become a working schedule for the live construction project."[72] Petra issued a project schedule on January 19, 2007 as required by CMA 4.4.1(b) and gave it to the City.[73] Under this conceptual schedule, construction was to last 16 months, although an 18 month construction schedule was authorized, and occupancy of the building was to occur on August 1, 2008.[74] On May 22, 2007, Petra issued an updated schedule.[75] The May 22, 2007 schedule showed a delay in foundation excavation from April 4, 2007 to May 7, 2007, and the start of the footings delayed to May 21, 2007, both due to the

[64] Testimony of Richard K. Bauer, 9463:10-21.
[65] Testimony of Gene Bennett, 5384:12-5385:2.
[66] Exhibit 2261.
[67] Exhibit 2261.
[68] Testimony of Gene Bennett, 5701:9-12.
[69] Testimony of Gene Bennett, 5699:11-17.
[70] Testimony of Gene Bennett, at 5876:11-15.
[71] Testimony of Richard K. Bauer, at 9474:12-21.
[72] Exhibit 2136, p. 1; Testimony of Richard K. Bauer, at 9450:3-8.
[73] Exhibit 2132; Testimony of Gene Bennett, at 5653:18-20; Exhibit 755 (illus.).
[74] Testimony of Gene Bennett, at 5699:5-7; Exhibit 755, p. 1 (illus.).
[75] Testimony of Gene Bennett, at 5673:3-5680:17; Exhibit 755 (illus.).

contaminated soil remediation.[76] The updated schedule advanced the move-in date to August 27, 2008.[77] This schedule had a 15.7-month duration for construction; again well within the 18 month period that was allowed. [78]

Petra issued another updated Project Schedule dated January 29, 2008 entitled Master Production Schedule and presented it to the City Council.[79] This was a schedule beginning on May 7, 2007 with move-in beginning October 10, 2008. It had the same 15.7-month duration for construction as the May 22, 2007 schedule, but showed the 6-week impact to the schedule from Architect's Supplemental Instructions ("ASI") and weather, as required by Section 4.5.2 of the CMA. This schedule reported the total duration of construction, including the schedule impacts up to that time, at 17.4 months. [80]

Petra provided the City with a Construction Management Plan,[81] a dynamic plan that evolved as the Project design changed. Petra informed the City of its intent to provide ongoing supplementation of the Plan in a transmittal dated January 19, 2007,[82] which it did.[83] Petra gave the City a preliminary price estimate dated January 15, 2007.[84] Petra met the standard of care during the Preliminary Design Phase.[85]

vi. Construction Documents Phase.

This Phase consisted of three primary phases: the core and shell, the tenant improvements, and the site work and plaza; and three secondary phases: the demolition and abatement of the Site, the separate bid for interior signs, and the east parking lot.[86] Pursuant to Section 4.5.1 of the CMA, Petra provided a Construction Management Plan,[87] monitored

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[76] Testimony of Gene Bennett, at 5679:3-9; Exhibit 755 (illus).
[77] Testimony of Gene Bennett, at 5680:15-17; Exhibit 755 (illus).
[78] Testimony of Gene Bennett, at 5679:10-13; Exhibit 755 (illus).
[79] Exhibit 561, pp. 6-7.
[80] Testimony of Gene Bennett, at 5702:6-5703:5.
[81] Testimony of Gene Bennett, at 5398:3-5402:20.
[82] Testimony of Gene Bennett, at 5398:3-5402:2; Exhibit 2236.
[83] Testimony of Gene Bennett, at 5398:3-5402:2.
[84] Testimony of Gene Bennett, at 5388:4-11; Exhibit 770, p. 1; Exhibit 2007.
[85] Testimony of Richard K. Bauer, at 9500:25-9501:8.
[86] Testimony of Richard K. Bauer, at 9502:25-9503:15.
[87] Testimony of Richard K. Bauer, at 9504:9-9505:15; Exhibit 2236; Exhibit 2237; Exhibit 2238.

schedule compliance, issued immediate reports on material deviations and provided periodic progress reports as required by Section 4.5.2 of the CMA.[88]

Petra reviewed construction documents at appropriate intervals,[89] made recommendations to the City and LCA regarding constructability, cost-effectiveness, clarity, consistency coordination,[90] and obtained peer reviews, all as required by Section 4.5.3 of the CMA.[91]

Petra helped separate work into bid packages,[92] conducted all necessary Project meetings,[93] kept and distributed the minutes, coordinated transmittal of documents to regulatory agencies,[94] provided value-engineering suggestions,[95] and provided a Final Cost Estimate.[96] Petra met the standard of care during the Construction Documents Phase.[97]

vii. The Bidding Phase.

Petra assisted the City and LCA in preparing bid packages during the bidding process,[98] Petra met the standard of care during the Bidding Phase.[99]

viii. The Construction Phase.

Petra met the standard of care during the Construction Phase.[100] With regard to this phase, the City has cited and challenged certain of the work of the prime contractors. A discussion of these issues is included below.

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[88] Testimony of Richard K. Bauer, at 9506:9-9507:6; Exhibit 2136, p. 34 (Items 00001, 00003, 00007); Exhibit 953, pp. 4-5 (illus.); Testimony of Gene Bennett, at 5644:24-5646:3; 5649:19-5705:21; Exhibit 755 (illus.).
[89] *See, e.g.,* Exhibit 770, p. 1; Exhibit 2007.
[90] *See, e.g.,* Exhibit 772; Exhibit 606; Testimony of Gene Bennett, at 5394:21-5397:10; 5354:19-5355:16.
[91] Testimony of Gene Bennett, at 5787:6-5789:18; Exhibit 2137, pp. 17, 19, 20; Testimony of Richard K. Bauer, at 9508:14-9509:17.
[92] Testimony of Richard K. Bauer, at 9510:1-8; Exhibit 953 (illus).
[93] Testimony of Richard K. Bauer, at 9510:9-24; Exhibit 2136.
[94] *See, e.g.,* Exhibit 2136, p. 13 (Item 00008 of Meeting Minutes No. 00003).
[95] Exhibit 772; Testimony of Gene Bennett, at 5416:1; Testimony of Steve Simmons, at 7196; Testimony of Richard K. Bauer, at 9511:24-9516:25; Exhibit 953, pp. 13, 16-37.
[96] Exhibit 561, p. PETRA94208-94209; Testimony of Gene Bennett, at 5480:5-17.
[97] Testimony of Richard K. Bauer, at 9519.
[98] Testimony of Richard K. Bauer, at 9522:1-9533:5.
[99] Testimony of Richard K. Bauer, at 9617:7-23.
[100] Testimony of Richard K. Bauer, at 9561-9562:1.

ix. Third-Party Inspections and Observations.

The CMA states: "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."[101] Petra helped schedule inspections, and observed construction but was not responsible for inspections.[102]

LCA,[103] the Engineer of Record (Mike Wisdom),[104] the Structural Engineer (Jan Welch),[105] and Heery International (Chuck Hurn, Commissioning Agent) made all required observations.[106] Materials Testing & Inspection ("MTI") (Dave Cram)[107] and the City's building department inspectors (including, but not limited to, Ed Ankenman and Tom Johnson)[108] performed required testing and inspections.

Heery International contracted directly with LCA to provide the commissioning of the building.[109] Thus, Petra was not responsible for commissioning. Heery's Commissioning Agent, Chuck Hurn conducted his commissioning of the building independent of Petra.[110] Heery commissioned the following systems: Air Handlers, Fan Systems, Terminal Boxes, Exhaust Fans, Direct Digital Controls System, Pumping Systems, Cooling Systems, Heating Systems, Domestic Hot Water Systems, Lighting Systems, Emergency Generation Systems, as well as the associated operational components installed within the above systems.[111] Under Heery's contract with LCA, Chuck Hurn, visited the site multiple times, drafted several site visit reports for construction quality,[112] directed functional testing and proving of the various systems,[113] and

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[101] Exhibit 2003, p. 10 (Section 3.2.5 ofthe CMA).
[102] Testimony of Gene Bennett, at 5511:5-6.
[103] Testimony of Steve Christiansen, at 8343:19-8344:7; Testimony of Gene Bennett, at 5513:14-18.
[104] Testimony of Mike Wisdom, at 7032:10-18.
[105] Testimony of Jan Welch, at 7088:12-18; Testimony of Gene Bennett, at 5550:1-5551:1-9.
[106] Testimony of Chuck Burn, at 4966:21-5014:6; Testimony of Gene Bennett, at 5513:19-24.
[107] Testimony of Dave Cram, at 6766:16-6775:2; Testimony of Gene Bennett, at 5582:11-14.
[108] Testimony of Gene Bennett, at 5513:2-5; 5582:23;-5583:1; Testimony of Mike Wisdom, at 6958:21-6959:1.
[109] Exhibit 691.
[110] Testimony of Chuck Hurn, 4962:15-18.
[111] Exhibit 691.
[112] Testimony of Chuck Hurn, at 4967:1-20.
[113] Testimony of Chuck Hurn, at 4969:10-5014:6.

produced detailed reports that were transmitted to LCA.[114]

In its September 8, 2008 report, Heery stated: "All building systems and equipment installed in this project were fully tested. Heery's issues log cites remaining unresolved items noting the absence of seismic bracing, chiller unit noise/vibration and EF-2 duct noise being the most significant."[115] Heery then verified and closed each of these issues.[116]

MTI contracted with the City to perform testing and inspections in these areas: (1) geotechnical observation/recommendations; (2) soils density testing; (3) structural masonry testing/inspection; (4) epoxy installation of bolts/dowels inspection; (5) structural steel, high strength bolting inspection; (6) structural steel welding inspection and non-destructive testing.[117] After completing testing, MTI issued a Certificate of Compliance, which stated:

> We certify that, to the best of our knowledge, the requirements of the 2006 International Building Code and the approved plans and specifications have been complied with, insofar as meeting the portion of the aforementioned inspections requiring special inspection under Chapter 17 of the IBC, except as noted below: All non-compliance issues were corrected, and all structural steel welding and high strength bolting has been approved by Gordon Finlay (American Welding Society certified Welding Inspector).[118]

MTI retested and passed all previously reported non-compliant work.[119] Dave Cram of MTI testified: "Our obligation is to ensure that everything is constructed in accordance with the plans and specifications and at the end of the project, to provide a final certification letter. And that-that's by code. And that's what we've done."[120]

Stapley Engineering contracted with LCA to provide structural engineering services for the Project.[121] The Structural Engineer, Jan Welch, observed construction of the structural systems and reviewed MTI's test reports that came to her almost daily during construction.[122]

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[114] Exhibit 2143; Exhibit 546A; Exhibit 763; Exhibit 764;Testimony of Chuck Hurn, at 5014:7; 5044:2.
[115] Exhibit 546A, p. HeeryReport98006.
[116] Exhibit 764.
[117] Exhibit 2149, p. 4; Testimony of Dave Cram, at 6766:19-6767:4.
[118] Exhibit 2149, p. 4.
[119] Testimony of Dave Cram, at 6770:23-6771:5.
[120] Testimony of Dave Cram, at 6780:13-18.
[121] Testimony of Jan Welch, at 7088:12.
[122] Testimony of Jan Welch, at 7088:12; 7090:16.

All deficiencies noted by MTI were corrected.[123]

It is important to note the difference between observation and inspection and testing. Paragraph 4.7.9 of the CMA required Petra to observe the work of each contractor. Observing by a Construction Manager involves viewing the work to see what activities are underway, viewing progress on site, checking for consistency with the contractor's pay applications, checking for consistency with the contractor's reports of schedule progress, and noting safety issues and gathering information for coordinating between contractors. Observing also involves gathering information for coordinating between contractors and entities such as the inspectors, the architect, the commissioning agent and the owner stage, such that it can be corrected before it is complete and ready for inspection.[124]

Inspection and testing are much more detailed and focused than observing. Inspecting is typically required at key points in the technical specifications and by code. Testing involves precise measurements, tests, and compliance with codes and specification. Inspecting and testing often require the individuals performing the inspection and tests to possess specific qualifications and represent specific entities in order to be valid.[125]

Richard K. Bauer testified that Petra met its standard of care regarding observation.[126]

x. Substantial Completion of the Project, Punch Lists, and Warranties.

The Project achieved substantial completion under Petra's guidance on October 15, 2008[127], ahead of schedule.[128] The CMA does not contain a Project schedule or any milestone dates, other than an "Owner's Schedule" of six months for Pre construction Phase Services and 18 months for Construction Phase Services.[129]

The City required Petra to start construction before completion of the plans and

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[123] Testimony of Jan Welch, at 7091:5-6; 7135:2-12.
[124] Testimony of Richard K. Bauer, at 9583:23–9590:2.
[125] *Id.*
[126] Testimony of Richard K. Bauer, at 9598:10-24.
[127] Testimony of Ted Baird, at 277:4-11; Testimony of Gene Bennett, at 5643:10-5644:1; 5633:14-19.
[128] Testimony of Richard K. Bauer, at 9488:2-12.
[129] Exhibit 2003.

specifications,[130] making it a fast-track project.[131] The City wanted to, and did move in before the winter of 2008.[132] The Project was delayed because of ASI's, RFI's, weather, Rule Steel's unexcused one-month delay, and a 12-day LEED air flush. With a seven-day move-in, the impact to the critical path schedule could have led to an occupancy date of December 25, 2008.[133] However, due to time made up by contractors under Petra's supervision, the contractors completed the Project in 17.4 months, ahead of schedule.[134]

As required by Section 9.8.2 of the A201, Petra assisted LCA in the preparation, completion and close out of multiple punch lists during the Project.[135] The City also actively participated in the creation and closeout of multiple punch lists.[136] Multiple versions of various punch lists were created and exist in the record, but each punch list item was corrected before July 2, 2009, the date Petra personnel left the Project site.[137] Final punch lists were closed out by the City's building inspectors.[138] Even Keith Watts, the City's authorized representative, admitted that after the punch lists were completed, any remaining items were warranty items.[139]

The City, Petra, and LCA agreed to a unified substantial completion date of October 15, 2008 for purposes of warranties, risk of loss, security, and utilities.[140] Each prime contractor gave the City a warranty of workmanship and materials, the majority of which officially commenced on October 15, 2008.[141] The unified substantial completion date maximized the warranty benefits for the City by extending the actual warranty periods for many of the prime

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[130] Testimony of Gene Bennett, at 5448:12-19.
[131] Testimony of Gene Bennett, at 5449:5-8; Testimony of Mike Wisdom, at 6962:1-22.
[132] Testimony of Gene Bennett, at 5449:22-5450:18.
[133] Testimony of Gene Bennett, at 5702:6-5705:18.
[134] Testimony of Gene Bennett, at 5702:6-5705:18; Testimony of Richard K. Bauer, at 9487:9-9489:8; Exhibit 755, p. 6 (illus.).
[135] Testimony of Tom Coughlin, at 8723-8724:3; Testimony of Steve Christiansen, at 8220:18-8225:4.
[136] Testimony of Tom Coughlin, at 8724:4-8730:21; Exhibit 548; Exhibit 626.
[137] Exhibit 548; Testimony of Tom Coughlin, at 8695:9-8736:3.
[138] Exhibit 548; Exhibit 872; Exhibit 871;Testimony of Ed Ankenman, at 8097:7-8099:13; Testimony of Tom Coughlin, at 8796:20-24; 8731:1-7.
[139] Exhibit 733.
[140]Testimony of Steve Christiansen, at 8301:23-8302:1; 8353:15-19.
[141] Exhibit 545A; Testimony of Ted Frisbee, Jr., at 6849:17-21; Testimony of Tim McGourty, at 7703:24-25; Testimony of Rob Drinkard, at 7906:6-7907:13; Testimony of Lenny Buss, at 8634:5-23.

contractors.[142]

City building inspectors issued certificates of occupancy for the City Hall and the City took beneficial occupancy on October 15, 2008.[143] Petra delivered a closeout package consisting of the O&M Manuals and the warranty sheets.[144] Petra also delivered the as-built drawings.[145]

Section 9.8.2 of the A201 states: "Architect will prepare a Certificate of Substantial Completion...."[146] Petra requested that LCA issue certificates of substantial completion. Despite Petra's request, LCA did not do so.[147]

xi. Project Cost.

