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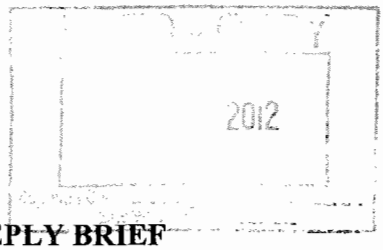
City of Meridian v. Petra Inc. Appellant's Reply Brief Dckt. 39006

IN THE SUPREME COURT FOR THE STATE OF IDAHO

THE CITY OF MERIDIAN, an Idaho Municipal Corporation, Plaintiff/Appellant, v. PETRA, INCORPORATED, an Idaho Corporation, Defendant/Respondent.	Supreme Court Docket No. 39006-2011 Ada County Case No. CV OC 09-7257



APPELLANT'S REPLY BRIEF

Appeal from the Fourth Judicial District, Ada County, Idaho

HONORABLE RONALD WILPER, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. SUMMARY OF ARGUMENT

The Contract Documents expressly and unambiguously define: (1) what services Petra was to have performed, (2) how much Petra was to be paid for those services, (3) under what circumstances Petra might be entitled to receive additional compensation for those services, and (4) if those circumstances presented, how, and in what amount, Petra was to seek that additional compensation.[1] The Brief of Respondent Petra Incorporated ("Petra"), like the ultimate conclusions of the District Court below, wholly disregards these basic and fundamental provisions of the Contract Documents.[2]

As to Petra's claims for additional compensation, Petra failed to comply with any of the express contractual and legal duties. Implicitly acknowledging the lack of any breach of the CMA by the City, the District Court failed to enforce the express, unambiguous provisions of the Contract Documents and hold Petra to its repeated, undisputed affirmative representations that it would not seek additional compensation.[3] Instead, the District Court awarded Petra damages on the theory of affirmative waiver and estoppel. The District Court's failure to apply the proper legal analysis to the key undisputed Findings and evidence, and its failure to conclude Petra's demand for additional compensation for its services was barred by either the CMA, the Idaho Tort Claims Act ("ITCA"), or prohibited on the basis of waiver or estoppel requires reversal.

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[1] "The Contract Documents which defined the parties' respective promises and duties were clear and unambiguous." R. 8286, ¶ P.

[2] The "Contract Documents" include the Construction Management Agreement ("CMA") (Ex. 2003), the Construction Management Plan ("CMP") (Ex. 2267), the AIA A101 (Ex. 2018), the AIA A201 General Conditions (Ex. 2017), and the Meridian City Hall Specifications (Ex. 2151; Ex. 2152; Ex. 2153; Ex. 2154; Ex. 2672; Ex. 2733; Ex. 2734; Ex. 2750; Ex. 2751; Ex. 2752; Ex. 2818; Ex. 2820).

[3] Ex. 2007 (January 15, 2007); Ex. 2183 (February 12, 2007), Ex. 2145 (April 9, 2007); Ex. 2184 (July 12, 2007); Ex. 2025 pp. 45-46.

Certain key Findings by the District Court are not in dispute.[4] It is the District Court's application of law to those Findings which are clear error. Regardless of these issues, the inescapable truth remains that if Petra had complied with its contractual, if not fiduciary, obligations under the CMA, or its legal obligations under the ITCA and presented a claim for additional compensation for its services **before** it performed those services, this controversy may have been avoided.

The Contract Documents clearly and unambiguously identified and defined what services Petra was to perform. Thus, while Petra's Brief contains numerous unsupported, or false assertions,[5] and seeks to overwhelm the record with representations about those aspects of the management services that are not in dispute, the vast majority are simply not relevant to the central issues of the City's present appeal.

The City did not ask the District Court to find, nor does it ask this Court to hold Petra to be a "guarantor" of the work. Rather, the City asks only that this Court do that which the District Court failed to do – hold Petra accountable in damages for those material breaches of the undisputed, express, and unambiguous terms of the Contract Documents between the parties. The Contract Documents make clear that Petra, not the City, breached their terms. The CMA makes clear that it is the City, not Petra, that is entitled to damages.

Again, the issues central to the City's appeal are:

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[4] However, the District Court's Finding No. 177 that Petra had not yet provided "additional services" as of August 20, 2007, is clearly erroneous. Findings 79 and 80, combined with the uncontested testimony of Gene Bennett and Ex. 755 demonstrate, unequivocally that Petra began supervising the foundation/basement construction on May 7, 2007, more than 3 ½ months before the purported notice under Section 7 of the CMA. In addition, the District Court's Findings of Fact Nos. 31, 36, 47, 62, 69, 84 and 124 are clearly erroneous as a matter of law.

[5] *See* Appendix "A."

1. Petra represented to the City in four successive written documents that there would be no change in Petra's CM Fee, despite increases in the project cost – yet now asserts a right to an increased fee based solely upon an increase in project cost.[6]

2. Petra unambiguously and expressly appeared before the City Council on July 24, 2007,[7] with full knowledge of every "change,"[8] and expressly told the City Council there would be no increase in CM Fee.

3. The District Court and Petra asserted Petra had no duty of "inspection." To the contrary, the Contract Documents unambiguously and expressly provide for "inspection" by Petra as the "Construction Manager."

4. Petra materially breached its duty of "trust and confidence" and other provisions of the CMA by overcharging the City.

5. Petra materially breached the CMA when it failed to notify the City before it began providing claimed "additional services" as to the basement, in violation of Section 7 of the CMA.[9]

6. Petra failed to provide the statutorily required notice under the Idaho Tort Claims Act when it became aware of an increase in cost, and thus Petra's claim of a percentage Fee increase based upon cost, triggering the notice requirement in January of 2007.

7. Petra failed to comply with state law by failing to provide the Payment and Performance Bonds statutorily required under I.C. §54-4512.

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[6] Ex. 2007 (January 15, 2007); Ex. 2183 (February 12, 2007); Ex. 2145 (April 9, 2007); Ex. 2184 (July 12, 2007).
[7] Ex. 2025, pp. 45 & 46.
[8] *See,* "Appendix B" to Appellant's Brief, evidencing "what Petra knew, and when Petra knew it" with respect to increases in project costs and "changes" to the project.
[9] *See,* Footnote 4, supra.

The District Court failed, as a matter of law, to correctly interpret, apply, and enforce the Contract Documents. For this reason, and as demonstrated by the City's present appeal, a reversal with direction, of the District Court's Order is mandated as a matter of law.

II. Argument

A. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE CMA AS TO PETRA'S ENTITLEMENT TO ADDITIONAL COMPENSATION.

The District Court found, and Petra does not dispute, that the provisions of the Contract Documents are clear and unambiguous.[10] Moreover, the District Court did not find, nor does Petra assert on this appeal, that the City breached any provision of the CMA. The District Court's inability to find the City to have breached the contract is fatal to the District Court's Order.

It must be noted that little of Petra's Brief discusses, the provisions of the CMA or the other Contract Documents as to: 1) the circumstances in which Petra might be entitled to an additional CM Fee for its services; 2) the method the CMA mandated Petra to follow to seek an additional CM Fee; and 3) what amount, if any, Petra might be entitled to receive for its additional services. These glaring omissions were, and remain, a central flaw in Petra's analysis. Likewise, these express contract terms form the framework for the fundamental error in the legal conclusion of the District Court. These errors ultimately resulted in the District Court's erroneous award of damages to Petra in a manner and amount not only prohibited, but not even contemplated, by the CMA.

Thus, the City must again return the focus to the express provisions of the CMA which expressly controlled Petra's conditional entitlement to additional compensation. Petra cannot, nor does it, dispute that these provisions clearly and unambiguously provide that "**[p]rior to**

[10] R. 8286, ¶ P; Petra's Brief at p. 49.

providing any additional services, Construction Manager **shall notify** Owner of the proposed change in services and **receive** Owner's approval for the change."[11] Thus, the obligation under the CMA was upon Petra, and remained upon Petra as the burden of proof, to establish that it received the City's approval for its "additional services" before Petra provided those "additional services."

As revealed in the District Court's decision, and Petra's Brief, Petra does not, nor can it deny, that it failed to either seek or obtain the City's approval before it began the alleged provision of "additional services."[12] But moreover, and fatal to Petra's position, in Petra's Brief, Petra fails to identify a single piece of evidence indicating what "additional services" were required or provided.

Buried in a footnote on page 35 of Petra's Brief, Petra concedes that which the District Court expressly found in Finding of Fact Numbers 79 & 80: the "basement" was one of the changes in the Meridian City Hall, which purportedly caused Petra to provide additional services. However, completely missing from Petra's Brief is any response to the uncontroverted testimony of its Authorized Representative, Gene Bennett ("Bennett"), as Project Manager, that construction of the basement began on May 7, 2007, more than three and one-half months **before** the purported notice of Petra on August 20, 2007 that Petra relies upon in support of its claims for waiver and estoppel.[13]

Regardless of whether one accepts that it was November of 2007 when the City arguably received its first purported "notice" by Petra of an intention to seek an increased CM Fee, or whether one accepts Petra's representation that it delivered this notice to the City August of

[11] Ex. 2003, p. 20, § 7.
[12] *See,* Footnote 4, supra.
[13] R. 8282, ¶ 177.

2007,[14] the indisputable and undeniable finding remains that there is no evidence in the record that Petra advised the City of its intention to seek an increased CM Fee **before** the construction of the MCH foundation/basement began in May of 2007.

Rather than confront the date Petra began providing "additional services" in May of 2007, Petra's Brief argues that its purported notice to the City was timely because "costs incurred on the Project did not exceed the original $12.2 million budget until after February, 2008."[15] Petra's argument wholly ignores the express provisions of Section 7 of the CMA.

Petra's argument that it is only required to provide notice after costs exceed $12.2 million fails because the CMA contains no provision that Petra must notify and seek the City's approval before the amounts incurred on the Project exceed the original budget. The CMA clearly, expressly, and unambiguously provides that Petra is required to seek the City's approval "[p]rior to providing any additional services."[16] It seems almost too simplistic to say, but "services" means something far different than "costs." The phrase "costs exceed" does not actually appear anywhere in the CMA.

The District Court found the inclusion of the basement at the MCH was a change to the size, quality, and complexity requiring "additional services."[17] The undisputed evidence based on the express findings of the District Court and Petra's Authorized Representative that "additional services" were provided in May of 2007, conclusively establishes that Petra breached

[14] "Notice" under Section 10.14 of the CMA required delivery of written "notice" to the City Clerk and City Attorney, not Petra's alleged burying of a single line into a spreadsheet containing Eighty Lines. Petra's argument fails as a matter of law as to, complying with Section 10.1.4 of the CMA.
[15] Petra's Brief, p. 38.
[16] Ex. 2003, p. 20, § 7.
[17] R. 8271, ¶¶ 79 & 80.

Section 7 of the CMA by failing to present the City with timely notice of its intention to seek an increased CM Fee.[18]

The adoption of Petra's **new** argument that an increase in costs, as Petra now claims, directly increased their "services," would mean that under Section 7, Petra was then required to notify the City at Petra's **first knowledge** of increased cost versus the $12.2 million budget, which would have been January 15, 2007.[19]

Petra's position reveals yet another fatal flaw with regard to Petra's argument, and the District Court's ultimate conclusion. There is absolutely no evidence to support Petra's assertions that it was required to provide "additional services." Petra simply **assumes**, as did the District Court that "there is simply no doubt" that it would require the incursion of "additional services" to manage a project that changes in size, quality, complexity and budget.[20]

Petra was not required to prove "beyond a doubt" that it incurred "additional services" justifying an increased CM Fee. However, Petra was required to present evidence that "additional services" were in fact required, provided, and expended. To use Petra's own responding analogy, if "additional services" are required to supervise the change in construction from a single sink in one location to ten sinks in various locations, then this increase in supervision time to observe or inspect should be evidenced in a fashion demonstrating what Petra planned versus what they actually performed. Petra failed to provide any evidence of "additional

[18] Petra's attempt to equate "additional services" with "additional cost" is the sole and exclusive cause of the creation of the instant dispute. Adoption of Petra's position would permit Petra, or any Construction Manager, to incur undisclosed additional cost and then extract a payment when the project is incomplete but the budget expended.

[19] Ex. 2007, Petra's January 15, 2007 "price estimate" to the City.

[20] Petra's Brief, p. 45.

services." Simply put, Bennett testified that Petra could have tracked the "additional services" it claimed, but failed to do so.[21]

Petra failed to produce any evidence of "additional services." Petra simply sought, and the District Court adopted an assumption that because a change occurred, the change required "additional services." Yet, when challenged, Petra fails to cite to a single piece of evidence in the record to support the District Court's finding, thus making the finding clearly erroneous.[22] Idaho law provides no basis for a presumption that because the Project cost more money means it required "additional services." Moreover, the District Court's legal error in adopting Petra's request for additional fee as a simple percentage of total cost unequivocally demonstrates that Petra lacked the necessary level of proof. The District Court erred as a matter of law in failing to require that proof.[23]

Assistant City Attorney, Ted Baird stated it best in the City's rejection of Petra's claim on May 29, 2008,[24] one month after Petra submitted its requested change order.

> The City Council has directed me to submit this reply to your letter of April 4, 2008 regarding proposed change order No. 2 for additional construction management fees.
>
> Your change order makes reference to a "CM rate of 4.7%" yet the Construction Management Agreement between the City and Petra does not calculate the CM fee as a percentage of the project budget. Although a percentage of the budget may have been a rule-of-thumb used during negotiations, the agreement is clear in the requirement that equitable adjustments will be made only if changes in circumstances materially affect the Construction Manager's services (see the first sentence of the last paragraph of Section 7 of the Agreement). **Simply applying a percentage to the total budget is not acceptable...**[25]

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[21] Tr. p. 6078, LL. 9-17.
[22] The District Court's Finding that a "change" required additional services is "clearly erroneous." R. 8271, ¶ 80.
[23] "[T]he total cost approach to calculation of construction damages is not favored by the courts and would not constitute adequate proof of damages in this case." *Clearwater Const. & Eng'g, Inc. v. Wickes Forest Indus., a Div. of the Wickes Corp.*, 108 Idaho 132, 136, 697 P.2d 1146, 1150 (1985).
[24] R. 8283, ¶ 189.
[25] Ex. 2326 (emphasis added).

Petra's change order based upon the simple application as a percentage of the project budget was rejected by the City on May 29, 2008, and as a matter of law, should have been rejected by the District Court as inconsistent with the express terms of the CMA.