The CMA required the City to provide Petra with the City's budget.[148] The City represented to Petra the Project Budget was $12,200,000.[149] The City did not provide Petra with an updated budget.[150] The City had de facto control over the Project Budget, not Petra. Petra's role was to provide periodic estimates, value engineering suggestions, and actual cost reports.[151]

Petra kept the City fully informed of the cost of the Project.[152] The City approved every contract,[153] every change order,[154] every contractor payment, and thus, the total cost of the Project, with full knowledge of the relevant and material facts.[155] Mayor Tammy de Weerd, Councilman Keith Bird, City Attorney Bill Nary, Deputy City Attorney Ted Baird, Finance Director Stacey Kilchenmann, and Keith Watts, the City's authorized representative, debated and discussed the Project cost through email in July 2007. While the Mayor was very critical of

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[142] Testimony of Gene Bennett, at 5642:16-5643:9.
[143] Exhibit 543 and Exhibit 543(a).
[144] Exhibit 794.
[145] Exhibit 603.
[146] Exhibit 2017, p. 42 (Section 9.8.2 of the A201 General Conditions).
[147] Testimony of Steve Christiansen, at 8614:11-18.
[148] Exhibit 2003, p. 9 (Section 3.2.2 ofthe CMA).
[149] Exhibit 2003 (Section 4.4.1(f) of the CMA); Testimony of Gene Bennett, at 5352:24-5353:3.
[150] Tr. 9360:10-13.
[151] *See* Exhibit 2003 (Section 4 of the CMA).
[152] Testimony of Gene Bennett, at 5394:1-5395:6; Testimony of Jon Anderson, at 7475:5-21; Testimony of Will Berg, at 7388:13-7389:9; Exhibit 549-561.
[153] Testimony of Ted Baird, at 2205:21-25.
[154] Testimony of Ted Baird, at 2206:1-5.
[155] Testimony of Gene Bennett, at 5486:18-24; Testimony of Tom Coughlin, at 5680:6-8693:5; Exhibit 583, p. 1; Exhibit 597; Exhibit 791.

LCA, Councilman Keith Bird stated: "We [the City] are the ones that have let the costs go up, not the architect or cm [Construction Manager, Petra]." Bill Nary agreed, stating "I didn't think. [sic] that the CM or architect caused the additional cost." Exhibit 597.

LCA delivered conceptual design documents to Petra in December 2006[156], four months after Petra signed the CMA. These documents included the conceptual architectural elevations and floor plans but did not include structural steel drawings or mechanical/electrical drawings.[157] LCA delivered 20% core and shell drawings to Petra in late December 2006.[158]

Petra provided a Preliminary Price Estimate to the City of $15,475,160 for building construction plus $1,319,266 for construction management and site acquisition costs[159] based on these 20% documents.[160] Gene Bennett presented this cost estimate at a Mayor's Building Committee Meeting on January 10, 2007.[161] At this meeting, Keith Watts recorded Councilman Keith Bird stating "the cost did not surprise him and he would proceed as he thought we could find the extra $2,275,000."[162] Petra officially transmitted this price estimate to the City on January 22, 2007.[163] After receiving the Preliminary Price Estimate, the City did not direct LCA to redesign the Project to bring it under $12.2 million; it could have done so pursuant to Section 4.4.3 of' the CMA.[164]

Around February 2007, Petra received 60% drawings from LCA.[165] After receiving them, Petra provided a detailed second cost estimate to the City as required by Section 4.5.9 of the CMA.[166] It reflected an increase to $16,254,033 for construction cost.[167] Petra presented this cost estimate to the City on February 12, 2007 and at the Mayor's Building Committee meeting

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[156] Testimony of Gene Bennett, at 5388:9-5389:1.
[157] Testimony of Gene Bennett, at 5394:1-11.
[158] Testimony Gene Bennett, at 388:4-11.
[159] Testimony of Gene Bennett, 5394:12-20.
[160] Testimony of Ted Baird, at 223:14-19.
[161] Exhibit 606; Testimony of Gene Bennett, at 5394:21-5397:10.
[162] Exhibit 606, p. 6.
[163] Exhibit 770, p. 1.
[164] Testimony of Steve Simmons, at 7172:1-7; Exhibit 2003.
[165] Exhibit 804; Testimony of Gene Bennett, at 5408:13-14.
[166] Exhibit 804; Testimony of Gene Bennett, at 5403:8-16.
[167] Exhibit 804; Testimony of Gene Bennett, at 5406:19-5412:22.

on February 26, 2007.[168] On February 26, 2007, the City told Petra that the Council wanted the "full building as designed."[169] The City directed LCA to complete the drawings[170] and directed Petra to put the Project out for bid in the first part of March.[171]

LCA did not provide a complete set of bid documents for the core and shell until approximately March 12, 2007.[172] After bid acceptance, Petra issued an updated cost estimate in July 2007 of just under $20.5 million, which included site development, LEED, and FF&E in addition to construction costs.[173] Petra provided a final cost estimate to the City of $21,773,078.[174] The City was fully aware of and approved the total Project cost.[175]

Steve Christiansen of LCA recalled Councilman Bird stating: "Not to worry about the cost. We've got plenty of money. We've got to make sure that we do the project right. This is our one shot to do it so."[176] The Project as constructed did not exceed the Final Cost Estimate.[177]

xii. The Masonry Veneer and TMC's Winter Conditions Charges.

TMC, Inc. installed the masonry[178] under a contract with the City.[179] TMC began its masonry work on or around July 2, 2007 in accordance with the then most recent and current construction schedule.[180] The City approved Change Order No. 3 changing TMC's date of substantial completion to August 28, 2008.[181] TMC did not cause any delays to the Project schedule.[182] TMC's work on the masonry veneer was accepted by LCA.[183]

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[168] Exhibit 606; Testimony of Gene Bennett, at 5412:23-5415:22.
[169] Exhibit 606; Testimony of Gene Bennett, at 5414: 13-18.
[170] Exhibit 606; Testimony of Gene Bennett, at 5414: 13-18.
[171] Exhibit 606; Testimony of Gene Bennett, at 5414: 13-18.
[172] Exhibit 2136, p. 24 (Item 00018 of meeting minutes).
[173] Testimony of Gene Bennett, at 5466:15-17.
[174] Exhibit 561; Testimony of Gene Bennett, at 5480:1-17; *see also* Testimony of Steve Christiansen, at 8205:22-8208:7.
[175] Testimony of Gene Bennett, at 5487:23-5494:3; Exhibit 592 (illus).
[176] Testimony of Christiansen, at 8208:2-7.
[177] Testimony of Gene Bennett, at 5493:17-5494:2; Exhibit 592 (illus).
[178] Testimony of Tim McGourty, at 7677:3-18; 7680:15-25; Exhibit 2018.
[179] Testimony of Tim McGourty, at 7677:3-18; 7680:15-25; Exhibit 2018.
[180] Testimony of Tim McGourty, at 7838:18-23.
[181] Exhibit 2068.
[182] Testimony of Tim McGourty, at 7692:11-13.
[183] Testimony of Steve Christiansen, at 8254:4-8255:14; Testimony of Tim McGourty, at 7697:12-21.

During the final punch list walk through, Tom Johnson, the City's building inspector, specifically complimented the masonry, and said words to the effect: "[E]veryone was pleased with the way the building had come out overall."[184]

The plans and specifications for the masonry met the product specifications and ASTM standards governing the industry.[185] TMC, in accordance with industry standards for masonry installers, must rely on the specifications[186] for the material called out in the plans and specifications.[187] Significantly, Todd Weltner, the City's construction expert erroneously failed to consider the appropriate tolerances in the masonry when opining as to alleged "defects" in the masonry veneer.[188]

TMC achieved substantial completion on or around May 18, 2008.[189] TMC completed two punch lists for the masonry veneer.[190] LCA approved TMC's completion of the first punch list.[191] The City and LCA approved TMC's completion of the second punch list.[192] The City paid TMC's retention.[193]

After substantial completion of the Project, it appeared to the City that certain aspects of the masonry needed repair.[194] These masonry "defects" in the veneer are aesthetic issues, not structural.[195] Aesthetic issues fall within the realm and expertise of LCA, who approved the

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[184] Testimony of Tim McGourty, at 7807:3-12.
[185] Testimony of Tim McGourty, at 7759:15-19; 7769:4-16; 7771:2-8; Testimony of Steve Christiansen, at 8264:16-8269:23; Testimony of Richard K. Bauer, at 9592:14-9598:9.
[186] Tim McGourty testified as to the standards TMC followed: "—they have clearly identified a manufacturer and, in this particular case a particular size unit, both of which have specific variations that are allowed and that the team that created the contract, the architects, are basically including in the contract. And so, therefore, the tolerance to only be considered in the strictest sense of 1/8 of an inch here, without given to the material that the creators of the contract specified, is an absence of any understanding of what we're really working with." *See* testimony of Tim McGourty, at 7775:8-20.
[187] Testimony of Tim McGourty, at 7772:1-6.
[188] Testimony of Todd Weltner, at 3538:12-3540:19.
[189] Testimony of Tim McGourty, at 7832:6-17.
[190] Testimony of Steve Christiansen, at 8254:4-8255:14.
[191] Testimony of Tim McGourty, 7697:18-21.
[192] Testimony of Steve Christiansen, at 8254:4-8255:14.
[193] Testimony of Tim McGourty, at 7706:12-7708:1.
[194] Exhibit 846.
[195] Testimony of Richard K. Bauer, at 9718:18-9719:4; Testimony of Steve Christiansen, at 8301:7-12; Testimony of Richard K. Bauer, at 9596:2-18.

masonry veneer at least twice during the final punch list process.[196] These minor aesthetic "defects" fall under TMC's warranty.[197] They are due to the normal separation, settling, and movement that typically occurs with the product specified in the City's Design.[198]

Petra ensured that TMC gave a one-year warranty to the City, which was effective for one year after October 15, 2008.[199] The City acknowledged its warranty rights in a letter to TMC.[200] Pursuant to this letter, TMC became aware of the City's concerns and informed the City it was willing to address them.[201] TMC tried to work through the warranty issues with the City.[202]

The City ignored its warranty rights with regard to TMC, despite the fact that TMC clearly expressed a willingness to address the City's concerns.[203] Tim McGourty, a 30-year industry veteran, testified that the alleged deficiencies raised by the City could be repaired for $5,000-$6,000, based on his personal knowledge of both the masonry installation and alleged deficiencies raised by the City.[204]

TMC billed separately for extra expenses related to winter conditions.[205] TMC had made allowance during its bid for winter conditions and this allowance was within TMC's schedule of values, but was not a separate line item.[206] Billing separately for winter conditions was a mistake no one found until months after completion of the Project.[207] After being advised of the error by Petra, TMC agreed to reimburse the City for the extra charges.[208]

xiii. The HVAC System.

Engineering, Inc. (Mike Wisdom) designed the HVAC system under a contract with

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[196] Testimony of Steve Christiansen, at 8254:4-8255:14.
[197] Testimony of Richard K. Bauer, at 9785:5-12.
[198] Testimony of Tim McGourty, at 7811:16-7813:1.
[199] Testimony of Tim McGourty, at 7703:24-7704:21.
[200] Testimony of Tim McGourty, at 7708:5-25; Exhibit 846.
[201] Testimony of Tim McGourty, at 7711:19-21, 7716:18-7717:1, 7741:21-25; Exhibit 845.
[202] Testimony of Tim McGourty, at 7714:21-7720:20.
[203] Testimony of Tim McGourty, at 7739:11-7740:6, 7752:12-16; *see also* Exhibit 842.
[204] Testimony of Tim McGourty, at 7751:5-7752:16.
[205] Testimony of Tim McGourty, at 7688:7-25.
[206] Testimony of Tim McGourty, at 7688:10-7692:10, 7844:1-7848:8.
[207] Testimony of Tim McGourty, at 7844:1-7848:8.
[208] Testimony of Tim McGourty, at 7847:6-7848:8.

LCA.[209] Wisdom is a professional engineer licensed in the State of Idaho and he served as the mechanical Engineer of Record for the Project.[210] Hobson Fabricating Inc. installed the dry side portion of the HVAC system.[211] Petra did not direct the design of the HVAC system.[212]

Originally, Engineering, Inc. contracted with LCA to design a "standard typical mechanical system for a midrise office with overhead supply using packaged rooftop HVAC systems, low pressure air distribution and basic packaged controls."[213] Wisdom personally made presentations to the City regarding the HVAC system and was involved in the City's selection of the ultimate design for the HVAC system.[214] Wisdom personally discussed options for the design of the HVAC system with the City, specifically whether to use a "standard roof-type system" or an "underfloor positive displacement" system.[215] Based in part on a tour of the Banner Bank Building, the City decided to install an underfloor system.[216]

During a subsequent design development meeting, LCA directed Wisdom to design the HVAC system that is currently installed in the Meridian City Hall.[217] To alleviate the City's concerns, LCA stated the Water Center system was a "much cheaper and stripped down version utilizing the entire floor cavity as the air plenum vs. the controlled and regulated plenum as designed."[218]

Tim Petsche testified as the City's expert regarding the HVAC system. Petsche testified the areas of concern[219] were (1) chiller vibration; (2) lack of central re-heat; (3) system hydronics; (4) final test and balance report; (5) Building Automation System and underfloor

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[209] Testimony of Mike Wisdom, at 6915:2-10.
[210] Testimony of Mike Wisdom, at 6910:4-6; 6915:4.
[211] Exhibit 570.
[212] Testimony of Mike Wisdom, at 6925:21-24.
[213] Exhibit 580.
[214] Testimony of Mike Wisdom, at 6918:10-6919:4; Exhibit 2898.
[215] Testimony of Mike Wisdom, at 6923:12-16.
[216] Exhibit 2898; Testimony of Steve Simmons, at 7206:21-7207:11.
[217] Testimony of Mike Wisdom, at 6925:8-24.
[218] Exhibit 2136, p. 17.
[219] The City does not raise on appeal any issues regarding chiller vibration, system hydronics nor building automation and underfloor pressure. However, the facts establish that as to each of these areas, Petra met its duty under the CMA. Testimony of Wisdom, at 6930; Testimony of Buss, at 8658-59; Testimony of Petsche, at 1666-1668.

pressure.[220] Petsche admitted that he had no experience with an HVAC system comparable to the Meridian City Hall.[221] He admitted he had never designed or installed an HVAC system like the one installed at the City Hall. He also admitted he did not have the skills to adjust the controls of the HVAC system.[222] Petsche is not a licensed engineer.[223] He admitted he had no knowledge of what adjustments City personnel had made to the system.[224] He admitted he had never read the Heery report drafted by the Commissioning Agent regarding the HVAC system[225] or spoke with its designer, Mike Wisdom, the Engineer of Record.[226]

Petsche claimed reheat needed to be added to the central core. Contrary to the City's erroneous understanding of the HVAC system, the contractor did install central core reheat units in the HVAC system, as documented by the drawings and as testified to by Mike Wisdom, the Engineer of Record, who designed the system,[227] and Ted Frisbee, Jr. of Hobson Fabricating, the prime contractor who installed the equipment.[228] All confirmed that reheat was in full working order when Petra left the Project site.[229]

Incredibly, Petsche estimated the HVAC correction costs at $1,854,025 including an estimate of $1,500,000 million to install reheat in the central core of the building.[230] Petsche failed to observe that reheat already existed in the central core.

xiv. Final Test and Balance Report.

The Commissioning Agent was contractually required to issue a final test and balance report.[231] Heery reviewed test and balance reports for the hydronic and air systems.[232] Heery

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[220] *See generally,* Testimony of Tim Petsche, at 1526:16-1719:3.
[221] Testimony of Tim Petsche, at 1692:15-1695:4.
[222] Testimony of Tim Petsche, at 1692:15-1695:4; 1695:16-1696:3.
[223] Testimony of Tim Petsche, at 1691:21-23.
[224] Testimony of Tim Petsche, at 1699:1-5, 16-20.
[225] Testimony of Tim Petsche, at 1699:6-15.
[226] Testimony of Tim Petsche, at 1696:4-7.
[227] Testimony of Mike Wisdom, at 6915:2-10.
[228] Testimony of Mike Wisdom, at 6944:18-6946:7; Testimony of Ted Frisbee, Jr., at 6849:4-16.
[229] Testimony of Mike Wisdom, at 6944:18-6946:7; Testimony of Ted Frisbee, Jr., at 6849:4-16.
[230] The original contract to supply and install the entire HVAC system for the new Meridian City Hall building was $2,060,000 for Hobson and $963,385 for Buss (includes both plumbing and hydronics).
[231] Exhibit 2153, p. 93.
[232] Testimony of Chuck Hurn, at 5180:6-11; Exhibit 546, p. 99331-99397.

included what it considered the final test and balance report in Heery's final commissioning report:[233] "All building systems and equipment in this project were fully tested."[234] There was no need to do any further retesting and balancing of the system.[235]

xv. Roof.

LCA designed the roof system. Western Roofing installed it under a contract with the City.[236] LCA specified the type of membrane installed on the roof.[237] Ray Wetherholt, the roofing expert hired by the City, conceded on cross-examination that the roof installation generally complied with manufacturer's instructions and industry practices. However, Wetherholt criticized LCA's design that did not require saddle flashing. Steve Christiansen, an LCA architect primarily involved in the Project, and Rob Drinkard, owner of Western Roofing each testified that saddle flashing was not best construction practices in this geographic locale.[238]

Western Roofing protected the roof during construction.[239] In the fall of 2009, Western Roofing made repairs to the roof after Versico, the membrane manufacturer, made a detailed inspection.[240] Then Versico re-inspected and warranted the membrane as installed.[241]

Western Roofing gave the City a two-year warranty effective October 15, 2008.[242] After inspecting the roof twice, LCA closed out Western Roofing's punch lists.[243] Rob Drinkard, delivered the Versico Warranty to the City.[244] Drinkard personally inspected the roof after the Versico warranty inspection in the fall of 2009. He inspected the roof four months later and noted new damage had occurred to the roof.[245]

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[233] Exhibit 546, p. 99331-99397.
[234] Exhibit 546, p. 98006.
[235] Testimony of Mike Wisdom, at 6946:8-16.
[236] Exhibit 2014.
[237] Testimony of Steve Christiansen, at 8247:3-12.
[238] Testimony of Steve Christiansen, at 8247:13-16; Testimony of Rob Drinkard, at 8009:22-25.
[239] Testimony of Rob Drinkard, at 7936:1-12.
[240] Testimony of Rob Drinkard, at 7899:23-7901:2.
[241] Exhibit 545A, pp. 23-24; Testimony of Rob Drinkard, at 7905:9-19; 8028:18-8031:1; Exhibit 604; Exhibit 863; Exhibit 864.
[242] Exhibit 545A, pp.21-22; Testimony of Rob Drinkard, at 7906:6-11.
[243] Testimony of Steve Christiansen, at 8250:14-8251:17.
[244] Testimony of Rob Drinkard, at 8030:14-8031:1.
[245] Testimony of Rob Drinkard, at 7912:17-7914:11.

The City's expert, Ray Wetherholt, visited the roof over a year after completion of the Project.[246] Wetherholt could not determine whether the damage he pointed out during his testimony occurred during construction or after completion of construction when the City had control of the Project site.[247]

Rob Drinkard testified that some damage is expected in any construction project and all damage to the roof was repaired, at no cost to the City, prior to Versico issuing its warranty.[248]

The following facts support the District Court's Finding that the roof was damaged after the City took occupancy and after Petra left the site: (a) Versico's inspection and issuance of its warranty, (b) Western Roofing's repairs to the roof in the fall of 2009, (c) Western Roofing's completion of the punch list,[249] and (d) the City's expert witness did not inspect the roof until 2010. Therefore, roof leaks resulted from the new damage.[250] Thus, the City is responsible for damage due by its maintenance personnel and any City directed design revisions.

The City's expert gave a cost estimate that does not differentiate between damage, warranty items, and alleged failures to comply with the plans and specifications.[251] His estimate was more than double the original contract amount of $182,990.00 to install the existing roof system.[252]

i. Water Features.

Neil Anderson, the City's water features expert, opined that with some changes and repairs to certain feature details and to the mechanical system, the City could have both an aesthetically pleasing and well functioning water feature. Neither a complete tear-down nor major reconstruction was necessary or warranted.[253] M.R. Miller and Alpha Masonry, the prime

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[246] Testimony of Ray Wetherholt, at 963:2-5.
[247] *See* Testimony of Ray Wetherholt, 656:13-658:8.
[248] Testimony of Rob Drinkard, at 7935:14-25, 7905:9-19.
[249] Petra's duties and responsibilities were complete once the punch list was closed.
[250] Testimony of Steve Christiansen, at 8247:3-12; 8247:13-16; 8247:13-16; 8250:14-8251:17;Testimony of Rob Drinkard, at 8009:22-25; 7912:17-7914:11; 7936:1-12; 7899:23-7901:2; 7905:9-19; 8028:18-8031:1; Exhibit 545A, pp. 21-22; Exhibit 604; Exhibit 863; Exhibit 864.
[251] Testimony of Ray Wetherholt, at 954:23-24.
[252] Exhibit 2014, p. 3.
[253] Testimony of Neil Anderson, at 791:15-792:4.

contractors who built the water features, each gave the City a warranty for the workmanship and materials, but there is no evidence the City ever called on M.R. Miller and Alpha Masonry to perform under their warranties.[254]

The City's expert also opined that the water features suffered from design issues, including that the water storage tank was too small—when the pump shuts off the water overflow goes into the sewer.[255] The storage tank size was a design issue.[256] LCA's subcontractor, Hatch-Mueller, designed the water features.[257] The City contends that shop drawings were not prepared and pressure testing did not occur. App.Br.60. But a schematic drawing was agreed upon as a substitute for the shop drawings,[258] and there was no proof at trial that pressure testing did not occur.

In short, the punch lists for the water features were completed and closed.[259] LCA inspected the water features after their construction, MTI performed testing on the concrete and grout, and the designer, inspected the water features.[260] Petra met its obligations as to the water feature and the City did not pursue its warranty in regards to the concerns it now raises.

ii. The Plumbing Systems.

Clifford Chamberlain, the City's plumbing expert testified regarding a number of issues he perceived with the plumbing system, but in each instance his testimony was unsupportable. Chamberlain testified that Mike Wisdom, the Engineer of Record, made a mistake when he specified two backwater valves in the City Hall.[261] The backwater valves installed in the City Hall basement complied with Section 710.1 of the Uniform Plumbing Code (UPC) because they did not serve the fixtures above the basement and above the manhole cover of the sewer system. Section 710.1's prohibition on sewage discharging through a backwater valve is limited to

[254] Exhibit 545A, p 11; Testimony of Gene Bennett, at 5345:19-22.
[255] Testimony of Neil Anderson, at 795:18-25.
[256] Testimony of Neil Anderson, at 796:18-23.
[257] Testimony of Gene Bennett, at 5345:23-25; Testimony of Steve Christiansen, at 8239:21-8240:4.
[258] Exhibit 2160, p. 309-13; Exhibit 2161, pp. 199, 210.
[259] Testimony of Gene Bennett, at 5624:12-14.
[260] Testimony of Gene Bennett, at 5623:4-12.
[261] Testimony of Clifford Chamberlain, at 4013:16-4014:5; 3998:22-25.

sewage from fixtures above the basement.[262] The authority having jurisdiction over the plumbing installed at City Hall is the plumbing inspector for the City of Meridian.[263] The City's plumbing inspector, specifically charged with code inspections, passed the plumbing system with the backwater valves.[264]

Chamberlain testified about an alleged lack of seismic bracing on basement sewer runs. He failed to note that the City Hall is in a seismic hazard level D area, the minimum level.[265] Buildings in the D hazard level do not require seismic bracing on exposed sewer lines at all. Rather, standard lateral bracing is only required if the pipe hanger lengths are more than 12 inches long. For pipes with hangers more than 12 inches long, a lateral brace is required every 40 feet. If the pipe runs through a wall, the code considers the wall as a lateral brace.[266] All pipes on upper floors are braced and tied to the building structure by uni-struts or metal steel plates secured to the walls, so no additional bracing is required on the upper floors.[267] Mike Wisdom, the Engineer of Record, inspected and passed the bracing. In addition, the City plumbing inspectors, inspected and passed the bracing.

The City never contacted Buss Mechanical, the contractor that had the responsibility to install seismic bracing, to ask Buss Mechanical to install more seismic bracing.[268] Buss Mechanical's warranty would have covered any missing seismic bracing.[269]

Chamberlain testified that certain sewer lines in the basement did not have at least a one-percent slope. Chamberlain's testimony ignored the elevation of the building as designed vis-a-vis the elevation of the main sewer line located in the street. The physical relationship between these two elevations dictated the slope of the sewer lines in the basement.

The City erroneously contends that PVC pipe was improperly used below grade in the

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[262] Exhibit 2755, p. 3 (Section 710.1 of the UPC); Testimony of Clifford Chamberlain, at 4066:17-22.
[263] Testimony of Mike Wisdom, at 6955:12-15.
[264] Testimony of Mike Wisdom, at 6954:16-6955:15, 6958:4-15.
[265] Testimony of Mike Wisdom, 6959:6-8.
[266] Testimony of Lenny Buss, at 6942:2-15.
[267] *Id.*
[268] Testimony of Lenny Buss, at 6942:2-6.
[269] Testimony of Lenny Buss, at 6942:7-15.

basement. App.Br.70. The mechanical engineer did "have a cow" and Petra told Buss Mechanical to use hubless case iron piping instead. The record indicates his was done.[270]

As with all of the plumbing issues raised by Chamberlain, Mike Wisdom and the City's code inspectors inspected and passed the plumbing installation. It was reasonable and in accord with the applicable standard of care set forth in Section 1.1 of the CMA for Petra to rely upon the Engineer of Record, the licensed plumber, and the City's licensed code inspectors for technical compliance with the plans and specifications and applicable codes.[271] And, the City never contacted Buss regarding any pipe sloping issues.[272]

Chamberlain testified that a number of cleanouts were missing, but the number and location of cleanouts specified is not a rigid number. Buss had discretion in routing the piping and installing cleanouts.[273] Buss re-routed some of the sewer waste piping eliminating the need for some cleanouts.[274] Mike Wisdom and the City's code inspectors approved of Buss' re-routing of the sewer waste pipes.[275] Wisdom prepared punch lists for the plumbing systems, which were completed.[276]

The City retained the responsibility to inspect the work including the plumbing, and the required inspections were performed by the Authority Having Jurisdiction ("AHJ") to verify the plumbing complied with the Uniform Plumbing Code.[277] Further, the plumbing punch lists were completed and closed. As noted throughout this Brief, and confirmed by the CMA, it was not Petra's duty to guarantee the work of the contractors.

iii. Southwest Corner Leak and Roof Drains.

Weltner, the City's construction expert, testified regarding certain leaks and issues with

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[270] Testimony of Gene Bennett, at 5549:1-15.
[271] Testimony of Mike Wisdom, at 6958:16-24.
[272] Testimony of Lenny Buss, at 8663:21-25.
[273] Testimony of Mike Wisdom, at 6957:10-18.
[274] Testimony of Mike Wisdom, at 6954:10-17.
[275] Testimony of Mike Wisdom, at 6957:19-6958:3; 6955:8-11.
[276] Testimony of Mike Wisdom, at 6955:12-6956:3.
[277] Exhibit 2755, p. 3 (Section 710.1 of the UPC); Testimony of Clifford Chamberlain, at 4066:17-22; Testimony of Mike Wisdom, at 6960: 10-20.

roof drains at the west pilasters. Weltner testified that the roof drains are PVC and they should be cast iron.[278] Since the installation was outside the building envelope, PVC was used to reduce the weight and the installation was approved by the City code inspectors and Mike Wisdom, the Engineer of Record.[279]

The City's witnesses testified about a leak in a roof drainpipe, based on a faulty connection to a scupper. This occurred sometime in the spring of 2010, approximately a year after Petra left the Project site.[280] Eric Jensen, the City's facilities manager, testified he had removed the scupper.[281] Considering how long it had been since construction without a leak, the evidence supported a finding that after construction was completed, Eric Jensen removed the scupper and failed to reconnect it properly. As in other instances, the City never called Buss to address this alleged problem.[282] Lenny Buss testified that if his personnel failed to perform the work properly, it would have been a warranty item he would have fixed.[283]

The contractor installed PVC underground storm drains outside the building under the landscaping.[284] Weltner testified that these drains should have been cast iron. However, the civil drawings specify PVC.[285] Weltner relied on the wrong specification when he rendered his opinion. He relied on Division 15 instead of Division 2, the correct specification, which calls for PVC.[286]

Weltner testified that the contractor reversed the main roof drains and overflow drains. However, Rob Drinkard testified that the City called on him to switch back the roof drain dome and the overflow dome, which had been inadvertently mixed up. The drains are not "cross-piped."[287] Once again, Weltner's testimony was incorrect.

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[278] Testimony of Gene Bennett, at 5609:6-5623: 1; Exhibits 754, 756, 757.
[279] Testimony of Gene Bennett, at 5612:1-5612:20; Exhibit 757.
[280] Testimony of Eric Jensen, at 4465:20-4466:1.
[281] Testimony of Eric Jensen, at 4465:20-4466:l.
[282] Testimony of Lenny Buss, at 8658:7-23.
[283] Testimony of Lenny Buss, at 8658:13-23.
[284] Testimony of Jon Anderson, at 7493:6-10.
[285] Testimony of Gene Bennett, at 5609:6-5623:1; Exhibits 754, 756, 757.
[286] Testimony of Gene Bennett, at 5612:1-5612:20; Exhibit 757.
[287] Testimony of Rob Drinkard, at 7940:3-9.

iv. Waterproofing, Basement Electrical Pad, Mayor's Reception Area.

Weltner testified regarding a water main leak and an issue with the basement equipment pad. Weltner did not provide testimony when the alleged leak was first discovered. If the leak was discovered during the warranty period, then correcting the leak would be a matter of the City properly administering the warranty, an obligation that rested with the City. Weltner appeared to attribute the leak to an alleged lack of water proofing on the foundation up to grade level.[288] The evidence at trial, however, supported the District Court's finding that the water proofing membrane was properly installed. The proper placement of the water proofing was confirmed by Petra's site visitation on February 8, 2011 as testified to by Gene Bennett.[289] There is a small area on the west side that was not water proofed. This occurred at the location of a raised landscaping berm added by the City that was not included in the original plans and specifications. Regardless, the evidence established that there was no moisture leaking into the basement during the trial.

Steve Christiansen, an LCA architect, also testified the "waterproofing was in place, and I witnessed it and saw it prior to backfilling."[290] Sealco, the responsible prime contractor, confirmed that it installed the required waterproofing. The City has never asked Sealco to redo the waterproofing.[291]

Any deterioration of the electrical pad in the basement area was a warranty item. There was no evidence the City contacted the responsible prime contractor.[292]

The relevant punch lists did not identify any missing caulking or closure strips in the Mayor's Reception area. Missing materials in this area was a warranty item.[293] There is no evidence in the record that the City called the prime contractor or made a warranty claim.[294] The

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[288] Testimony of Todd Weltner, at 3514:21-3532:4.
[289] Testimony of Gene Bennett, at 5881:12-5883:3; Exhibit 825 (photographs only).
[290] Testimony of Steve Christiansen, at 8315:11-8316:2.
[291] Testimony of Eric Jensen, at 4467:3-19.
[292] Testimony of Todd Weltner, at 3808:13-23.
[293] Testimony of Gene Bennett, at 5633:3-5633:13.
[294] Testimony of Eric Jensen, at 4468:8-4469:4.

City did not notify Petra.[295]

v. Access Floors.

Weltner's opinion that one-third of the access floor panels needed to be adjusted or replaced was incorrect and was not accepted by the District Court. During a site inspection, Gene Bennett personally inspected the access floor panels and determined that at most 2 percent need to be adjusted in the high traffic areas.[296] Weltner admitted that he did not know the extent of the repairs that may be necessary. He also admitted he had never installed access floor panels like the ones in the City Hall.[297]

IV. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Attorneys Fees on Appeal.

Petra is entitled to an award of attorneys fees and costs on Appeal as more fully discussed at Section Q herein.

V. ARGUMENT

A. Petra Established, Through Competent Substantial Evidence, Its Right To An Equitable Adjustment.

As set forth in the CMA, the City retained Petra to provide construction management services over a contemplated 80,000 sq. ft. building with an anticipated budget of $12.2 million. At the time the CMA was signed, the actual design of and construction plans for the building, under the authority of LCA and the City, had not been completed. There is no doubt, however, that the City Hall ultimately designed and constructed, increased dramatically in size, scope, budget, and complexity over that which had been contemplated at the time the CMA was executed. The City Hall is a $21.7 million, 104,000 sq. ft. LEED – certified 3-story building.[298]

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[295] Testimony of Gene Bennett, at 5633:4-13.
[296] Testimony of Gene Bennett, at 5883:4-5587:14.
[297] Testimony of Todd Weltner, at 3806:4-9.
[298] It includes a basement, a large support free counsel chamber, exterior stone and brick cladding, IT server room upgrades, extensive cabinetry throughout, high tech mechanical and electrical systems, and finished offices in lieu of open office space. The steel structure is a four way moment frame system. The ultimate design, as built, includes an additional parking lot and elaborate plaza with a separate building, amphitheater, and four integrated water features.