Either Petra was required to incur "additional services" in performing its express duties with respect to the MCH, in which case it might be entitled to an equitable adjustment, or it did not, and no such adjustment is required. Petra was not, nor is it today, entitled to a legal presumption that "additional services" were required because of the existence of a change. The City was not required to "guess" as to what additional services were required so as to calculate an equitable adjustment.

The District Court found Bill Nary's letter of February 24, 2009 to be a rejection letter.[26] Mr. Nary, on behalf of the City, uses nearly identical language as Mr. Baird's letter of May 29, 2008 in rejecting Petra's change order request for a second time. Mr. Nary states:

> The Agreement set the Construction Manager's fee as a flat fee, not a percentage of the project budget. **The City continues to maintain its position that simply applying the fee to a budget increase is unacceptable...**Furthermore, the additional substantiation provided by Petra fails to specifically justify how the increase in budget has materially affected the services delivered by the construction management team. Did Petra provide any additional services based solely on the increased budget, and if so, how did those additional services affect Petra's home office overhead costs?[27]

Petra failed to answer these questions for the City, and failed to present any evidence answering these questions at trial. It is in this regard that the District Court's adoption of Petra's methodology for calculation of equitable adjustment cannot withstand judicial scrutiny. In order to be entitled to an equitable adjustment, the District Court is required under the rule of law to

[26] R. 8283, ¶¶ 186, 189.
[27] Ex. 2386 (emphasis added).

make a claimant's award based on the presence of admissible, non-speculative evidence. "The burden is upon the [complaining party] to prove not only that it was injured, but that its injury was the result of the defendant's breach; both amount and causation must be proven with reasonable certainty." *Griffith v. Clear Lakes Trout Co., Inc.,* 143 Idaho 733, 740, 152 P.3d 604, 611 (2007) (internal citations omitted).

There was no evidence provided by Petra to the City that Petra was required to perform "additional services." The District Court summarily assumed that Petra was entitled to an award based upon 4.7% of the increased cost of the construction beyond the original budget calculation.

Petra cannot dispute that there is no reference in the CMA to a percentage basis for a calculation for its original CM Fee or in reference to calculation of an equitable adjustment. Petra's CM Fee was fixed by the contract in an amount of $574,000, plus Reimbursable Expenses[28] not to exceed $279,812.[29]

If Petra had wanted to be paid on a percentage basis, or even believed that it should be entitled to an increase fee on a percentage basis, it could have sought to have the CMA provide for its fee in that manner. However, the CMA did not provide for a percentage fee and Petra cannot now ask, nor can the District Court rewrite the contract to provide for a percentage based fee.

> We must construe the contract according to the plain language used by the parties. While a court may interpret agreements voluntarily entered into, a court cannot modify an agreement so as to create a new and different one, nor is a court at liberty to revise an agreement where its interpretation is involved. Courts cannot make for the parties better agreements than they themselves have been satisfied to make, and by a process of interpretation relieve one of the parties from the terms which he voluntarily consented to; nor can courts interpret an agreement to mean something the contract does not itself contain. 12 Am.Jur. 749; *Nuquist v. Bauscher,* 71 Idaho 89,

[28] Ex. 2003, the CMA, refers to Reimbursable Expenses as both "Reimbursables" and "Reimbursable Expenses."
[29] Ex. 2003, pp. 17-18, §6.

227 P.2d 83; *Durant v. Snyder,* 65 Idaho 678, 151 P.2d 776; *Ohms v. Church of the Nazarene,* 64 Idaho 262, 130 P.2d 679.

McCallum v. Campbell-Simpson Motor Co., 82 Idaho 160, 166, 349 P.2d 986, 990 (1960).

In the absence of any reference to a percentage based recovery in the CMA, there is only one construction as it concerns Petra's entitlement to an increase in CM Fee which is consistent with the CMA's express provisions – Petra held the burden to prove its "additional services" warranting an equitable adjustment. *Griffith,* supra, at 740. Anything less is not only inconsistent with the provisions of the CMA itself, but is entirely arbitrary.

Petra may have been entitled to seek an equitable adjustment, not a percentage fee, if additional services were incurred. However, the City was expressly entitled to be provided with notice of Petra's intention to seek an additional fee before those services were provided. Petra breached both of these duties imposed upon it by the express, unambiguous provisions of the CMA and the District Court erred as a matter of law, by failing to apply them to bar Petra's claim.

B. THE DISTRICT COURT ERRED IN APPLYING WAIVER AGAINST THE CITY AND NOT AGAINST PETRA.

Having failed to comply with the notice provision of Section 7, and having not made any claim that Petra complied with the express conditions precedent required of Petra to seek additional compensation, Petra now seeks to justify the District Court's award based upon the District Court's conclusion that the City waived its right to "preauthorize" the claim for an equitable adjustment.

As noted above, the Findings and the record establish conclusively that if Petra did in fact incur "additional services," it did so allegedly as a result of the inclusion of a basement, the construction of which began in May of 2007. The construction of the basement began

approximately three and one half months before Petra purportedly provided any claimed notice.[30] Thus, as a matter of law, Petra materially breached the express requirements of Section 7.

Further, the record before the Court establishes that while Petra necessarily recognized the changes to the Project design, Petra made repeated written representations that Petra's CM Fee would not increase despite the increases in cost. Petra began its construction management services with the construction of the basement without first providing any notice of its intention to seek an increased CM Fee. Petra cannot assert that the City waived its right to "preauthorize" as expressly contained in Section 7 of the CMA when Petra failed to provide the City with an opportunity to preauthorize.

Disregarding the legal conclusion inescapably drawn from the undisputed chronology of events, Petra's attempt to justify the application of waiver based on the alleged conduct of Keith Watts, more than 4 months after construction on the basement began, lacks basis in fact or law. The District Court's finding is clearly erroneous, as there is no evidence to support the assertion that Mr. Watts had been appointed as the City's Authorized Representative, as required by the CMA.[31] Petra never sought to establish Watts as the Authorized Representative during construction.[32]

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[30] "Notice" under Section 10.14 of the CMA required delivery of written "notice" to the City Clerk and City Attorney, not Petra's alleged burying of a single line into a spreadsheet containing eighty lines.

[31] Ex. 2003, p. 6, §1.2: "Upon Owner's selection of its authorized representative, Owner will provide Architect the name and contact information for such representative." There is no evidence in the record evidencing a City vote in an open meeting to name Watt's as the "Authorized Representative."

[32] In the more than 160,000 pages of documents, e-mails, and correspondence, there isn't a single document from Petra, nor the City, nor any other participant in this Project, which identifies Keith Watts as the Authorized Representative of the City. Petra's assertion and the District Court's legal conclusion is truly cut from whole cloth, and is directly contrary to the Contract Documents.