In the course of construction, Petra managed approximately 150 change orders, hundreds of ASI's, and 150-200 RFI's. During August 2008, the City added the "east parking lot" to the Project due to the increased size of the building. All of these changes, in size, scope, and complexity, impacted Petra's management of the overall Project and justified Petra's request for an equitable adjustment to its fee.[299]

In awarding Petra an equitable adjustment of $376,808.00 the District Court made the following specific Findings:

> 176. On August 20, 2007, Petra disclosed its intention to request an increase in its construction management fee in the amount of $384,782.00 because of the change in the scale of the project.
>
> 177. On August 20, 2007, Petra had not yet provided additional services on the project.
>
> 178. The costs incurred on the project did not exceed the original $12.2 million budget until after February 2008.
>
> 179. On or about September 5, 2007, and in response to Petra's suggestion, the City's agent Keith Watts agreed on behalf of the City that Petra should wait to submit the formal proposal for an equitable adjustment in Petra's fees until the final value of the project was determined.
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> 180. On November 5, 2007, Petra sent a letter to the City to again remind the City that Petra would be seeking an additional fee.
>
> 181. Petra reasonably relied on Mr. Watt's September 2007 representation and did not formally submit the request for equitable adjustment until April 4, 2008, in the form of Change Order No. 2.
>
> 182. By April 4, 2008, Petra had provided extra services on the project.
>
> 183. The amount of Petra's Change Order No. 2 request was $376,808.00; some $8,000.00 less than the amount reflected in the August 20, 2007 budget.
>
> 184. Petra provided the City additional information in support of the request in October 2008.

The City added an under floor HVAC system, a system that was not noted in the City's request for qualifications when it originally sought Petra's services. Chuck Hurn, of Heery International, the commissioning agent considered the building a prototype building because there were so few like it in this area.

[299] LCA, the architect separately retained by the City that had responsibility for the design of the building, that reviewed and approved all pay applications, and that acted as the City's direct agent regarding the construction of the building, also sought an equitable adjustment to its fee based on "a significant change to the Project has occurred in the size, complexity and budget since our contract was executed." Furthermore, Engineering Inc., also requested an additional fee from LCA on September 25, 2008. Mike Wisdom, on behalf of Engineering Inc., noted that he was initially hired to design a far less sophisticated system than what he was eventually directed to design.

185. The City did not approve the request.

Each one of these Findings is supported by the facts and testimony that were presented to the District Court and that are in the record before this Court.

First, The City contends that Petra did not inform the City that it intended to seek an equitable adjustment "until November 5, 2007", a contention that is nothing more than a challenge to Finding 176 by the District Court in the face of conflicting evidence. The facts establish that on August 20, 2007, Petra disclosed its intention, through a cost estimate, to request an increase in its Construction Management fee and that such intention was based upon the substantial change in the scale of the Project. This cost estimate had a line item that noted "CM contract adjustment for change in project scale."[300] This exact same line item was ultimately included in Change Order Request No. 2.[301] Moreover, in December 2007, and in each of the January – November 2008 monthly reports provided to the City by Petra, a line item was designated "CM fee, pending change order change in scope & complexity."[302]

The request seeking an equitable adjustment could not be completed until August of 2007 because final acceptance of the Phase 3 bids was not completed until the month prior, July 2007.[303] It was not until final acceptance of Phase 3 bids that Petra was able to use actual contract amounts to determine the Project budgeting. Therefore, it was not until August 2007 that Petra could determine the Project's actual and ultimate scope.[304] The CMA, as drafted by the City, contemplated an "equitable adjustment" to Petra's fee where there was a change to the size, scope, and complexity of the Project. Thus, the contract unambiguously recognized that a request for equitable adjustment could not occur until the final "size, scope and complexity" of the Project was determined.

In a September 5, 2007 email to the City's authorized representative, Keith Watts, Petra informed the City of its change order request due to "change in Project complexity from a $12.2

[300] Exhibit 2148; Testimony of Gene Bennett, at 5467:3-4.
[301] Exhibit 537; Testimony of Gene Bennett, at 5471:15-18.
[302] Exhibits 549-560.
[303] Testimony of Gene Bennett, at 5481:4-16.
[304] Testimony of Richard K. Bauer, at 9480:20-9582:25.

million 80,000 SF to $19.9 million 100,000 SF Project...."[305] Petra further stated that it 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.[306] In response, Watts replied: "good idea on the 2nd one," referring to Change Order Request No. 2.[307] In direct and reasonable reliance upon Watt's email, Petra delayed formal presentation of its request for equitable adjustment.[308]

Second, the City contends that Petra's request for additional fees was untimely, under Section 7 of the CMA, because at the time the request was made Petra had already provided "Additional Services" on the Project. The phrase "Additional Services" is not defined in the contract. The City consistently took the position that the CMA was unambiguous,[309] and the District Court concluded the same.[310] The District Court had the authority, as a matter of law, to determine the plain meaning of the language that was contained in the contract, including the proper meaning that should be attributed to the phrase "Additional Services."[311] In fact, the Court concluded, in Finding 177, that as of August 20, 2007, Petra had not yet provided Additional Services. That Finding is fully supported by the Court's additional Finding 178, in which the Court notes that the costs incurred on the Project did not exceed the original $12.2 million budget until after February, 2008, almost six months after Petra made the initial request for additional fee. The fact that the CMA contains no specific definition of "Additional Services", and there is not a clear demarcation in the factual record between "original services" and "contemplated and new services", the Court's Findings and ultimate Conclusions are fully supportable.

Third, the City contends that Petra made a "representation" that its fee would never

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[305] Exhibit 535.
[306] Exhibit 535.
[307] Exhibit 535.
[308] Testimony of Gene Bennett, at 5482.
[309] Tr. at 3900-3915.
[310] Conclusion P.
[311] Section 7 provides that "prior to providing any additional service, Construction Manager shall notify Owner of the proposed change in services . . . ." The "change in services" were not "proposed by" Petra; they were mandated by the City due to the substantial changes in the project.

increase. *See* App.Br.14; *see also* 26, 27 (erroneously contending that Wes Bettis made a "representation to the City Council that Petra's fee and reimbursable expenses would not increase by even a dollar"). To support this argument, the City cites only a portion of Bettis' statement in a July 2007 City Council meeting. In his entire statement, Bettis advised the City Council of a starting place "to make a good working budget":

> What we have attempted to do with this budget is to give us the highest budget that we could think of inclusive of all of the items, including the 1.5 million dollar budget for the plaza and community area, so that we have a starting place to address the value engineering issues and work with you to make a good working budget out of this project.[312]

As the Project scope, size, complexity, and budget dramatically increased, it came as no surprise to anyone, including the City that the services Petra was being asked to perform had been impacted by the substantial changes in the Project mandated by the City. As the fact finder, the District Court was not persuaded that the representation meant that expenses would not increase.

Fourth, while the City expresses concern with representations it contends Petra made, representations not supported by the record, the representations made by the City must be emphasized. Those representations are contained in Recital B and Section 4.4 of the CMA which established the original plan upon which Petra made its original projections and that contemplated a $12.2 million Project, for an 80,000 sq. ft. office building. This representation was relied upon by Petra when it submitted its original bid contained in the CMA. The substantial changes that effectively modified the building significantly undermined the City's representation. Common sense alone dictates that a construction project that increased in size by 30% and increased in cost by 78% would require substantial increases in supervisory staff, labor and expense. The City cannot be allowed to ignore the express representations set forth in the CMA that it drafted, while at the same time attempting to rely upon alleged representations that the District Court did not find supportable.

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[312] Exhibit 2025, p. 46.

Fifth, the City asserts that the District Court committed error in considering the concepts of waiver and estoppel in denying to the City the right to demand a particular type of notice and to object to equitable adjustment of Petra's fee. The City contends that neither waiver nor estoppel was pled nor were they tried by consent. The record does not support either contention.

(1) This litigation began by the filing of a Complaint by the City seeking a Declaratory Judgment that Petra was not entitled to an equitable adjustment. In response, in its Answer, Petra specifically asserted estoppel as Affirmative Defense No. 31 and waiver as Affirmative Defense No. 32 thus placing at issue Petra's contention that the City had waived and/or was estopped to deny Petra's right to an equitable adjustment.[313]

(2) As noted in the extensive factual recitation contained in this Brief, the issue of waiver and estoppel were clearly litigated between these parties as is reflected by the correspondence between Bettis on behalf of Petra and Watts, the City's authorized representative.

(3) The City cites *Absher Const. Co. v. Kent School District*, 890 P.2d 1071 (Wash. Ct. App. 1995) for the proposition that notice requirements are mandatory and cannot be waived nor estoppel applied. Unlike here, the contract at issue in *Absher*, on its face, precluded any waiver argument. *But see* 890 P.2d at 1075, n.8 (providing analysis of cases with similar facts to those presented here where courts held waiver applicable). Here, the City's authorized representative approved any alleged delay in the notice; the City directed the additional work; the City accepted the additional work and thus ratified its agent's action. *Johnson, Inc. v. County of Spokane*, 150 Wn. 2d 375, 391-92, 78 P.3d 161, 169 (Wash. 2003), also relied on by the City is equally distinguishable. In *Johnson*, the Court held that waiver occurs when there are "unequivocal acts of conduct evidencing an intent to waive." Unlike this case, where the City's authorized representative agreed Petra should delay its request for equitable adjustment, in *Johnson* the county "repeatedly notified" the contractor that it did not "intend a waiver of any claim or defense." The Washington Supreme Court also cited its decision in *Bignold v. King County*, 399

[313] R.0084.

P.2d 611 (Wash. 1965), noting that "it was the owner's knowledge of the changed conditions coupled with its subsequent direction to proceed with the extra work that evidenced its intent to waive enforcement of the written notice requirements." Judge Wilper's Conclusions are consistent with the *Bignold* rationale and analysis.[314]

(4) The City's extensive reference to the Open Meetings law, suggesting that waiver or estoppel cannot apply to the City is not supportable. I.C. § 67-2341, excludes "ministerial or administrative actions" from the Open Meetings requirement. "Thus, the governing body is not required to vote on 'ministerial or administrative actions' that are necessary to carry out decisions previously reached in accordance with the open meeting laws." *City of McCall v. Buxton,* 146 Idaho 656, 666, 201 P.3d 629, 639 (2009). The CMA was approved by the City Council in an open meeting; its administration did not require such a process.[315]

The evidence at trial fully supports the District Court's Findings and confirms that Petra did not perform any "Additional Services" for which it sought an increase in its fee until long after August 20, 2007, the date Petra delivered to the City the cost report listing the additional fee. In the emails exchanged between Wes Bettis, on behalf of Petra, and Keith Watts, the City's authorized representative, on September 5, 2007, the City did not express any objection to Petra's request for additional fees. In addition, in correspondence dated November 5, 2007,

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[314] *See also, D'Onofrio Bros. Const. Corp. v. Bd. of Ed. of City of New York*, 421 N.Y.S.2d 377, 379 (N.Y. App. Div. 1979) (holding that the city was estopped from asserting the "failure to strictly comply with the terms of the contract" and opining that "[t]his court is also mindful that construction work must often proceed without undue delays and that strict compliance with the formal contract procedures may sometimes not be practical"). *Howdy Jones Constr. Co., Inc. v. Parklaw Realty, Inc.*, 76 A.D. 2d 1018, 1018-1019, 429 N.Y.S.2d 768, 770, *aff'd*, 53 N.Y.2d 718 (N.Y. App. Div. 1981) (holding that trial court erred in disallowing charges "for extra work as a result of its finding that the invoices for said work were not signed by personnel of defendants authorized to approve extra work" where evidence showed that "work done by plaintiff that was not contemplated in the original contract and that defendants requested that such work be done"). *Joseph F. Egan, Inc. v. City of New York*, 17 N.Y.2d 90, 97, 268 N.Y.S. 2d 301, (1966) (finding city waived strict compliance with "protest" and "notice" provisions of construction contract where evidence showed that "original construction plans required major and constant revisions," city was behind schedule on processing change orders and it was necessary for contractor to conduct additional work where "such work was either disputed work from the beginning...or where the question was left open for future determination" so that "work progressed with minimum delay").

[315] And further noted in *Buxton*, the actions of the agent of the City, Mr. Watts, can and were ratified by the City. In addition, I.C. § 67-2347 provides that any action seeking to declare conduct "null and void" as a violation of the Open Meetings law must be brought within "30 days of the time of the violation...." The issue raised by the City in this regard was not timely.

Bettis, on behalf of Petra, again notified the City that Petra would be submitting a change order request with an additional construction manager's fee. The pendency of the additional fee request was set forth in each monthly report submitted by Petra to the City. The formal Change Order Request No. 2 was dated April 8, 2008 and included Petra's request of an additional fee of $386,392. In response to Change Order Request No. 2, Baird, the Meridian City Attorney, did not deny the request as untimely but requested more information by letter dated May 29, 2008. Gene Bennett and Tom Coughlin, on behalf of Petra, met with Baird and responded to his questions. Thereafter, on August 3, 2008, Petra delivered to the City the requested back-up for Change Order Request No. 2. This included the additional fee and reimbursable salaries.

The City did not respond to the change order request supported by the back-up requested by Baird until February 24, 2009 at which time it denied the request. These facts fully support the District Court's Conclusion that the City waived its contractual right to pre-approve the request for equitable adjustment, that the City is estopped from denying the fee request, and that the City unreasonably delayed making a decision on the request.[316]

Section 7 of the CMA provides in part that Petra's services maybe changed "upon owners request" or "if construction manager's services are affected by" "...(b) significant change to the Project, including, but not limited to size, quality, complexity, owner schedule, budget or procurement method." There can be no factual doubt that changes to Petra's services were made as the result of "owners request" since it was the City as owner, in conjunction with LCA, that substantially modified the size, quality, complexity, and budget of the Project. There can further be no doubt that Petra's services were "affected" by those substantial changes.

Section 7 continues by noting that when a change in circumstances "materially affect(s) construction manager services", Petra would be entitled to an equitable adjustment of its fee and reimbursable expenses, "as mutually agreed by owner and construction manager." The City argues that it did not agree to an additional fee and therefore it is not obligated to pay an

[316] Conclusions I and L.

additional fee. Accepting the City's interpretation would render Section 7, a section drafted by the City, surplusage – the City could demand additional services, but never "agree" to any increased fee.

The contract utilizes the phrase "equitable adjustment" in authorizing the construction manager to seek an additional fee. Equitable principles therefore apply. The facts, as found by the District Court, support the award of the additional fee, in light of the substantial change to the size and complexity of the Project. Moreover, the City's retention of the benefit delivered by Petra in providing the additional services mandated by the change in size and complexity of the Project without also paying Petra for the compelled additional service was inequitable. The City's decision to essentially ignore that request for almost two years, but to demand the benefit of the additional services supports the Court's determination that the City is estopped to deny the request for equitable adjustment and has waived its right to contend otherwise.

Section 7 imposes a mandatory obligation on the City to pay an "equitable adjustment" where the preconditions are satisfied. As the facts in this case establish, both aspects of Section 7 were applicable: First, the change in Petra's services, as Construction Manager, were required because of "owners request" in that the owner required Petra to manage substantial modifications to the Project. Second, the change in Petra's services were caused by "[7](a) a change in instructions or the approvals given by owner that necessitate revisions to previously prepared documents or the performance of previously performed services; [or] (b) significant change to the Project, including, but not limited to, size, quality, complexity, owner schedule, budget, or procurement method." Both events mandated an equitable adjustment.

The City contends that the District Court committed error in utilizing Section 7 of the CMA to address Petra's claim for an equitable adjustment, and that Section 8 was the provision that should have applied. App.Br.39-41. However, Section 7 is the more specific provision as opposed to Section 8, because it specifically references "changes in construction manager services" and further provides that "...construction manager shall be entitled to an equitable adjustment in the schedule of performance, construction manager's fee and/or the not to exceed

limits for reimbursable expenses...." Thus, Section 7 directly addressed the issues presented by Petra's counterclaim. To the contrary, Section 8 simply refers to "any claim, dispute or other matter in questions...." Section 7 is clearly the more specific provision to the issues presented, and is therefore controlling.

Where contractual provisions are alleged to conflict, the interpretation of the written contract and the intent of the parties is a matter for the trial court's discretion. *Haener v. Ada County Highway Dist.*, 108 Idaho 170, 173, 697 P.2d 1184, 1187 (1985). The determination of a contract's meaning and legal effect is a question of law when the contract is clear and unambiguous. *Bondy v. Levy,* 121 Idaho 993, 996-97, 829 P.2d 1342, 1345-46 (1992). Specific provisions in a contract control over general provisions where both relate to the same thing or issue. *Twin Lakes Village Property Ass'n, Inc. v. Crowley*, 124 Idaho 132, 138, 857 P.2d 611, 617 (1993). *Morgan v. Firestone Tire & Rubber Co.,* 68 Idaho 506, 518, 201 P.2d 976, 983 (1948).