Not only was Watts never identified as the City's Authorized Representative, the Contract Documents, the CMP, expressly defines Watts' role.[33] Petra prepared, and Bennett reviewed and authorized the CMP,[34] which specifically addressed Mr. Watts' "role" and "authority,"[35] as well as providing an organizational chart for the City. In that document Petra defined Mr. Watts' role and authority, as follows:

> **City Staffing Requirements:**
> It is recommended that the City provide a minimum of two contact sources for day to day operations so that in the case of unforeseen conditions that require City feedback or to address contractual issues. The current contact protocol of Keith Watts-Purchasing Agent, first contact; if unavailable or time sensitive communication the second contact would be Ted Baird-Asst. City Attorney.
>
> **Keith Watts is responsible for** releasing the bid packages in each phase of the project, collecting the bid results, issuing the bid results to the City Council for ratification and approval, confirming with Ted Baird and the Construction Manager that the successful bidders meet the legal requirements for the project and collect the executed contracts, approved by the City Attorney's office. Copies of all executed contracts, purchase orders and/or service agreements are to be forwarded to the Construction Manager for the project files.[36]

Neither Mr. Watts nor Mr. Baird are identified as the City's Authorized Representative. This Contract Document fails to declare Mr. Watts as an Authorized Representative. In fact, it is clear from the description that Mr. Watts has no authority, as he is required to issue bid results to the City Council for "ratification and approval."

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[33] "A plan for the management of the design and construction of the Project (the "Construction Management Plan"), which shall include (i) a Project organizational chart, (ii) staffing recommendations for Owner, Architect and Construction Manager, along **with an explanation of the roles, responsibilities, and authority** of each staff member from each of the three entities..." Ex. 2003, p. 12, §4.4.1(a) (emphasis added).

[34] Tr. p. 5915, LL. 11-19.

[35] Petra's CMP required that Petra "shall include...staffing recommendations for Owner...along **with an explanation of the roles, responsibilities, and authority** of each staff member from each of the three entities..." Ex. 2003, p. 12, §4.4.1(a); Ex. 2267, pp. 7-8.

[36] Ex. 2267, pp. 7-8 (emphasis added).

Petra prepared and submitted multiple iterations of the CMP during the course of the Project.[37] Petra's argument as to Mr. Watts is directly contrary to Petra's own statements, representations, and admissions to the City during construction.38 Thus, the District Court's legal conclusion that Watts was the City's Authorized Representative is inconsistent with the clear and unambiguous terms of the Contract Documents, specifically the CMP, defining Mr. Watts' authority.

Moreover, a court may make a finding of apparent authority to protect third parties but only where the third party was not on notice of the scope of the agent's actual authority. *Thomson v. Sunny Ridge Vill. P'ship,* 118 Idaho 330, 332, 796 P.2d 539, 541 (Ct.App.1990). The rationale supporting *Thomson* also applies here. Petra was not only aware of Watts' role and authority, but, pursuant to the CMA, Mr. Bennett fulfilled Petra's contractual obligation by affirmatively stating in writing Petra's knowledge of Watts' actual authority. Petra was fully informed, stated the same in writing, and left no doubt about Watts' status on the Project. Petra's attempt to identify Mr. Watts as an Authorized Representative is without legal merit and the District Court erred, as a matter of law, in so finding.

"A waiver is a voluntary, intentional relinquishment of a known right or advantage, and the party asserting the waiver must show that he acted in reasonable reliance upon it and that he thereby has altered his position to his detriment." *Fullerton v. Griswold,* 142 Idaho 820, 824, 136 P.3d 291, 295 (2006) (internal quotation omitted). "Waiver is foremost a question of intent." *Seaport Citizens Bank v. Dippel,* 112 Idaho 736, 739, 735 P.2d 1047, 1050 (Ct.App.1987). A clear intention to waive must be shown before waiver shall be established. *Margaret H. Wayne Trust v. Lipsky,* 123 Idaho 253, 256, 846 P.2d 904, 907 (1993). "Waiver will not be inferred

[37] Ex. 2236; Ex. 2237; Ex. 2238; Ex. 2267; Ex. 2132; Ex. 2547.
[38] Ex. 2267, pp. 7-8.

except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel." *Id.* Petra affirmatively acknowledged, admitted, and stated in writing Mr. Watts' role. It would be inequitable and legally impermissible to now allow the District Court to disregard Petra's admissions.

Once the proper chronology, and the fallacy of Petra's attempted use of Mr. Watts as an Authorized Representative is recognized, the proper application of the Washington Court's decisions in *Absher Constr. Co. v. Kent Sch. Dist. No. 415,* 77 Wash. App. 137, 143, 890 P.2d 1071 (1995) and *Mike M. Johnson, Inc. v. County of Spokane,* 150 Wash.2d 375, 391, 78 P.3d 161 (2003), is evident.

Petra seeks to distinguish the court's recognition in *Absher Constr. Co.* of the legal consequence to a contractor for failure to follow contract procedures for claims submittals based on the assertion that the contract at issue there had no express provision prohibiting waiver.[39] Both Petra, and the District Court, again fails to read and apply the express language of the CMA which states:

> 10.17 Integration; Waivers.
> This Agreement may be modified only in writing signed by both parties. Any waivers hereunder must be in writing.[40]

Again, Petra's argument fails. There is no evidence that Watts, the City, or anyone from the City did anything to waive Petra's duty to notify and seek pre-approval in the months prior to May of 2007, when Petra began its "Construction Management" of the construction of the basement.

Similarly, Petra's entire argument against the application of the analogous rule in the case of *Mike M. Johnson, Inc.*, is premised upon the false assertion that Mr. Watts was the City's

[39] Petra's Brief at 40.
[40] Ex. 2003, p. 26, §10.17.

Authorized Representative. Moreover, Petra's argument ignores that the City was never presented with an opportunity to waive the application of Section 7, because Petra proceeded in its actions without an original presentment **before** Petra began providing "additional services," as is clearly required by the CMA.

Petra and the District Court disregarded the policy reasons supporting the strict compliance with these contractual provisions regarding notice, and the inapplicability of waiver to these provisions. While attempting unsuccessfully to distinguish *Mike M. Johnson, Inc.* and *Absher*, Petra makes no reference to *Razorback Contractors of Kansas, Inc. v. Bd. of County Com'rs of Johnson County,* 227 P.3d 29 (2010), which collects those cases which have held that notice provisions concerning requests for increase in fees should be strictly enforced against contractors performing on public works contracts. In its reasoning, the Kansas Supreme Court recognized the policy behind such strict enforcement as:

> [N]otice and documentation provisions serve an important public interest in that they 'provide public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages and avoid the waste of public funds.'

Razorback Contractors of Kansas, Inc., 227 P.3d at 35, (*quoting Perini Corp. v. City of New York,* 18 F.Supp.2d 287, 294 (S.D.N.Y.1998)).

Petra, by repeatedly representing that all increases to the Meridian City Hall in terms of cost, size, and complexity would not be accompanied by a resultant increase in the contractually defined CM Fee, deprived the City of the ability to take timely action to avoid the extra expense or make any reasonable adjustments to best spend public funds. The policy reasons behind strict enforcement as identified in these cases, combined with Petra's representation of no increased CM Fee warrants the same conclusion.

The uncontroverted chronology of events and Petra's express admissions, require the conclusion that the District Court erred in applying the doctrine of "waiver" to evade Petra's material breach of the provisions of the CMA concerning **when** and **how** it was to submit a claim for an equitable adjustment of the CM Fee. Given Petra's multiple and repeated representations that the CM Fee would not increase and Petra's failure to provide timely notice, the correct application of law requires the conclusion that it is Petra, not the City, to which the doctrine of waiver should be applied.