Sixth, the City challenges the manner in which Petra calculated its additional fee. The City contends that simply utilizing a 4.7% factor, of the increased cost of the Project, is not appropriate or supportable. In fact, Petra utilized the 4.7% factor in calculating its original fee under the original $12.2 million budgeted amount for the Project as set forth in the CMA. Petra again utilized the 4.7% factor in calculating its additional fee set forth in Change Order No. 1 which additional fee was due to the contaminated soil situation that was faced at the Project. Petra set forth the 4.7% factor, in Change Order Request No. 2, at the time it was formally submitted to the City in April of 2008. The City had thus approved that factor on two prior occasions.

The City contends that the District Court committed error by awarding an equitable adjustment to Petra in the amount of 4.7% of the additional budgeted amount without requiring proof that "actual additional increase[s] in services were provided by Petra as a result of any particular change." App.Br.33. The CMA, specifically Section 7, does not require such proof.[317]

[317] It must be noted that Section 6.2 of the CMA, addressing additional reimbursables contains language conditioning the right to receipt of additional reimbursables on specific elements of proof.

The City's attempt to impose such an obligation seeks to incorporate an element of proof extrinsic to the contractual agreement. The unambiguous language in Section 7 simply states that Petra's services, as Construction Manager, may be changed upon the "owners request" or if Petra's services are "affected" by a change in the instructions or approvals given by owner or by a significant change to the Project. If those events occur the Construction Manager "shall" be entitled to an equitable adjustment in construction manager's fee. There is simply no provision imposing an obligation upon Petra to track each hour and minute of additional work that it accomplished as a result of changes compelled by the City's decisions.

In fact, the City acknowledges that the contract it prepared contains "no specific methodology for the increased fee." App.Br.34. Any attempt to include such a methodology rewrites the parties' contract. As written, the CMA left to the fact finder, here the Court, the amount of a reasonable fee awardable as an "equitable adjustment." Moreover, through its course of conduct the City had previously agreed to a 4.7% factor – both in the original contract and in its approval of Change Order No. 1. *See Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992) (noting that course of conduct may guide a district court in determining intent, including waiver and estoppel). Judge Wilper's conclusion that the 4.7% factor was appropriate and the City waived and is estopped to challenge the fact of and amount of the equitable adjustment is supported by the record.

Notwithstanding the City's admission "that no specific methodology exists for the increased fee," the City contends that the District Court improperly authorized the additional fee. The City utilizes an analogy suggesting that the cost to supervise the installation of a $1 sink would not exceed the cost to supervise the installation of a $3 sink. App.Br.34. This analogy fails. There is simply no doubt, as the District Court found and concluded, that it does in fact take "additional service" to manage a project that had the substantial changes in size, quality, complexity, and budget as occurred with the Meridian City Hall. In other words, additional service is required where an original Project calls for the supervision of the installation of 1 sink, but the change in the project results in the supervision of the installation of 10 sinks of various

size, various quality, located in different areas of the project, and which cost various amounts.

Petra provided construction management services to the City for almost two years after it made its initial request for additional fee and 14 months after it submitted Change Order Request No. 2. The City required Petra to implement its changes, by requiring Petra to supplement its supervision of the prime contractors and vendors that had contracted with the City. But not once during that two year period did the City direct Petra to discontinue providing construction management services. Not once did the City declare that the "extra services" set forth in Petra's August, 2007 request were unnecessary. The City thus obtained the benefit of the additional services, but refused to pay for such additional services. After the punch list items were completed, the City accepted the building and certified that the Project was complete and finalized. As a matter of law, therefore, the District Court's conclusions that the City waived its right to approve an equitable adjustment of Petra's fee, is estopped to contest the equitable adjustment, and the amount of that adjustment should be affirmed.

B. The District Court Correctly Determined That Petra Complied with the Requirements of the Idaho Tort Claims Act.

The Idaho Tort Claims Act, I.C. § 6-901 *et seq.,* in conjunction with I.C. § 50-219, requires that as a precondition to asserting any claim against a municipality, a notice of the claim must be provided to the municipality within 180 days of the date that the claim arose. In denying the City's Motion for Summary Judgment, the District Court concluded that the Tort Claims Act was triggered by the City's correspondence dated February 24, 2009[318] advising Petra that it would not pay an additional fee/equitable adjustment as set forth in Petra's Change Order No. 2:

> 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.

[318] R.0136-38.

> 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 through their 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.[319]

The District Court correctly determined that the February 24 correspondence triggered the 180 day notice requirement. The District Court further held that Petra put the City on notice, thus complying with the Act, in its March 16, 2009 letter[320] that challenged the City's failure to pay Petra for Change Order No. 2, and which requested mediation.

On appeal, the City contends that Petra knew, or should have known, of its claim for an increased fee based upon its percentage of budget theory: "as of January 15, 2007 when it submitted its 'first budget' exceeding $12.2 million." App.Br.41. The issue under the Tort Claims Act is when the claim "arose or reasonably should have been discovered, whichever is later." I.C. § 6-906. This Court has held, in several cases, that a claim arises and the 180 day period begins to run "from the occurrence of the wrongful act, even though the full extent of damages may be unknown or unpredictable at that time." *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987). As stated in *Carman v. Carman*, 114 Idaho 551, 553, 758 P.2d 710, 712 (Ct. App. 1988), a claimant discovers his claim, only when he becomes apprised of the injury or damage and of the governmental entities' role. And as this Court noted in *Magnuson Properties Partnership v. City of Coeur D'Alene*, 138 Idaho 166, 169-70 59 P.3d 971 974-75 (2002), the claim arose when the City sent the owner a letter in which it refused to pay for work the owner completed.

In this case, the claim did not arise when Petra first advised the City that it would seek an equitable adjustment in its fee due to the substantial change in the size, cost and complexity of the Project. When those events occurred, there had been no "wrongful act" by the City; there had been no action by the City that was detrimental to the interests of Petra. It was not until the

[319] Sept. 27, 2010 Tr. at 37:11-38:7; *see also* R. 6568; R.7348.
[320] R.5744.

City denied Petra's Change Order Request No. 2 on February 24, 2009 that Petra's "claim" against the City accrued. The District Court, therefore, correctly determined that Petra's notice dated March 16, 2009 properly placed the City on notice under the Tort Claims Act. *See generally Huff v. Uhl*, 103 Idaho 274, 647 P.2d 730 (1982); *Cox v. City of Sandpoint*, 140 Idaho 127, 131, 90 P.3d 352, 356 (Ct. App. 2003), holding that there is no express format for a claim under the Idaho Tort Claims Act. "Substantial compliance" is sufficient, particularly here where the City makes no claim that it was misled. *See Smith v. City of Preston*, 99 Idaho 618, 621, 586 P.2d 1062, 1065 (1978).[321]

The City contends that the Court committed error by not requiring specific proof at trial, of Petra's compliance with the Idaho Tort Claims Act. App.Br.42. As noted above, the issue was resolved by pretrial motion. In *Smith v. Mitton*, 140 Idaho 893, 898, 104 P.3d 367, 372 (2004), this Court held that "Idaho courts have not mandated that the requirements set forth in I.R.C.P. 9(c) apply to the [Idaho Tort Claims Act.]" Neither pleading compliance with the Act, nor proving compliance at trial is required – rather, pleading non-compliance with the Act is an affirmative defense, proof of which must occur at trial if not resolved in pretrial proceedings. *Smith*, 140 Idaho at 898, 104 P.3d at 372. The City failed to cite any case law to suggest that any further compliance by Petra with the Idaho Tort Claims Act was required.

C. The District Court Did Not Commit Error In Failing To Reference Section 7 of the CMA In Its Findings and Conclusions.

The City contends that the District Court committed error in failing to reference Section 7 in its Findings and Conclusions. App.Br.28. This contention cannot be supported. First, the City fails to cite any authority which would require Judge Wilper to specifically reference Section 7 of the CMA in his Findings or Conclusions.

Second, the Court issued the following Conclusion:

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[321] Alternatively the Idaho Tort Claims Act should not be held applicable to compulsory counterclaims filed in response to a governmental entity's complaint. *See, e.g., Urban Renewal Agency of the City of Coos Bay v. Lackey*, 275 Or. 35, 549 P.2d 657 (1976); *US v. Martech USA, Inc.*, 800 F. Supp. 865, 866 (D. Alaska 1992); *Spawr v. US*, 796 F.2d 279, 281 (9th Cir.1986); *US v. Taylor*, 342 F. Supp 715, 717-718 (D. Kan.1972).

J. Petra is entitled to an equitable adjustment of its Construction Management fee and contract reimbursable expenses based on the increased services that Petra performed.

This Conclusion directly tracks the language contained in Section 7 of the CMA.

Third, the District Court made the express Finding necessary to support the Conclusion reached, by utilizing language directly out of Section 7 of the CMA:

187. The City knew the project had increased in size, scope, cost and complexity by August 2007 because the City had so directed.

The District Court did not commit error as suggested by the City.

D. The District Court Did Not Commit Legal Error in Concluding That Petra did not Owe a Fiduciary Duty to the City.

The City argues that the express terms of the CMA created a fiduciary relationship between Petra and the City. App.Br.43.[322]

The District Court's Conclusions regarding whether there was a fiduciary relationship between the parties state as follows:

P. The Contract Documents which define the parties' respective promises and duties were clear and unambiguous. Petra expressly accepted that the contract established a relationship of trust and confidence between itself and the City.

Q. This Court has previously ruled that Petra's relationship with the City was not that of a fiduciary. The City has asked the Court to reconsider that decision.

R. The Court has again considered whether section 1.1 of the CMA may reasonably be construed as having created a fiduciary relationship between the parties. If so, and if the contrary construction is also reasonable, the ambiguity favors Petra rather than the City because the City employed the attorney who drafted the contract.

S. Alternatively, if this Court's previous ruling on the fiduciary question was in error and if the language in section 1.1 clearly and unambiguously shows the parties intended that Petra was the City's fiduciary, Petra's dealings with and on behalf of the City did not violate that duty.[323]

While case law exists in Idaho that describes the concept of fiduciary duty in terms of

[322] Breach of fiduciary duty was never pled by the City and was not tried by consent of the parties, as Petra objected each time it was brought up by the City, as required by I.R.C.P. 15(b) and *Lindberg* v. *Roseth,* 137 Idaho 222, 226, 46 P.3d 518, 521 (2002).
[323] R.8286-Conclusions.

"trust and confidence," the City does not cite a case or provide any authority for the proposition that a contract can create a fiduciary duty solely because it contains the phrase "trust and confidence." The City simply cites cases containing the terms "trust and confidence." App.Br.44 (citing *High Valley Concrete, LLC v. Sargent*, 149 Idaho 423, 234 P.3d 747 (2010); *Gray v. Tri-Way Const. Servs., Inc.*, 147 Idaho 378, 386, 210 P.3d 63, 71 (2009); *Mitchell v. Barendregt*, 120 Idaho 837, 844, 820 P.2d 707, 714 (Ct. App. 1991)). These cases describe specific relationships; they do not support the City's argument that use of the terms alone in a contract is sufficient to create a fiduciary duty.

The City also cites *Sorensen* v. *Saint Alphonsus Regional Medical Center, Inc.,* 141 Idaho 754, 118 P.3d 86 (2005), where the Court held a fiduciary relationship existed between retirement plan administrators and beneficiaries. In that case, the contract between the parties plainly stated: "[t]he people who are responsible for the operation of the Retirement Plan are called 'fiduciaries' of the plan. They have a duty to operate your plan prudently and in the interest of you and other plan participants and beneficiaries." *Id.* at 765, 118 P.3d at 97. Notably, the term "fiduciaries" does not appear in the CMA which was drafted by the City.

This Court has previously held that "mere respect for another's judgment or trust in this character is usually not sufficient to establish such a relationship." *Idaho First Nat. Bank* v. *Bliss Valley Foods,* 121 Idaho 266, 278, 824 P.2d 841, 853 (1991). This distinction is particularly important since this Court has not held that the relationship between a construction manager and an owner is fiduciary in nature. If the City intended to create a fiduciary duty by contract, it could have simply used the term "fiduciary." In fact, in all the documents in the voluminous record—generated prior to the commencement of litigation—there is not a single use of the word "fiduciary" with regard to the relationship between the City and Petra. The word "fiduciary" does not even appear in the City's Complaint.

Further, the issue whether Petra owed a fiduciary duty to the City is immaterial to this appeal. There is substantial evidence in the record to support the District Court's alternative conclusion that even if the "trust and confidence" language alone created a fiduciary duty

"Petra's dealings with and on behalf of the City did not violate that duty."[324] The City does not acknowledge or address this alternative ruling in its Brief.

Before the District Court, in it failed attempt to support a breach of an alleged "fiduciary" duty, the City raised PAC-WEST billing, TMC winter conditions billing, Rule Steel, and Petra's billing of certain office expenses. In each instance, the City was fully apprised of the facts, and reached its own conclusion as to how to address those facts.

Regarding the PAC-WEST billing, there is no dispute that Petra's superintendent made a $4,537.50 mistake with regard to one elevation. But the City was fully informed of the mistake and made its own decision, notwithstanding that knowledge, to submit payment on the PAC-WEST billing. The evidence at trial established that Tom Coughlin, informed Keith Watts about this issue.[325] Moreover, at trial the City produced from its own records the PAC-WEST invoice that contains the notation: "PAC-WEST was given the wrong benchmark elevation to use in setting the floor. Petra's supt. Confused the mark."[326] Notwithstanding this notice, the City paid the PAC-WEST change order billing with full knowledge of all the relevant facts and after all necessary City reviews and approvals.

Regarding Rule Steel, the City continues to allege that Petra was involved in dishonesty with regard to the Rule Steel delay. The facts are clear: The City ultimately approved the Change Order No. 3 with full knowledge of the relevant circumstances. For a more detailed analysis of the Rule Steel change order, see Section L below.

Regarding the TMC winter conditions, the City's allegation is simply contrary to the evidence that was accepted by the District Court. The facts at trial establish that TMC was the only prime contractor that had a separate winter allowance built into its contract.[327] The winter allowance was accounted for in TMC's schedule of values, but it was not a separate line item.[328] In addition, Petra set up a $200,000 winter allowance for the entire Project. McGourty stated

[324] Conclusion S.
[325] Testimony of Tom Coughlin, at 8689:19-8963:25; Exhibit 583, pp. 1 and 39.
[326] Exhibit 583, p. 39.
[327] Exhibit 2018.
[328] Testimony of Tim McGourty, at 7844:1-7845:1.

that collection of the $40,000 was a mistake and that TMC was willing to reimburse the City the $40,000.[329] Despite the City's insinuation that a "cover up" occurred, the facts establish that an honest mistake was made. These factual circumstances are confirmed by the Court's Findings 99-101, which Findings are supported in the record.

Regarding the General Conditions billing, the City alleges that Petra billed the City for its own expenses. Yet General Condition reimbursables are noted in Section 4.7.1 of the CMA and were identified in a construction management plan estimate that was issued in February 2007. Some of the specific items mentioned in that portion of the contract included transportation expenses, office supplies, phones and photocopies. Transportation and phone charges were never billed to the City. Office supplies and photo copies were properly billed as part of the LEED documentation and certification. The City reviewed the charges in detail and paid these.

Very simply, the facts do not establish a breach of fiduciary duty, nor a breach of any "trust and confidence" that Petra accepted under the terms of the contract. The facts do establish that the City and its agent LCA, were intimately involved with and in fact controlled every aspect of the Project thus dispelling any factual support for the contention that a fiduciary duty existed. Moreover, a detailed review of those facts confirm the District Court's Conclusion that even if a fiduciary duty existed, it was not breached.[330] While there may have been some mistakes in billing (not surprising in a Project of this magnitude) the City's claims that Petra acted dishonestly or "hid" overcharges from the City are false. Mistakes are typically found during the audit that takes place at the end of every project. On this Project the audit never occurred due to the filing of litigation by the City. The "mistakes" total $92,000 at most – the TMC winter allowance of $40,000 and the $52,000 offset allowed by the District Court. This equals 4 tenths of 1% of the total cost of the project.

[329] Testimony of Tim McGourty, at 7691:9-12.
[330] Conclusions Q, R, and S.

E. The District Court Properly Found that the Parties' Agreed on an Errors and Omissions Policy in Lieu of a Performance Bond.

The City argues that Petra's procurement of an errors and omissions liability insurance policy in lieu of a performance bond was a "material breach" of the CMA. App.Br.49-50. And apparently in the alternative the City argues that the CMA is "void" on the grounds of public policy because it furthered a "matter or thing prohibited by statute." These arguments find no support in fact or law.

The District Court made the following factual findings as to the performance bond issue:

> 9. Consistent with the parties' agreement, Petra provided the City a $2 million errors and omissions liability insurance policy.
>
> 10. The 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.[331]

These Findings are supported by substantial evidence in the record. The testimony at trial establishes that the City requested an errors and omissions policy instead of a bond. Petra informed the City (which has three staff attorneys) about the payment and performance bond requirement.[332] The City and Petra agreed that Petra would provide an errors and omissions policy instead of a performance bond, saving the City additional expense.[333] There is no error.

As to the City's argument that the procurement of an errors and omissions policy in lieu of a performance bond was a "material breach" by Petra, the CMA made a performance bond optional and placed the onus on the City as the owner to request a performance bond. Section 10.3 states "*If and when requested by Owner,* the Construction Manager shall provide Owner with a payment and performance bond . . ." Counsel for the City drafted this provision. Thus, Petra performed by the plain terms of the CMA and there was no breach, let alone a material breach of the CMA.

Likewise, although I.C. § 54-4512 requires a performance bond, as found by the District

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[331] Findings 9, 10.
[332] Testimony of Gene Bennett, at 6539:15-23.
[333] Testimony of Gene Bennett, at 5834:16-5835:13.

Court, it places the burden on the City as owner to formally require the bond be issued: "A licensed construction manager or firm providing public works construction management services *shall be required* to post a payment and performance bond . . ." *See* I.C. § 54-4512 (emphasis added). However, even if the onus were on Petra, the failure to procure a performance bond does not somehow make the CMA "forbidden by law." Unlike the ordinance in *Kunz v. Lobo Lodge, Inc.*, 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct. App. 1990), I.C. § 54-4512 is not penal as it does not on its face prescribe conduct that is declared criminal. As stated in *Porter v. Canyon County Farmers' Mut. Fire Ins. Co.*, "courts will treat the contract as valid, unless it is manifestly the intention of the statute to make it void." 45 Idaho 522, 263 P. 632, 634 (1928).

Finally, no matter what conclusion the District Court reached with regard to the bond issue, there can be no legitimate claim to reversible error because it is beyond dispute the City did not suffer any damage as a result of the parties' agreement to an errors and omission policy in lieu of a performance bond.[334]

F. The District Court Properly Found that the City Took Occupancy of the City Hall Within the CMA's Contemplated 18 Month Project Schedule.

The City argues that the District Court erred "by failing to apply the time is of the essence standard" to what is characterizes as an "incontrovertible breach of the CMA" as to the Project Schedule. *See* App.Br.58-59. This argument lacks merit because there was no breach of the CMA—City inspectors issued certificates of occupancy and the City took occupancy of the new City Hall within the 18 month schedule for completion of construction services as set forth by the CMA.[335]

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[334] The City cites at App.Br.49, *Vienna Metro LLC v. Pulte Home Corp.*, 786 F. Supp. 2d 1076, 1081-82 (E.D. Va. 2011) for the proposition that "[T]here are no exceptions" to the requirement that construction managers post payment and performance bonds. Vienna Metro does not so provide, does not use language "there are no exceptions", and does not even address payment or performance bonds. Rather, the Court held that a material breach of contract occurred, because "time is of the essence language" existed in the contract, and the construction was not completed as of 2011, even though the contract required completion by 2007. In the instant case, the City Hall was completed within the contractually set 18 month construction phase. Moreover, unlike the present case, the contract in Vienna Metro required timely construction of each individual construction phase.

[335] Exhibit 543; Exhibit 543(a); Testimony of Gene Bennett, at 5702:6-5705:18; Testimony of Richard K. Bauer, at 9487:9-9489:8; Exhibit 755.

The District Court made the following factual findings as to the Project Schedule:

> 26. The agreement did not contain a specific time schedule for construction, but provided for a six month pre-construction phase and an eighteen month construction phase.
>
> ...
>
> 51. On May 22, 2007, Petra issued an updated schedule to account for the delay caused by the contaminated soil. The new occupancy date was scheduled for August 27, 2008.
>
> 52. On January 29, 2008, Petra presented the City with another updated schedule with an occupancy date of October 10, 2008, still within the originally contemplated eighteen month construction time estimate.
>
> ...
>
> 70. City inspectors issued certificates of occupancy and the City took occupancy on October 15, 2008.

These findings are supported by substantial evidence in the record.

Gene Bennett testified that Section 6.2.2 of the CMA provides "Owner's schedule (i.e. six months Preconstruction Phase Services, eighteen months Construction Phase Services." That is the only Owner's Project Schedule in the Contract Documents.[336]

The conceptual schedule issued in January of 2007 had an August 2008 completion date. The City occupied the building in October. The difference was due to delays arising from LEED certification, design changes, Rule Steel's delay, the large number of ASI's and RFI's, the weather, and the unforeseen soil contamination. The key fact is not whether various components of the schedule were adjusted—they were—the material fact is that the original conceptual Project Schedule was 18 months and Petra guided the Project to completion in little more than 17 months despite the numerous issues identified above and despite the numerous City driven changes to the design and scope of the Project.

Moreover, contrary to the City's argument, construction did not begin on April 2, 2007, due in large part to the City itself. The design of the Project, under the control of the City and LCA, evolved throughout late 2006 and into 2007. The bidding process was not even completed

[336] Testimony of Gene Bennett, at 5760:2-10.

until March 2007 and it was not until April 2007 and later before LCA prepared and obtained signatures to the contracts with the prime contractors.[337]

In sum, Petra fulfilled its contractual requirement to bring the project to completion in less than 18 months. No other schedule was applicable. "If a contract is clear and unambiguous, the determination of the contract's meaning and legal effect are questions of law, and the intent of the parties must be determined from the plain meaning of the contract's own words." *Johnson v. Lambros*, 143 Idaho 468, 473 147 P.3d 100, 105 (Ct. App. 2006). The CMA provided 18 months for completion of construction services and as the District Court found, Petra met that requirement.

G. The District Court Properly Concluded That an Accounting Error Equal to Less Than 1% of the Project Cost Was Not a Material Breach of the CMA.

The City erroneously argues that the District Court's finding of a $40,000 overpayment to TMC, Inc. compels the conclusion that Petra materially breached the CMA. *See* App.Br.54-55.[338] This argument significantly overstates one Finding of the District Court, ignores other Findings of the District Court,[339] and lacks any merit. The District Court properly concluded that that there was no material breach of the CMA and there is substantial and competent evidence to support the District Court's Findings.

The District Court made the following Findings as to the mistaken overpayment to TMC, Inc.:

> 99. TMC, Inc., the City's prime masonry contractor, received a $40,000.00 overpayment due to Petra's failure to attribute that sum to TMC's budget. Instead, it was approved for payment by Petra from the project's winter conditions budget. The error was discovered during a forensic audit of the project costs months after the project was completed.
>
> 100. TMC's contract differed from those of the other prime contractors in that TMC's contract uniquely contained a provision for winter conditions. All other

[337] Testimony of Gene Bennett, at 5448:12-5449:8; Testimony of Mike Wisdom, at 6962:1-22.

[338] The City also asserts that Petra breached a fiduciary duty in the accounting error. For the reasons stated in Section D, Petra did not have a fiduciary relationship with the City, and even if it did, Petra acted consistent with that duty.

[339] In Finding 101, the Court acknowledged that an error occurred, but concluded that it was just that—an error, not a material breach.

prime contractors' claims for winter condition costs were charged against the $200,000.00 winter allowance budget.

101. While this was a substantial error on the part of Petra, it was nothing more than an error. Petra did not intend to deceive the City. TMC's President Tim McGourty testified at trial that he realized that this was an overpayment and that he would reimburse the City.

From these undisputed factual findings, the District Court made the following legal conclusions:

A. The City has failed to prove its breach of contract claim against Petra.

...

D. The cost to repair alleged construction defects and the cost to reimburse the City for a $40,000.00 accounting error equal a sum less than 1% of the original project budget of $12.2 million, much less the final cost of $21.3 million.

...

G. TMC is not a party to this lawsuit. The court has no authority in the context of this case to order TMC to reimburse the City. During the trial, TMC's president testified that he would reimburse the City for the City's overpayment to his company. There is nothing in the record since that testimony to show whether or not TMC has or has not tendered the $40,000 to the City; whether TMC is unwilling or unable to do so; or whether or not the City has asked or demanded that TMC do so. In any event, the City has not only the right to ask for the money, but the duty to do so in order to mitigate its damages.[340]

"A material breach is more than incidental and touches the fundamental purpose of the contract, defeating the object of the parties entering into the agreement." *Borah v. McCandless*, 147 Idaho 73, 79, 205 P.3d 1209, 1215 (2009); *see also Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 181, 45 P.3d 829, 837 (2002) (a material breach "destroys the entire purpose for entering into the contract"). Section 2.1.5 of the CMA requires Petra to take responsibility for "improper acts." The District Court concluded that this accounting error was not such an act, but instead was an honest accounting error that should be and will be remedied by TMC, Inc. An accounting error, equal to less than 1% of the original contract price does not destroy the entire

[340] The City had a duty to mitigate its damages, if any, and did not meet that duty. *See Belk v. Martin*, 136 Idaho 652, 660, 39 P.3d 592, 600 (2001) ("The duty to mitigate, also known as the 'doctrine of avoidable consequences,' provides that a plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts....").

purpose of the parties' contract, a $21 million office building.[341]

H. The District Court Correctly Calculated the Amount of Overcharge.

The City objects to the District Court's calculation of $52,000.00 in overcharges. App.Br.46-47. The City contends the Court ignored clear evidence of "multiple categories and costs for which Petra "overcharged" the City." The City's objection is contrary to Idaho law on the standard of review of the District Court's Findings. This Court stated in *Browning v. Ringel*, 134 Idaho 6, 14, 995 P.2d 351, 359 (2000) "[T]he trial court is not required to provide a lengthy discussion on every single piece of evidence and every specific factual issue involved in the case." And authority analyzing the federal rule which is substantively identical to I.R.C.P. 52(a), states:

> As a rule, the trial judge is not required to recite every piece of evidence and either adopt it or reject it, or to sort through and discuss the testimony of each witness. Furthermore, the trial court may disbelieve the testimony of witnesses without giving specific reasons for doing so, provided that the record supports the conclusion that the court made adequate credibility determinations.
>
> The fact that counsel for a party sincerely contended for a position does not mean that findings must be made on that position. A decision between the positions of two litigants necessarily rejects contentions made by one or the other. The trial court's failure to discuss each party's contentions does not make the findings inadequate or suggest that the court failed to understand the propositions.

Moore's Federal Practice 3d, § 52.15[2][b].

Here, the trial court sorted through conflicting evidence of inadvertent overcharging and concluded that $52,000 was a reasonable assessment of the overcharges.[342] The City's objection lacks merit and should be rejected.

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[341] McGourty summed it up best: "In my letter I clearly identified that we were willing to take care of that. Obviously, in the middle of these excessive and outlandish criticisms, we haven't done anything yet. I told Tom [Coughlin] point-blank, we have no issue with that. The minute he called me, accounting went through it. They brought it in front of me. We identified it. We responded back to Petra and said: Here is what happened. The common practice in our operation is winter protection is billed every month through the winter. Accounting was not aware of that allowance. It didn't get identified, and it was simply an oversight. You don't exist for 30-some years being dishonest." Testimony of Tim McGourty, at 7847:18-7848:8.

[342] Findings 92-95.

I. The District Court Did Not Apply a New Standard to Petra's Duties.

With regard to the District Court's Finding 166, that a "missing enclosure strip and inadequate calking in the area of the Mayor's suite and reception area allowed air, water, and insects to enter the interior of the building," the City is simply wrong in asserting that the Court applied a new standard that did not exist in the contract. The Court noted that the alleged defect was "not readily accessible for inspection."[343] It is important to note that by the parties' agreements[344] the obligation to inspect was not imposed upon Petra, but was imposed the City. The Court noted that the inspectors retained and/or employed by the City did not see the alleged defect. No one included the alleged defect on a punch list. By its Findings and ultimate Conclusions, the Court did not create a new standard. The Court simply noted that the alleged defect, to the extent it even existed, was simply not noted by anyone during the course of inspection and that the reason it was not noticed was because the area was not "readily accessible for inspection." Ultimately, to the extent the defect actually existed, the Court correctly determined that any damage or defect was a warranty item.[345]

J. Petra Fulfilled Its Duties Under the CMA, Including Addressing Non-Conforming Work.

The District Court's determination that Petra did not breach its duties under the CMA is supported by the substantial evidence cited throughout this Brief. Notwithstanding this evidence the City claims that Petra failed to reject nonconforming work. App.Br.52. This argument completely ignores among other things the extensive punch list process. There is substantial evidence demonstrating that Petra coordinated and assisted LCA and the City in bringing the punch-list process to completion.[346] In fact, the City criticized Petra for having an extensive

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[343] Finding 166.
[344] *See, e.g.,* Exhibit 2003, Section 9.2.5.
[345] Furthermore, the Court was not persuaded that the defect alleged by the City caused damage.
[346] Exhibit 548; Exhibit 872; Exhibit 871;Testimony of Ed Ankenman, at 8097:7-8099:13; Testimony of Tom Coughlin, at 8796:20-24, 8731:1-7; Testimony of Tom Coughlin, at 8723-8724:3; Testimony of Steve Christiansen, at 8220:18-8225:4; Testimony of Tom Coughlin, at 8724:4-8730:21; Exhibit 626; Testimony of Tom Coughlin, at 8695:9-8736:3.

punch list when the Project was substantially complete.[347] The City cannot have it both ways. Did Petra overlook non-conforming work? Or, did Petra catch too many instances of non-conforming work? Comprehensive punch lists were created and closed out under the guidance of Petra, LCA, and the City's own inspectors. This process proved that Petra observed the work and rejected non-conforming work. If there is a latent, and thus an unobservable defect, A201 unambiguously placed the responsibility on the prime contractor who actually performed the work to fix the defect under its warranty.[348]

K. Petra Did Not Breach the CMA Regarding Substantial Completion.

Substantial completion occurs when "the work is sufficiently complete in accordance with the contract documents so that the owner can occupy or utilize the work for its intended use." 2 Bruner & O'Connor Construction Law § 5:182. There is no dispute that substantial completion occurred. The City issued certificates of occupancy, moved into the building, and continued conducting City business.[349] The Mayor, in early November, proclaimed the "building is ours now" and directed that the City was to take charge.[350]

In an attempt to convince the District Court that warranties never existed (to excuse the City's failure to administer its rights under the warranties), the City accused Petra of acting dishonestly with an intent to deceive in issuing "so called" warranty letters and concocting nothing more than a "story" about the actual substantial completion date of October 15, 2008. As discussed in detail in this Brief, there can be no doubt that warranties issued by each prime contractor were in effect, and effective October 15, 2008.[351] The failure of the City's agent, LCA, to issue actual certificates of substantial completion to each of the prime contractors,

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[347] The City admits that Petra, LCA, and the City caught 2,692 non-conforming items prior and after substantial completion. These punch-list items-which did not interfere with the City's ability to put the building to beneficial use-were all completed and closed out.
[348] Exhibit 2017, p. 28 Section 4.6.6 of the A201, General Conditions.
[349] Exhibit 543; Exhibit 543(a).
[350] Exhibit 602, p. 1.
[351] Testimony of Steve Christiansen, at 8301:23-8302:1; 8353:15-19; Exhibit 545A; Testimony of Ted Frisbee, Jr., at 6849:17-21; Testimony of Tim McGourty, at 7703:24-25; Testimony of Rob Drinkard, at 7906:6-7907:13; Testimony of Lenny Buss, at 8634:5-23; Testimony of Gene Bennett, at 5642:16-5643:9.

despite Petra's request, did not impact or cause any harm to the City. The City did not present any evidence that it pursued a prime contractor on a warranty item, and that prime contractor refused to recognize that warranty because a certificate of substantial completion did not exist. The City, LCA, and Petra all agree that the City took beneficial occupancy of the building on October 15, 2008—the agreed upon date of substantial completion.

L. Petra Properly Assessed Liquidated Damages.

The City claimed that Petra breached the CMA, by not recommending liquidated damages against all of the prime contractors. Steve Amento, a City-designated expert whose credentials were significantly questioned, testified that Petra should have recommended $1,650,000 in liquidated damages. According to Amento, the Project was delayed 75 days, from August 1, 2008 to October 15, 2008 and that none of the delay was caused by the City, or by circumstances beyond the control of the prime contractors. Therefore, Amento theorized Petra is liable to pay the City $1,650,000 in liquidated damages and further that Petra should have recommended liquidated damages against all of the prime contractors (75 days x 44 contractors x $500 = $1,650,000).

The City failed to meet its burden of proving by a preponderance of the evidence that Petra should have recommended these additional liquidated damages. Any delay in the completion of the Project was due to the City's acts or omissions, or was otherwise excusable delay, with the exception of the Rule Steel delay for which Petra, with full approval by the City, negotiated liquidated damages of $14,000, and a contract extension of due to excused delays.