C. THE DISTRICT COURT ERRED IN APPLYING ESTOPPEL NOT AGAINST PETRA BUT AGAINST THE CITY.

The District Court expressly recognized that Petra made representations to the City as to its CM Fee and the Reimbursable Expenses in price estimates.[41] Petra has asserted from the beginning of this case that it's CM Fee "rate" was a percentage of the final price.[42]

Petra does not dispute that on January 15, 2007, February 12, 2007, April 9, 2007, July 12, 2007, and July 24, 2007, Petra made five specific representations that Petra's CM Fee and Reimbursable Expenses **would not increase** from the amounts in the CMA.[43]

Most importantly, Petra in its Respondent's Brief, fails to explain Petra's five representations to the City that its CM Fee and Reimbursable Expenses **would not increase** while the cost of the Meridian City Hall Project grew from $12.2 million to $20.5 million. If, as Petra has asserted, the CM Fee was always a percentage of the price, it seems the Court must ask why Petra's theory didn't apply when Petra prepared each of the price estimates.

Petra asserts in its Respondent's Brief that estoppel is appropriate against the City

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[41] R. 8272, ¶¶ 85, 87 & 88.
[42] Ex. 2309, Petra's Tom Coughlin transmittal letter of April 4, 2008; Ex. 2032, Petra's Amended Complaint.
[43] Ex. 2007 (January 15, 2007); Ex. 2183 (February 12, 2007); Ex. 2145 (April 9, 2007); Ex. 2184 (July 12, 2007); Ex. 2025, pp. 45 & 46 (July 24, 2007).

because the City acted with "full knowledge of relevant facts and materials." Petra makes no mention of the fact that "full knowledge" possessed by the City contained Petra's repeated representations that no increase in the CM Fee or Reimbursables would occur.

The City cannot be estopped from denying Petra's claim to an increased CM Fee when it was Petra that made the very representation that there would be no increased CM Fee. Petra cannot knowingly and intentionally induce the City's approval of increased cost budgets,[44] which contain the representation that there would be no increase in the CM Fee, and then seek an increased fee by claiming the City is estopped to deny its entitlement. The City submits that the undisputed findings of the District Court support the conclusion that it was the City who acted reasonably in relying upon Petra's representation that there would be no increase in the CM Fee or Reimbursables.

Petra is presumed to have read the CMA agreement. With its superior knowledge as the Construction Manager, Petra knew, or should have known, that with each change in the budget, scope, size, and complexity of the Project, it had the express duty, prior to providing any "additional services" to "notify" and present a request to the City for more money for its "additional services." Each time Petra had that opportunity, it clearly and unequivocally represented to the City its Fee and Reimbursable Expenses would not increase. *See, Knipe Land Co. v. Robertson*, 151 Idaho 449, 457-58, 259 P.3d 595, 603-04 (2011). As a matter of law, Petra must be bound by its own express representation of no increase in Fee.

As a matter of law, not only is the application of estoppel against the City legally unsupportable, it is Petra to whom, the doctrine of estoppel, if not quasi-estoppel, should be applied. *See, Lunders v. Estate of Snyder,* 131 Idaho 689, 695, 963 P.2d 372, 378 (1998)

[44] The City relied on Petra's "price estimates." Tr. p. 360, LL. 3-12.

("Quasi-estoppel prevents a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions.")

The District Court erred as a matter of law in disregarding the legal consequence of its own express findings with regard to Petra's representations as to affect of the purported changes in project cost, size, scope and complexity on Petra's CM Fee. Accordingly, as a matter of law, reversal of the District Court's application of estoppel against the City is required, and the correct legal application of estoppel as against Petra is mandated.

D. THE ITCA BARS PETRA'S CLAIMS.

The CMA expressly and unambiguously defined when, and how, Petra was to present its claim to the City in the event it believed that a circumstance had developed which suggested that Petra receive an equitable adjustment to its CM Fee. Not only does the CMA expressly impose a duty on Petra to timely and appropriately notify the City of its intended claim, so does the Idaho Code. The ITCA imposes a nearly identical duty, yet one with an even more stringent trigger. The District Court erred as matter of law when it accepted Petra's argument that the notice requirements of the ITCA can be ignored as easily as the similarly intended express terms of the CMA.

To this end, Petra and the District Court disregard when Petra's purported entitlement to a claim arose. The District Court's legal error constructs a novel legal analysis which permits a claimant to induce action from a municipality, then allows the claimant to unilaterally control when the claim will arise. The District Court allowed Petra as the claimant, to determine the *when* its claim would "fully mature" by reason of rejection, simply by allowing Petra to determine when it would submit its "claim" for rejection. Under Petra's theory, it could have waited until years after the completion of the project to submit its fully matured claim, simply to

have it rejected, thus triggering the 180 day notice provision. This absurd result would render a nullity, the entire rationale and purpose of the ITCA.

This Court has consistently held that proper application of the ITCA does not permit a result that "would allow a claimant to delay completion of their investigation before triggering the notice requirement." *Mitchell v. Bingham Memorial Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997). Accordingly, Petra was not required "to know all the facts and details of a claim" before providing its notice. *Id.* Likewise, the "notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time." *Magnuson Properties Partnership v. City of Coeur d'Alene*, 138 Idaho 166, 59 P.3d 971 (2002). The focus must be on what Petra knew, and when Petra knew it.[45]

To the extent that Petra believed it was entitled to an increased fee beyond that contained in the CMA, it was required to timely present it and give the City an opportunity to act on it. Petra did not and instead withheld its fee request, in contravention of the CMA's requirements, inducing the City's continued reliance on Petra's performance of its obligations under the CMA.

The policy behind this conclusion is not only straightforward, but is evidently demonstrated in this case. If "common sense" is to be applied, as Petra repeatedly urges, its application leads to the conclusion that **had** Petra timely and properly presented its claim for an increased CM Fee **before** the additional services were incurred, the City could have evaluated and weighed all options presented to it. The City could have approved the increase, modified its

[45] Appellant's Brief, p. 40 & Appellant's Brief Appendix B. This focus is critical, because the wrongful act in this case isn't the rejection of Petra's claim. The act at issue must be instead the event giving rise to Petra's claim, that being the change which Petra asserts "materially affected its services." The "change to budget, scope, size, and complexity" is at the core, and has been since the inception of this case, of Petra's claims. Thus, under the ITCA, the date the "claim arose" or 'reasonably should have been discovered' is the date of the "change" that "materially affected" Petra's services. That date was January 15, 2007, the date of Petra's first price estimate, Ex. 2007.

construction plans to mitigate the basis for the increase, or approved the changes in design, but refused Petra's request for an increased Fee.

The consequence of Petra's course of conduct is easily foreseeable. Petra and the City could have confronted the issue before the "additional services" were rendered, in January of 2007, had Petra fully and honestly undertaken to notify the City of Petra's intentions. More likely than not, had Petra honestly notified the City, this litigation might well have been avoided.

Petra, as did the District Court, chose to disregard the express provisions of the CMA, and the express requirements of the ITCA which likewise exist to prevent this unfortunate, and costly set of circumstances. Unfortunately for Petra, unlike compliance with the CMA, its failure to comply with the ITCA cannot be waived or estopped and is a jurisdictional bar to its claims. *Madsen v. Idaho Dept. of Health and Welfare,* 116 Idaho 758,761, 779 P.2d 433, 436(Ct. App. 1989). The District Court erred in applying a "fully accrued" analysis to Petra's failure to comply with the ITCA permitting Petra to control when and how it presents its claim against the City. Accordingly, reversal on this ground is mandated by both the public policy rationale and prior precedent in this Court.

E. THE DISTRICT COURT ERRED IN FAILING TO FIND PETRA'S MULTIPLE AND MATERIAL BREACHES OF THE CMA.

Unfortunately, the District Court's failure to apply the express terms of the Contract Documents was not limited to solely its application as a bar to Petra's claim for an equitable adjustment to its CM Fee. The District Court also disregarded the express provisions of the Contract Documents which defined Petra's duties, both contractual and fiduciary, to not simply "observe" the work performed but to actually "inspect" the work being performed by the various contractors.

Even more egregiously, the District Court expressly recognized that Petra had failed to comply with statutory mandates (required Construction Manager's Bond), explicitly found that Petra had overcharged the City, and had, at least implicitly, if not expressly, concluded that Petra had breached the Contract Document provisions with regard to seeking an equitable adjustment to its CM Fee and Reimbursables. Despite these findings, either individually or in combination, the District Court inexplicably did not find Petra to have materially breached the Contract Documents. No amount of focus upon those actions which Petra did undertake, as Petra's Brief seeks to divert this Court's attention, can obscure the Findings of Petra's material breaches of the Contract Documents and the District Court's error to recognize their legal effect, as a matter of law.

As has already been demonstrated, this case is simply about what duties Petra failed to perform.

1. Petra Materially Breached its Contractual Duty of Inspection.

First, Petra's Brief erroneously and falsely argues that Petra was under no obligation to actually "inspect" the work that was being performed on the Meridian City Hall. Each of the Contract Documents expressly state otherwise.

Section 4.7.9 of the CMA expressly provides that:

> Construction Manager shall carefully observe the Work of each Contractor whenever and wherever necessary, and shall, at a minimum, observe Work at the Project site no less frequently than each standard workday. The purpose of such observations shall be to determine the quality and quantity of the Work in comparison with the requirements of the Construction Contract. In making such observations, Construction Manager shall protect Owner from continuing deficient or defective Work, from continuing unexcused delays in the schedule, and from overpayment to a Contractor. [46]

[46] Ex. 2003, p. 16, §4.7.9

Even if you could ignore the CMA's explanation that the duty to observe was to ensure the work complied with the "requirements of the Construction Contract," in Petra's own words, in its self-crafted CMP, Petra expressly defined its duty of observation as to include its responsibility for inspection.[47]

Petra wrote the CMP which expressly states: "The Construction Manager/Project Engineer will be responsible for...[p]rovid[ing] **regular inspections** of work in progress in support of Project Superintendant for the project duration."[48]

Further, Petra defines its duty as: "Daily **inspection** for correctness and quality of work being installed by the Petra Project Management team **confirming** that the work is being installed in accordance with the contract design and best construction practices." [49] Petra, and the District Court, must again be bound by the unambiguous Contract Documents.

In addition, pursuant to the A201 General Conditions,[50] Petra was contractually obligated to make inspections as part of the closeout process mandated by the Contract Documents. Article 9.8.1 of the A201 General Conditions provided that Petra was to have "certified in writing" the substantial completion of the work by each Prime Contractor by both assisting the Project Architect in "an inspection to determine whether the Work or designated portion thereof is substantially complete" as well as undertake additional "inspections" as to any work that needed to be completed or corrected.[51] Petra's groundless assertion that it had no duty of "inspection" is expressly contradicted by the Contract Documents and is therefore absolutely false.

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[47] Ex. 2267, p. 9, "Construction Manager Staffing", point 8; Ex. 2547, p. 58, §III (c).
[48] Ex. 2547, p. 10.
[49] Ex. 2547, p. 58, Section III (c).
[50] In the CMA, Ex. 2003, p. 11, §4.7.1, Petra agreed, "Construction Manager shall have and perform those duties, obligations and responsibilities set forth in the construction agreements between Owner and each Contractor (the "Construction Contracts")." The "Construction Contracts" include the A201 General Conditions (Ex. 2017).
[51] Ex. 2017, p. 42, §9.8.1

Given Petra's denial of its obligation to inspect which duty was expressly and unambiguously imposed upon it by the Contract Documents, Petra and the District Court implicitly acknowledges Petra's breach of the CMA. This breach is unquestionably material.

Here, nothing could be more material to the City than Petra's express obligation of: "[d]aily **inspection** for correctness and quality of work being installed by the Petra Project Management team **confirming** that the work is being installed in accordance with the contract design and best construction practices."[52] The City sought a "first class result" on this Project.[53]

The District Court erred as matter of law when it failed to recognize Petra's express and acknowledged duty of inspection. Rather, and based upon the express findings of the District Court that Petra failed to comply with statutory mandates, explicitly found that Petra overcharged the City. The District Court at least implicitly, if not expressly, concluded that Petra breached the provisions with regard to seeking an equitable adjustment to its CM Fee and Reimbursables. The District Court was required to go one step further to determine whether, as a matter of law, these breaches were "material." *See J.P. Stravens Planning Associates, Inc. v. City of Wallace*, 129 Idaho 542, 928 P.2d 46 (Ct. App., 1996). *Stravens* presents an analogous fact pattern and is particularly instructive to the case at bar. Therein, the plaintiff, Stravens, entered into a written services contract with the City of Wallace to "render services related to the design of a proposed downtown revitalization project, the preparation of an application for a grant to finance the project, and the management of the project construction." *Id.* at 543, 928 P.2d at 47. In upholding the district court's decision, the court relied upon the following reasoning from the district court:

The City was not entitled to guarantee [sic] of successful application much less

[52] Ex. 2267, p. 9, "Construction Manager Staffing", point 8; Ex. 2547, p. 58, §III (c).
[53] Ex. 2017, p. 21, §3.5.1.

> perfection. It was entitled, however, to expect that plaintiff, a professional grant writer, would be sufficiently versed with the applicable standards and rule [sic] of the craft so as to be able to advise the city as to what it needed to do, if indeed it needed to do anything, and in any event to do what was necessary to present an application that would at least meet minimum standards so as to entitle the city for [sic] mere consideration. The record shows that the application prepared by plaintiffs did not meet such standard. Plaintiff attempts to lay this off to some vaguely defined "lack of community commitment," but it was his responsibility under the obligation of the contract relating to "the design" of the revitalization project to manage the presentation in at least a sufficient manner to put the application on the table.

Id. at 544, 928 P.2d at 48.

The court went on to note that "[t]he essence of the district court's findings is that the city was relying upon Stravens' expertise for the project design and the coordination of the grant application process, and that if the grant from the DOC was dependent upon the commitment of funds from or action by the city or other sources, it was Stravens' duty to inform and advise the city of these facts so that the requisite action could be taken prior to the submission of grant applications." *Id.* In this case, Petra, like the plaintiff in *Stravens*, contracted with the City to provide a service: to manage and coordinate the design, and to inspect in accordance with the CMA and to provide notice to the City of its intent to seek an equitable adjustment, prior to performing what Petra now contends were "additional services." As noted by the District Court, Petra thereafter overcharged the City and further breached the provisions with regard to seeking an equitable adjustment to its CM Fee and reimbursement. As with *Stravens,* these breaches went to the essence of the contract between the parties. Just as the court in *Stravens* concluded that Stravens materially breached the contract when he failed to advise the City of certain facts so that requisite action could be taken, the District Court erred when it failed to consider the legal effect of its Findings of breach.