In any event, the City's theory in calculating its "lost" liquidated damages failed as a matter of law because delay damages are assessed on a per day basis and only against the contractor causing the delay.[352]

The City agreed to an August 28, 2008 prime contractor substantial completion date.

[352] Under the City's approach, $500 in liquidated damages could never occur. If 1 contractor caused 1 day of delay, the City would seek liquidated damages of $22,000—1day X 44 contractors X $500. This is a nonsensical position. Such an analysis would preclude Petra from seeking reimbursement from the 43 contractors whose conduct did not cause any delay.

This date was set for the prime contractors' work to be completed and allowed six weeks for punch list and LEED air flush prior to the City's occupancy. Thereafter, the City, LCA and Petra agreed to an occupancy date of October 15, 2008 and to have that as the unified substantial completion date for most contractors. This agreement maximized the City's benefits under the warranties. The City waived its right to assess additional liquidated damages and did so with full knowledge of all the circumstances. The City's liquidated damage claim is thus speculative and not supported by the evidence.

Petra recommended that the City assess liquidated damages against the only contractor that caused unexcused delay to the critical path schedule.[353] The City assessed Rule Steel $14,000 in liquidated damages as part of Rule Steel's Change Order No. 3.[354]

Rule Steel began its work July 30, 2007, instead of July 16, 2007, the original start date.[355] Rule Steel had a substantial completion date of October 19, 2007.[356] Rule Steel had a total delay of approximately four months, achieving substantial completion February 8, 2008.[357] Petra determined that not all the delay was Rule Steel's fault.[358]

Keith Watts issued a document entitled Change Order No. 1 for Rule Steel to address additional work done pursuant to ASI's 7, 8, 18, 19 & 23.[359] When Watts delivered Change Order No. 1 to Petra, it already contained the signatures of the City's representatives, but did not contain the signatures of Petra or Rule Steel and was not a fully executed change order.[360]

Petra forwarded the copy of Change Order No 1 to Rule Steel. Rule Steel handwrote in a 27-day time extension request to address ASI's 7, 8, 18, 19, and 23.[361] Tom Coughlin of Petra then crossed this out and made the notation "TBD" because Petra had determined to keep the

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[353] Testimony of Gene Bennett, at 5714:14-5716:2; Testimony of Richard K. Bauer, at 9591:9-12.
[354] Exhibit 2117.
[355] Testimony of Gene Bennett, at 5709:2-11.
[356] Testimony of Gene Bennett, at 5711:4-12.
[357] Testimony of Gene Bennett, at 5711:18-5713:9; Testimony of Tom Coughlin, 8767:20-8768:5; Exhibit 2117, pp. 6-7.
[358] Exhibit 2117, pp. 6-7; Testimony of Tom Coughlin, at 8764:18-8768:5; Testimony of Gene Bennett, 5711:18-5713:9.
[359] Exhibit 2044; Testimony of Keith Watts, at 2863.
[360] Testimony of Tom Coughlin, at 8756:24-8759:7; Exhibit 2044.
[361] Testimony of Tom Coughlin, at 8757:19- 8759:7; Exhibit 2082.

time extension issue in abeyance until Rule Steel had completed its work on the Project.[362] This was why Change Order No.1, which addressed ASI's 7, 8, 18, 19, and 23, did not contain a time extension for Rule Steel.[363]

After making the notations, Coughlin spoke with Ron Allen of Rule Steel and sent the document back to Keith Watts. Watts and Coughlin spoke about the Change Order (containing the notations) and Petra's view that the issue should be "settled up to include everything: the time Rule had requested, the time caused by Rule's delays, and weather issues." Coughlin informed the City and Rule Steel that these matters would have to be determined and agreed to by all parties.[364]

Petra determined that out of the four-month delay, two months of the delay was due to design changes, one month was due to weather, and approximately one month was unexcused delay.[365]

Petra recommended Change Order No. 3, changing Rule Steel's substantial completion date to January 11, 2008.[366] Since its actual date of substantial completion was February 8, 2008, Petra recommended assessing liquidated damages of $14,000 for 28 days of unexcused delay, reflecting the negotiated resolution.[367] Petra's goal was to settle the issue in the most "expeditious and fair way possible for both the City and Rule Steel."[368]

In an extensive memoranda Petra communicated to the City all the facts surrounding the Rule Steel issue and Petra's recommendation for a negotiated settlement.[369] The City Council approved the resolution reflected in Change Order No. 3.[370] The District Court's Findings confirm these facts.[371]

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[362] Testimony of Tom Coughlin, at 8759:11- 8760:1; Exhibit 2082; Exhibit 2117, pp. 6-7.
[363] Exhibit 2117, pp. 6-7; Exhibit 2082.
[364] Testimony of Tom Coughlin, at 8762:24-8763:4.
[365] Testimony of Gene Bennett, at 5711:18-5713:9; Testimony of Tom Coughlin, at 8764:18-8766:14; *see also* Exhibit 2117, pp. 6-7; Exhibit 2035.
[366] Testimony of Tom Coughlin, at 8766:15-8768:5; Exhibit 2117, pp. 1-5.
[367] Exhibit 2117, p. 7.
[368] Testimony of Tom Coughlin, at 8766:1.
[369] Exhibit 2305; Exhibit 2117; Exhibit 527, p. 17; Testimony of Tom Coughlin, at 8762:24-8763:13.
[370] Exhibit 2117, p. 1.
[371] Findings 173-175.

M. The District Court Correctly Determined That the Damage Claims Asserted by the City were Speculative and Unsupported by the Evidence of Record.

The District Court concluded that the damages that the City sought to attribute to Petra were speculative. To the extent that the damages sought by the City were based upon evidence or testimony that conflicted with the evidence presented by Petra, it was the District Court's responsibility to resolve those conflicts. The Findings will not be disturbed upon appeal.

(1) Liquidated Damages.

The City sought liquidated damages in the amount of $1,650,000.00 suggesting that since it was not capable of determining which exact contractor caused the delay, all are responsible, all must pay and all must pay the full amount of liquidated damages that are assertable. This analysis certainly misstates the appropriate inquiry and it was the analysis that led the District Court to conclude the damages sought by the City were speculative. The focus of delay damage must be upon how many days over the scheduled completion date the owner is without use of the building – delays by individual contractors are not the controlling determination unless those delays impact the ultimate 18 month construction time frame. Moreover, delay damages are calculated under the A101 on a per day basis, attributable to delay by a contractor that causes a delay in the date by which the owner gains beneficial use of the building. The only properly chargeable delay in this case was that of Rule Steel which was discussed earlier.

There is simply no logical, legally supportable basis for the City's approach multiplying the total 44 prime contractors by the $500 per day liquidated amount and imposing that amount on the 75 days that the City contends the construction was delayed.

(2) Winter Conditions.

The City claimed $166,154.00 in winter conditions. This claim ignored the fact that a $200,000.00 winter conditions fund was set up specifically authorizing the reimbursement of winter condition expenses. This contention further ignores the fact that since construction on the Project was expected to extend 18 months, work on the Project certainly would extend through

one winter season. Amento, the City's expert on damages, simply added up all of the winter conditions and expenses to reach the $166,154.00 figure and then attributed all of those expenses to Rule Steel's delay. However, the delay by Rule Steel did not create the need for constructing the City Hall during the winter.[372] The Project would have required winter heat regardless of whether the steel was completed in January or February. In fact, had it not been for the effort of Petra in managing the prime contractors' work, and mitigating the impact of the substantial changes to the Project and the effects of weather delays, the City would have incurred additional winter condition expense in late 2008. As it was, however, Petra's management allowed the Project to be completed on October 15, 2008, avoiding a second year of winter condition expense. The District Court properly rejected the testimony of Amento in the face of the conflicting and compelling contrary evidence.

(3) Alleged Failure to Properly Administer the Contracts.

The City alleged at trial that Petra approved $543,387.00 in change orders without providing back up. This contention is apparently based upon a brief exchange between the City's counsel and the City's witness Weltner:

> And, Sir, based on your review, did you understand that Petra submitted $543,837.00 of additive change orders without any back up material?
>
> A. Yes.[373]

This testimony is not evidence that establishes the City's contention. This testimony is nothing more than speculation. The testimony lacks foundation. The testimony is simply that of the City's lawyer. The ultimate conclusion that the City asks this Court to accept must be rejected in the face of Exhibits 2013, 2033, 2037, 2040, 2040-2052, 2063-2071, 2075, 2077, 2078, 2079, 2080, 2081, 2082, 2083, which are change orders supported by appropriate and necessary back up.

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[372] Of the four month steel delay, two months were due to design changes, one month was due to weather and one month was due to Rule Steel.
[373] Tr. 3863:24-3864:3.

(4) Additional Damages Claims Were Properly Rejected by the Trial Court.

The total damage that the City sought at trial was $8,590,761.00. This represents almost 40% of the total cost of the Project. Beyond the "liquidated damages," the "winter conditions," and the "alleged failure to properly administer change orders," the remaining damage sought by the City was speculative, and was controverted by Petra, allowing the District Court to judge the credibility of, and sufficiency of the evidence. By way of example, the City's witness Tim Petsche estimated the cost to install reheat in the central core of the building would be $1.5 million while other testimony at trial established that reheat was actually installed.[374] The City's witness Bob Waltner estimated that it would cost $1,265,000.00 to correct alleged defects in the masonry, while McGourtey provided contrary testimony that the cost would be $5,000.00 - $6,000.00, and further noted that such cost would be a warranty item.[375]

The approximate $4 million remaining in damages are summarized in the chart appended to this Brief as Appendix 1 which establishes, by citation to the record, evidence that fully supports the District Court's damage conclusions that "damages attributable to Petra were speculative" and "alleged construction defects were relatively minor."[376]

N. The District Court Did Not Commit Error in Allowing the Testimony of McGourty.

The City contends that the District Court committed error in allowing the testimony of McGourty of TMC regarding the amount that McGourty anticipated would be incurred to repair the masonry at the City Hall. App.Br.66. The City asserts that McGourty was not timely disclosed and that his testimony was an improper and untimely expert opinion. Both contentions lack merit.

First, the delay in the disclosure of McGourty was the result of the City's own

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[374] Testimony of Mike Wisdom, at 6915:2-10; Testimony of Mike Wisdom, at 6944:18-6946:7; Testimony of Ted Frisbee, Jr., at 6849:4-16.
[375] Testimony of Tim McGourty, at 7751:5-7752:16.
[376] Conclusions B and C.

untimeliness in disclosing its damage testimony and evidence.[377] Petra identified, on August 21, 2009, as a potential witness "a representative of TMC" in response to the City's interrogatories. However, it was not until forty-four (44) days before trial, on October 18, 2010, that the City disclosed its damage theory and the amount that it was seeking.[378] Eleven days later, in response to the City's disclosure, Petra disclosed McGourty as the specific TMC witness that would testify. This issue was the subject of an extended colloquy between the Court and counsel with the Court exercising its discretion to allow the witnesses to testify.[379] *See Harris, Inc. v. Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 770, 264 P.3d 400, 409 (2011) (noting that this Court reviews a trial court's decision whether to admit or exclude evidence under an abuse of discretion standard).

Second, the City contends that it was without relief, in that it could not depose McGourty. However, there is nothing in the record to indicate that the City sought such relief either from Petra's counsel, or failing that from the Court.

The City further contends that the District Court committed error by allowing McGourty to provide untimely and undisclosed "expert testimony." The City recognizes that the admission of evidence by a trial court is an issue addressed to the Court's discretion, but suggests that the District Court abused that discretion because McGourty had "no basis for a lay opinion" because he had "no factual knowledge", "no perceptions", and "no foundation." App.Br.68. A review of the trial testimony of McGourty disputes each of the City's contentions.[380] McGourty testified that after the City brought its concerns regarding masonry to the attention of TMC, at that time, McGourty and an estimator inspected the building, determined the repairs that needed to be completed, and estimated that those repairs would cost between $5,000-$6,000. The Court properly allowed him to provide "factual" testimony—what he did; what he prepared; what it was based on; what the estimate was. All in response to concerns raised by the City.

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[377] Petra twice sought to exclude as City's damage evidence due to late disclosure.
[378] At that time, its claim was in the amount of $4,322,708 including $1,265,000 for the masonry, although that damage number changed dramatically throughout the trial.
[379] Tr. 7447:1-7457:25.
[380] Tr. 7745-7752.

Alternatively, the testimony of McGourty was properly admissible as "lay" opinion under Idaho R. Evid. 701. His statement as to the cost to repair the alleged problems with the masonry was rationally based on his perceptions and was helpful to a clear understanding of his testimony. He was not allowed by the Court to criticize the City's expert witness, nor to criticize the manner in which the City calculated its damages. He simply stated the fact that after his review of the City's complaints regarding the masonry, he developed an estimate of what it would cost to repair. The District Court did not abuse its discretion by allowing the testimony from McGourty.

O. The District Court Did Not Commit Error in Denying the City's Motion to Amend its Complaint to Assert Additional Claims, Including a Claim for Punitive Damages.

On March 31, 2010, the City filed its motion to amend its complaint to add additional substantive claims asserting that Petra committed fraud, fraud in the inducement, was unjustly enriched and that Petra's conduct justified an amendment to seek recovery of punitive damages. The Court conducted a hearing on the motion and on September 27, 2010 entered its Order denying the City's motion for leave to file a First Amended Complaint to Add a Claim for Punitive Damages.[381]

First, the City contends that the Court applied the wrong standard to its request to add punitive damages, suggesting that the Court applied a "summary judgment standard" to its motion to amend. App.Br.72. The contention cannot be sustained. In addressing the City's motion, the Court noted:

> 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 [sic] 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.[382]

The Court then noted the City must establish a "reasonable likelihood of proving oppressive, fraudulent, malicious, or outrageous conduct by clear and convincing evidence," citing I.C. § 6-

[381] R.6521-6526.
[382] R.6523.

1604(1)(2). The Court concluded that it was 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."[383] The Court thus clearly recognized that its decision was one of discretion, that it must consider the record as a whole and from that, applied the correct legal standard to the City's motion. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 423, 95 P.3d 34, 41 (2004); *Arnold v. Diet Ctr., Inc.*, 113 Idaho 581, 583, 746 P.2d 1040, 1042 (Ct. App. 1987).

Second, the City complains that the Court "abused its discretion when it failed to even discuss the proposed amended claims other than the punitive damage claim." App.Br.73. The Court certainly indicated that it was not persuaded that the evidence was sufficient to provide the City "a reasonable likelihood of proving the fraudulent ... behavior that evidences a bad act and bad intent...."[384] The Court did not, however, specifically address the other basis for amendment sought by the City. This, however, is not reversible error, and in fact, the assertion by the City on appeal shows the extent to which the City will "sandbag" for a particular result.

After the hearing on the motion to amend and the entry of the Court's decision on September 27, 2010, the City did not: (1) seek reconsideration or clarification of the decision under I.R.C.P. 11; (2) move under Rule 15(b) at the close of the evidence to amend its pleadings to conform to the alleged proof on the fraud/constructive fraud/unjust enrichment issues; (3) raise the fraud or related theories in its post trial brief or rebuttal brief; or (4) raise the fraud or related theories in its proposed findings and conclusions. The City cannot be allowed to raise error with regard to an issue that was simply overlooked by the District Court, but was never subsequently brought to the attention of that Court.

Finally, as is reflected in the detailed Findings and Conclusions, the failure to allow the amendment was harmless, if it was error at all. In its Brief, the City does not refer to any evidence to support its fraud and related theories, but leaves it to Petra and this Court to guess

[383] R.6525.
[384] R.6525.

what evidence it believes supports its contention that the District Court's oversight was something more than harmless.

P. The District Court Properly Awarded Costs and Attorneys Fees to Petra as the Prevailing Party.

Petra was the prevailing party in the litigation filed by the City. The District Court dismissed the claims and causes of action contained in the City's Complaint, with the exception of granting a $52,000 offset against the damages awarded to Petra. The Court entered its Judgment in favor of Petra and against the City in the amount of $324,808.00 plus prejudgment interest, costs and attorneys fees.

As noted in its "Order Denying Plaintiff's Motion to Disallow Costs and Attorneys Fees" and after reviewing the procedural history of the case, the District Court concluded: "To reiterate, the Court found overwhelmingly that Petra was the prevailing party."[385]

Section 10.6 of the CMA provides:

> 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 with 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.[386]

Based upon this language, the District Court ordered an award of attorneys fees and costs to Petra.

The City erroneously argues that the District Court "failed to perform any of the analysis required by Rule 54." App.Br.74. The City contends that Judge Wilper "relied exclusively upon the contract as the basis for the award of the entirety of the fees and costs claimed by Petra." This baseless assertion is belied by the record before this Court.