The more appropriate inquiry is whether Stravens' failure to perform in a

> workmanlike manner was a "material" breach of the contract. If a breach of contract is material, the other party's performance is excused. *Ervin Const. Co. v. Van Orden,* 125 Idaho 695, 700, 874 P.2d 506, 511 (1993); *Enterprise, Inc. v. Nampa City,* 96 Idaho 734, 740, 536 P.2d 729, 735 (1975); *Ujdur v. Thompson,* 126 Idaho 6, 878 P.2d 180 (Ct.App.1994); *Mountain Restaurant Corp. v. ParkCenter Mall Associates,* 122 Idaho 261, 265, 833 P.2d 119, 123 (Ct.App.1992). "A substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *Ervin Const. Co.,* 125 Idaho at 699, 874 P.2d at 510. *See also Enterprise, Inc.,* 96 Idaho at 740, 536 P.2d at 735; *Ujdur,* 126 Idaho at 9, 878 P.2d at 183.

Stravens, 129 Idaho at 545, 928 P.2d at 49.

Here, the District Court, despite finding multiple breaches of the contract, failed to engage in any analysis of the legal effect of these breaches. Based upon the reasoning set forth in *Stravens*, there can be but one conclusion of law to be drawn from the District Court's findings: Petra's breaches were material, the City's performance under Section 7 was excused, and Petra waived its right to seek an equitable adjustment under the CMA.

2. Petra Breached the CMA by Failing to Obtain a Statutorily Mandated Performance Bond.

In the CMA, Petra expressly agreed to comply with all laws.[54] The evidence in the record is not in dispute. Petra did not obtain a statutorily required performance bond pursuant to Idaho Code § 54-4512. Both the District Court, and Petra, falsely asserts that the City could somehow substitute an errors/omissions insurance policy for statutorily required bonds. However, neither Petra nor the City could waive the application of this express statutory obligation.

The District Court's legal error arises from the conclusion that the errors/omissions insurance policy may, in the discretion of the City, be substituted for the statutorily required

[54] Ex. 2003, p. 8, §2.7.

payment and performance bonds. By Idaho Code § 54-4512, such discretion is expressly prohibited, rendering the District Court's conclusion as one which would create an illegal provision within the Contract Documents. Such an illegal provision is expressly severable by reason of Section 10.18 of the CMA.[55]

An illegal contract is one that rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy. *Quiring v. Quiring,* 130 Idaho 560, 566, 944 P.2d 695, 701 (1997) (citations omitted). The general rule is that a contract prohibited by law is illegal and unenforceable. *Id.; Williams v. Cont'l Life & Acc. Co.,* 100 Idaho 71, 73, 593 P.2d 708, 710 (1979); *Whitney v. Cont'l Life and Acc. Co.,* 89 Idaho 96, 105, 403 P.2d 573, 579 (1965). A contract "which is made for the purpose of furthering any matter or thing prohibited by statute...is void." *Kunz v. Lobo Lodge, Inc.,* 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct.App.1999) (quoting *Porter v. Canyon County Farmers' Mut. Fire Ins. Co.,* 45 Idaho 522, 525, 263 P. 632, 633 (1928)). This rule applies on the ground of public policy to every contract which is founded on a transaction prohibited by statute. *Id.* (citing *Porter,* 45 Idaho at 525, 263 P. 632, 633 (1928) (citations omitted)).

The Idaho Court of Appeals has suggested that "where a statute intends to prohibit an act, it must be held that its violation is illegal, without regard to the reason of the inhibition ... or to the ignorance of the parties as to the prohibiting statute." *Id.* (quoting 17A Am.Jur.2d *Contracts* § 251 (1991)); *Trees v. Kersey*, 138 Idaho 3, 6-7, 56 P.3d 765, 768-69 (2002)

Here, the public policy of I.C. §54-4512 is patently clear. Rather than an insurance

[55] Ex. 2003, p. 27, § 10.18.

policy, such as the decreasing value policy of errors & omission coverage supplied by Petra,[56] the statute expressly requires a payment and performance bond to insure the faithful performance of all duties by the bonded Construction Manager. Any agreement which would substitute an insurance policy for the statutorily required Construction Manager's Bond on a public works project is void. The District Court's conclusion and Petra's assertions to the contrary are simply false. There can be no question that the failure to comply with a statutory mandate requirement is material and the District Court erred as a matter of law in failing to apply Idaho law.

3. Petra Materially Breached the CMA by Overcharging the City.

The District Court's express recognition of Petra's overcharging of the City but failure to acknowledge such as an express and material breach of contract is utterly inexplicable. Despite this recognition of overcharges, overcharges which Petra itself concedes could even be as much as $92,000 rather than the $52,000,[57] the District Court completely fails to address its legal significance as if "materiality" was some sort of numbers game where what is material is determined by reference to the total contract price.[58] As demonstrated in the City's Appellant's Brief, the District Court's overcharge figure is nothing more than a speculative guess, rather than a careful examination of the evidence presented.[59]

"Materiality" is not simply dismissed by a mathematical computation of claimed damages to total value. Rather, "[a] substantial or material breach of contract is one which

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[56] A decreasing value insurance policy is one in which the amount of insurance decreases with funds spent by the insurance company in the prosecution or defense of any claim. Insurance policies may also contain significant exclusions as compared to bonds.

[57] Petra's Brief, p. 52; Petra fails to dispute the City's calculation of overcharges as contained in the Appellant's Brief totaling $223,775.76.

[58] The District Court implicitly conceded Petra's post trial argument that §2.1.4 of the CMA, the "betterment clause," did not relieve Petra of its contractual responsibility under §2.1.5 of the CMA for "full responsibility to Owner for its own improper acts and/or omissions" when it awarded the City damages for Petra's overcharges. However, out of caution, the City would refer the Court to the City briefing at R. 4321-4322 and the Affidavit of Franklin G. Lee at R. 4047-4063.

[59] Appellant's Brief, pp. 45-48 & 75-76.

touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 700, 874 P.2d 506, 510 (1993); *See also, Aldape v. Lubke,* 107 Idaho 316, 318, 688 P.2d 1221, 1223 (Ct. App. 1984). Whether considered to be fiduciary in nature or not, Petra, by the express provisions of the CMA, understood and accepted "the relationship of trust and confidence" with the City.[60] Can there be any more material breach, any action which goes more to the heart of ones trust and confidence, than overcharging? The District Court's express findings that Petra obtained payment from the City for amounts "not provided for in the Construction Management Plan or which exceeded the limits for Reimbursables," set the foundation for a correct legal analysis, absent from the District Court's Order.[61]

Despite this express finding, the District Court erred as a matter of law by failing to acknowledge any breach, let alone the material breach. This legal error is further exacerbated by the District Court's approach concerning the calculation of the damages incurred by the City. Contrary to the assertions of Petra, the City is not asserting the District Court is required to "provide a lengthy discussion on every single piece of evidence."[62]

However, at minimum, the legal precedent of this Court requires that the District Court was required to, essentially, "show its work" and explain how it derived at an amount for which even Petra itself cannot calculate a justification. As was the case in *Ervin Const. Co.* where this Court reversed and remanded on the trial court's calculation of damages, the District Court cannot summarize the evidence and assert its award is a "reasonable balance" fairly reflecting the evidence it considered. As this Court stated in *Ervin Const. Co.*:

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[60] Ex. 2003, p. 5, §1.1.
[61] R. 8273, ¶ 92.
[62] Petra's Brief at 58.