In arguing before the District Court that the fees sought by Petra were unreasonable, the City argued that Petra's attorneys fees should be reduced to an amount not "exceeding that

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[385] R.9131.
[386] Exhibit 2003.

incurred and paid by the City of Meridian."[387] In fact, as noted in the District Court's Order denying the City's Motion to Disallow:

> "In holding that $595,896.17 is a reasonable amount for costs in this case, the Court notes that at the August 1 hearing, Mr. Trout, as an officer of the Court, confirmed that the City's total costs and fees in this matter neared $2 million, including just over $900,000 in attorneys fees and approximately $1 million in costs."[388]

Thus, while the amount incurred in costs and attorneys fees by an opponent is not determinative of a "reasonable" amount, in fact the $1,871,312.67 awarded by the Court to Petra as costs and attorneys fees is less than the amount represented by counsel as the amount incurred by the City.

Moreover, the City's suggestion that the District Court did not address reasonableness or the proper amount of cost and attorney fees under Rule 54(e)(3) is simply unsupported:

> The CMA clearly states that attorneys' fees must be reasonable in order to be awarded. Petra seeks $1,275,416.50 in attorneys fees, and the Court finds these fees to be reasonable. This case was litigated for more than two years. It involved more than a dozen vigorously contested pretrial motions. The trial lasted fifty-nine (59) days. Petra's lead attorneys, Mr. Walker and Ms. Klein, are experienced litigation attorneys, having practiced law for thirty-five (35) years and thirteen (13) years respectively. Their fees are consistent with similarly experienced attorneys in this jurisdiction. The range of issues presented and defended was exhaustive, and often required both parties to work within confined time frames. For all of these reasons, the Court finds the requested attorneys fees were both reasonable and reasonably incurred.[389]

Both the costs and attorneys fees sought by Petra were reasonable and reasonably incurred. The District Court properly analyzed the issue and properly granted costs and attorneys fees to Petra. The City's challenge to the District Court's award of cost and fees is frivolous.

Q. Petra is Entitled to an Award of Costs and Attorneys Fees on Appeal.

The entire substance of the City's appeal depends upon its challenge to the District Court's Findings. All of the Findings are supported by substantial evidence. No meaningful nor

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[387] R.8666-75.
[388] R.9132.
[389] R.9132.

significant legal challenge is presented. The City consistently took the position that the CMA was not ambiguous, authorizing the District Court to interpret the contract as a matter of law; the tort claim and other issues are controlled by existing Idaho case law; and the challenges to the evidentiary rulings were discretionary with the District Court. Under these circumstances, attorneys fees on appeal are appropriate since the appellate issues raised by the City are frivolous. I.C. § 12-121; *Dow v. Rowe*, 133 Idaho 805, 992 P.2d 1205 (1999); *Knowlton v. Mudd*, 116 Idaho 262, 775 P.2d 154 (Ct. App. 1999).

This dispute arose out of a commercial transaction—the application of the CMA related to the construction of the City Hall. An award of attorneys fees on appeal are thus proper under I.C. § 12-120(3) because the gravamen of the suit involves commercial transaction. *Johannsen v. Uttterbeck*, 146 Idaho 423, 196 P.3d 341 (2008); *Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 218 P.3d 1150 (2009).

Finally, the CMA itself in Section 10.6 compels the recovery of the costs and attorneys fees incurred by Petra in defending this appeal. *See Borah v. McCandless*, 147 Idaho 73, 205 P.3d 1209 (2009). For all of these reasons, attorneys fees on appeal are requested by Petra.

VI. CONCLUSION

Petra respectfully requests this Court affirm the Judgment of the District Court. Each of the 198 Findings issued by the District Court are supported by substantial evidence. Each of the Conclusions made by the District Court flow from the Findings and are consistent with Idaho law.

The District Court correctly determined that the construction defects alleged by the City were "relatively minor" and were the subject of warranties issued by the prime contractors. The Court thus concluded that the City failed to prove its breach of contract claim and that the damages that it sought to attribute to Petra were speculative.

The Court further correctly determined that Petra was entitled to an equitable adjustment to its fee because the "size, scope, cost and complexity" of the project was substantially changed

by the City; that the City waived and was properly estopped to contend that Petra's notice was untimely; and that the amount sought by Petra as its additional fee was reasonable.

The City has not presented any meaningful factual or legal challenge in its appeal. On that basis and because this dispute is grounded in a commercial dispute, and that the CMA specifically provides for reasonable costs and attorney fees, Petra is entitled to an award of costs and attorneys fees in responding to the appeal.

Dated this 29th day of May, 2012.

HOLLAND & HART LLP

By: _____
Scott D. Hess, of the firm

COSHO HUMPHREY LLP

By: _____
Thomas Walker, of the firm

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party on a Compact Disc via hand delivery.

Dated and certified this 29th day of May, 2012.

By: _____
Scott D. Hess

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Kim J. Trout
David T. Krueck
Trout Jones Gledhill Fuhrman, P.A.
225 N. 9th Street, Suite 820
Boise, ID 83702

- ☐ U.S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)

_____
of HOLLAND & HART LLP

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APPENDIX

DESCRIPTION	AMOUNT	REBUTTAL	CITATION REFERENCE
LIQUIDATED DAMAGES	$1,650,000	Bauer testimony: Amento's calculation is in error. Prime contractors made up time; Petra administered liquidated damages properly.	Ex 755; Tr 9488:17-21; Tr 9591:8-11
WINTER CONDITIONS	$166,154	Cost of winter heat, identified in bid documents as Owner Furnished Item, and as reimbursable in General Conditions ("GC") est. of the CMP per CMA 4.7.11	Winter heat Owner Item; Ex. 2152 p 96 CMP Est; Ex 804 p 2; CMA Ex 2003 p 17; Ex 792
WATER FEATURE REPAIRS	$315,000	Sizing of the feature, piping, tanks, and pumps was the responsibility of LCA/Hatch Mueller. Piping schematic shown in RFI 103. Material Schedule contained is ASI 88. Material Submittals were approved by LCA as shown in the submittal log. Hydraulic calculations are shown in RFI 110. Petra never recommended release of Alpha Masonry.	ASI 88 - Ex 2160 pp 309-313; RFI 103 to pipe schematic; Ex 2161 pg199; RFI 110 to Arch on Flow Calcs and Tank Size Ex 2161 p 210; Material Submittal Log Ex 559,p90; Retention Release List - Ex 2379 p 2; Sheer Descent Pictures-Ex 560, p27
ROOFING	$450,000	Warranty issues are between City of Meridian. Western Roofing/Versico. Roofing system - 15 year warranty. Roof does not need to be replaced per Versico. Warranty and repairs that have been made. Damage occurred after the warranty was issued in fall 2009. Wetherholt est. for membrane was $200,000; Sheet Metal was $250,000 for saddle flashing that is not on the drawings or required in Boise climate. Christian testified mitered and caulked coping at corners is acceptable.	Drinkard Tr 7899:6 -7907:10 Versico Warranty Ex 545, p 23; Subsequent damage Tr 7911:1-9; Tr 7942:4-12 Christiansen Tr 8247:13-16 ; 8563:18 – 8565:7
FLUSH AND CLEAN HYDRONIC LOOPS	$16,000	Buss testified this was performed.	Tr 8652:3-18
CHILLER	$5,000	Petra recommended City hold $15,000 for spring repair; work was performed after Petra left project; Wisdom testified unit is operating correctly per City reports.	$15,000 retention - Ex 2379 p2; Wisdom Tr 6931:17-25; 6932:1
HVAC CONTROLS	$250,000	Wisdom testified controls are fine and do not need to be replaced.	Wisdom Tr 6942:8-10
INTERIOR REHEAT	$1,500,000	Wisdom testified there is interior reheat, but the City is "monkeying" with the floor plenum pressure settings causing problems.	Wisdom Tr 6945:6-25; 6946:1-8
TEST & BALANCE	$83,025	Wisdom testified there is no need to retest and balance the system	Wisdom Tr 6946:9-17
ACCESS FLOOR	$212,000	Weltner guessed that 33% of the floor has clickers. Actual field measurements revealed only 2% which is a City maintenance issue.	Weltner Tr 3804:16 & 3806:6; Bennett Tr 5887:7-14
MAYOR'S RECEPTION	$95,850	Problem was discovered after Petra left the Project; City has only fixed 1 item and has not contacted the remaining prime contractors to perform warranty repairs of latent defects. Neither LCA nor Petra was informed of any problem until 2010.	Christiansen Tr 8613:15 - 8614. Weltner Tr 3452:20 – 3454:19; Weltner Tr 3803:8 – 3804:2; Weltner Tr 3813:22 – 3814:22; Jensen Tr 4468:8-4469:10
BASEMENT MECH. ROOM	$665,275	This is Weltner's estimate to add water proofing to basement walls; water proofing is present per field investigation and confirmed by Christiansen.	Christiansen Tr 8315:11 - 8316-6; Weltner Tr 3740:7 – 3747:3;Weltner Tr 3806: 10 – 3807:18; Bennett Tr 5881:12 – 5883:3
SOUTHWEST CORNER	$743,600	Weltner's erroneous opinion that PVC pipe was not called for in the site storm drain. Weltner erred using Div 15 spec instead of Div 2 spec and site drawings for Storm Drain which calls for PVC	Bennett Tr 5609:8- 5623:1; Div 2 Spec for site (not Div 15); Ex 754:5; 3.3A; PVC Pipe called for Tr 5619:19 & 5622:18; Site Drawings-Exs 757, 756, 790
PLUMBING	$222,600	Est. is for cleanout costs and seismic bracing which were inspected and approved as installed by the City Inspector (AHJ). Wisdom testified that the cleanouts are ok and seismic bracing was not required. Buss testified if there are lateral braces missing he will install at no cost to the City.,	Wisdom Tr 6957:14 – 6960:21; Wisdom – City AHJ Tr 6957:14 – 6958:4 Buss Tr 8641:13 – 8643:2

DESCRIPTION	AMOUNT	REBUTTAL	CITATION REFERENCE
MASONRY	$1,265,000	Installation meets industry standards with minor defects per Miller. Installation accepted by Christiansen and City Inspector, Tom Johnson. McGorty agreed to fix minor latent defects at no cost to the City.	Miller Tr 9930:18 – 9933:3; McGourty Tr 7752:12-16; 7804:1 – 7807:22; 7706:12 – 7708:1; Coughlin Tr 8734:6 – 8736:3; Bennett Tr 5582:4 – 5583:3
PAC WEST	$71,767	Tightening up "clickers" was required to provide a quiet floor prior to carpet. Costs were charged to LEED since the work was a result of MEP contractors and City communication contractors reopening the floor after installation by Pac West in order to perform LEED commissioning. Pac West's work to achieve the Innovative Design Credit for reduced air loss under the LEED program.	Bennett Tr 5568:22 – 5582:3; Innovative Design Credit Tr 5572:1-13 & 5579:7 – 5580:8
CHANGE ORDERS - BACKUP	$543,837	Weltner opinion that they should be rejected due to lack of backup. Backup was provided with each change order, reviewed by LCA, reviewed by Watts, and approved by City Council. If the backup docs are not in City files now, Petra does not know what they did with them.	Reference Ex 2013, 2033, 2037, 2040-2052, 2063-2071, 2073-83
CHANGE ORDERS - BACKUP	$105,011	These were deductive change orders and so it should have read a negative -$105,011. (A credit to Petra??) These were approved by all parties and Petra does not know what the City did with the backup.	See Comments above
TOOLS	$3,208	The tools listed are normal consumables in the construction process and they are also expenses associated with LEED documentation / certification, safety, and winter conditions. All items were billed with complete backup invoices and reviewed in detail by Watts and Bird.-Approved by City Council and paid.	Pay App 15 Ex 2056, approval p 6 – LEED; Approval p 24 - Winter Conditions; Approval p 49-50 Safety Phase 2 Reimb.; CMP est; Ex 804 p 2 Construction Management Agreement, Ex 2003 p 17
SIGNAGE	$1,712	The testimony referenced in the document does not add up to $1712 but adds up to $381.07. Signage was listed in the GC est. as a reimbursable per CMA 4.7.11.	CMP est.- Ex 804 pg 2; CMA Ex 2003 pg 17
JOB CONDITIONS	$57,077	The testimony referenced in the doc does not add up to $57,077 but adds up to $8,465.76.These amounts were for work not contained in Prime Contractor work scopes but was required to complete the Project. Amounts reviewed in detail by Watts and Bird. Approved by City Council and paid.	Job Conditions Ex 2061 p 82; Watts & Bird review & approval of Job Conditions Ex 2061 pp 8&9.
EXTRA WORK ORDERS	$80,545	Extra Work Orders were directed by the City through Watts in August 2008. First billed to the City in Sept 2008; reviewed in detail by Watts and Bird. Approved by City Council and paid. Extra work orders were City modification requests at the end of the project	Bennett Tr 5783:5-15; Pay App 23 Sept 08-Extra Work 2097:18-19; Server Rm 2097:23 Ice Maker / Plumbing 2097:26; Medallion 2097:28; Motorized Shades 2097:31
PAC WEST	-$71,767	Credit for "clicker" amount above.	See note for Pac West above.
PROJECT MEETINGS	$2,213	The City $ amount taken from Job Cost report. Actual amount billed was $1120.64 (Pay App 30) and reflects adjustments to the actual amount spent as a result of City review and requested adjustments.	Job Cost Detail - Ex 2127:18; Pay App 30; Ex 2126 pp 22&23
TWICE WEEKLY CLEANUP	$2,383	Cleanup was listed as reimbursable in GC est. of the CMP per CMA 4.7.11.	CMP est - Ex 804 p 2; CMA- Ex 2003 p 17
STORAGE CONTAINER	$529	Storage container was listed as reimbursable in GC est. of the CMP per CMA 4.7.11.	CMP est - Ex 804 p 2; CMA- Ex 2003 p 17
PROJECT TRAILER	$25,302	Project Trailer listed as a reimbursable in GC est. of the CMP per CMA 4.7.11.	CMP est - Exhibit 804 p 2; CMA- Ex 2003 p 17
DRINKING WATER	$748	Drinking Water listed as a reimbursable in GC est. of the CMP per CMA 4.7.11.	CMP est - Ex 804 p 2; CMA- Ex 2003 pg 17

DESCRIPTION	AMOUNT	REBUTTAL	CITATION REFERENCE
MATERIAL DELIVERY	$3,282	Material Delivery (Hoisting & Craning & Off Loading) listed as a reimbursable in GC est. of the CMP per CMA 4.7.11.	CMP estimate - Ex 804 p 2; CMA-Ex 2003 pg 17
PHOTOGRAPHS	$2,626	Photographs listed as a reimbursable in GC est. of the CMP per CMA 4.7.11.	CMP est-Ex 804 p 2; CMA- Ex 2003 p 17
PLANS AND PRINTING	$1,166	Plans and Printing (Plan Reproduction) listed as a reimbursable in GC est. of the CMP per CMA 4.7.11.	CMP est-Ex 804 p 2; CMA-Ex 2003 p 17
SUPPLIES AND POSTAGE	$4,721	Supplies and Postage listed as a reimbursable in GC est. of the CMP per CMA 4.7.11.	CMP est-Ex 804 pg 2; CMA-Ex 2003 p 17
TELEPHONE	$8,758	The City was **not** billed any of the cost for telephone. This amount is from the Job Cost Detail Sheet and does not reflect the actual billing which was zero (See Pay App 30) as per CMA.	Job Cost Detail-Ex 2127 p 61; Pay App.30 - Ex 2126 pp 22 & 23
PUNCH LIST	$2,688	Actual billing to City for Punch List was $1936.33 and covered items that were not part of the Prime Contractor's responsibility (touch up paint after 4 mos of use by the City) during the 2nd City requested punch list but were required by the City to provide a finished product.	Pay App 30-Ex 2126 p 30
LABOR READY - LEED	$59,241	Costs included the cost associated with LEED requirements in order to achieve LEED Silver; were not part of the Prime Contractors work scopes which covered LEED Certified only. Included such items as additional work to achieve the Innovative Design Credit for pressure loss that was better than that allowed by access floor manufacturer. All invoices were reviewed in detail by Watts and Bird. Approved by City Council and paid.	Bennett Tr 5571:22 – 5572:13; Ex 2604 pp 177 & 233
LABOR READY - Cleanup	$46,211	Costs included Daily Cleanup beyond the Prime Contractors cleanup work scope in order to achieve LEED Silver and the associated recycle requirements, set up for special events held by the City including tours, TV broadcasts, and special recognition events. Daily Cleanup was listed as a reimbursable in the G C est. of the CMP per CMA 4.7.11. All invoices reviewed in detail by Watts and Bird. Approved by City Council and paid	Exhibit 2605 p 178; CMP est - Ex 804 p 2; CMA-Ex 2003 p 17