> While the trial court may have been grappling with the sufficiency of the proof to establish the costs to repair the defects (as opposed to costs to complete the home, for which Ervin was responsible), it was nevertheless clearly erroneous for the trial court to create a damage figure which it deemed reasonable.

Id., 125 Idaho at 702, 874 P.2d at 513.

The District Court found that Petra had overcharged the City in violation of the express provisions of the CMA. It was clear legal error for the District Court to: 1) not consider this action to be a breach of the express trust and confidence that the City placed in Petra; 2) not to consider this breach to be material; and 3) not to identify the basis upon which it was awarding damages. This Court however, is free to adopt the undisputed[63] calculation provided by the City in its Appellant's Brief[64] and remand with direction for the entry of damages.

4. Petra Materially Breached the CMA by Failing to Assure Substantial and Final Completion.

The District Court further failed to acknowledge Petra's express duties contained within the Contract Documents concerning the substantial and final completion requirements. Petra's duties were expressly stated and, despite Petra's erroneous factual representation to this Court, the undisputed record reveals that Petra wholly failed comply with those clear, express duties. This failure is yet another material breach which both singularly, and in conjunction with the other breaches identified in the foregoing, constitutes a clear error by the District Court requiring outright reversal with direction.

In order to understand the erroneous nature of Petra's representation to this Court concerning what services it was to perform, and what it actually performed, it is again necessary to briefly return the focus to the express provisions of the Contract Documents that defined the

[63] Petra, in its Brief, does not dispute the City's calculation of the overcharges in any manner.
[64] Appellant's Brief, pp. 45-48 & 75-76.

duties concerning substantial and final completion. Pursuant to the CMA, it was Petra's responsibility "**to do all things**, or, when appropriate, require **Architect and each Contractor to do all things necessary**, appropriate or convenient to achieve the end result desired by Owner..."[65]

If not by implication, by express direction, the CMA expressly bound Petra to "require Architect...to do all things necessary..."[66] LCA's Professional Services Agreement is, by incorporation, part of the Contract Documents.[67] In the Professional Services Agreement, LCA was expressly require to "certify in writing to Owner the fact that, and the date upon which, each Contractor achieved Substantial Completion of the Project and the date upon which Contractor has achieves [sic] Final Completion of the Project."[68] Yet, when Petra asked LCA to issue **a** Certificate of Substantial Completion, and LCA failed to do so, Petra did nothing.[69] Petra's admission that it did nothing with respect to the express contractual Substantial Completion requirements is yet another undisputed material breach by Petra.

Moreover, as the Contract Documents included assuring compliance with the MCH Specifications, Petra ignores the indisputable fact that these Specifications contained a very specific "closeout" procedure. Further reinforcing the conclusion that Petra's duty was not merely to "observe," but also to inspect, the specifications required that Petra obtain test and inspection reports.[70] These close-out provisions expressly required, in Section 1.4 entitled "Final Completion,"[71] that Petra, among other actions, "[s]ubmit **certified copy of Architect's**

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[65] Ex. 2003, p. 11, §4.1
[66] Ex. 2003, p. 11, §4.1
[67] Ex. 2003, p. 10, §3.3; R. 8264, ¶ 6.
[68] Ex. 2002, p. 15, §4.6.11; This provision is consistent with the express duties of **both** Petra and LCA in §9.8.1 of the A201 General Conditions as a Contract Document; Ex. 2017, p. 42, §§ 9.8.1 & 9.8.2.
[69] Petra's Brief, p. 21.
[70] Ex. 2154, pp. 93-94, 100-103, 125-128.
[71] Ex. 2151, p. 7, §1.4.

Substantial Completion inspection list of items to be completed or corrected (punch list) **endorsed and dated** by Architect." Not a single punch list placed in evidence at trial was "endorsed and dated" by LCA.[72] Moreover, as required in the AIA A201 General Conditions Petra was obligated to ensure that each contractor give Petra "**written notice** that the Work is ready for final inspection and acceptance."[73] Petra was expressly required, by this same Section, to make a recommendation to the Architect that the "Work"[74] was acceptable and "the Contract fully performed."[75]

Against these clear, express, and unambiguous duties defined by the Contract Documents, Petra's failure to perform its duties is abundantly evident. For example, as argued in the Appellant's Brief at page 17, Petra's failure to require the specified pressure testing as part of the closeout procedures relating to the water features resulted in Petra's failure to discover, and reject the work of the contractor which resulted in the fact of the water feature leaking 5000 gallons of water per day, as acknowledged by Petra's witness Steve Christiansen.[76]

Petra seeks to deceive with a patently erroneous assertion of the factual record, with its representations as to the mechanical, electrical and plumbing systems as provided in Heery's September 8, 2008 report.[77] In particular, Petra asserts: "Heery then verified and closed each of these issues" relating to the mechanical, electrical and plumbing systems.[78] As authority for this statement Petra points to Ex. 764, a "Facility Assessment" prepared by Heery, March 23, 2010.

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[72] Ex. 2175; Ex. 2465; Ex. 548; Ex. 878.
[73] Ex. 2017, p. 43, §9.10.1.
[74] Remember, the "Work" as defined in Section 1.1.3 meant all labor and materials made necessary by the contract documents (no exceptions).
[75] Full performance of the Contract means exactly what it says, "full performance" and that all the Work be completed in accord with the contract documents. Petra's Brief never responds to the specific items of unperformed, or incorrectly performed Work which Petra failed to inspect and reject in accord with Petra's express contractual duty.
[76] Tr. p. 8531, LL. 3-22.
[77] Petra's Brief, p. 18.
[78] *Id.*

Petra's assertion is blatantly false, because more than one and one-half years later, Heery acknowledges significant concerns as to the mechanical, electrical, and plumbing systems. This conclusion was adopted by the District Court,[79] wholly ignoring the contemporaneous conclusions by Heery itself which acknowledged:

> To address the results of the AHU ((Air Handling Unit)) piping rework observations, there are items of concern...From our cursory review, the facility's mechanical, electrical and plumbing systems do appear to have **several significant concerns**. When we consider the **current items** with the **historical items** of concern, Heery would recommend that a report from the construction team and design team be sought.[80]

Heery's issues log dated September 8, 2008, indicated at least fourteen issues that were unresolved and recommended "the City of Meridian close-out the items on the issues log before fully accepting the building systems as installed, tested and programmed. Validation of the outstanding issues can be made by Heery during the post occupancy review."[81] However, and directly contrary to the District Court's Finding 66 that "all items were corrected," there is no evidence that these items were ever corrected, and the Finding is clearly erroneous. Both Heery's September 2008 and March 2010 reports reflect that the major issues with the mechanical, electrical and plumbing systems were never resolved.[82] The mechanical, electrical and plumbing systems, as identified by Heery, were never substantially complete, nor was the

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[79] *See,* R. 8270, ¶ 66: "Petra and LCA worked together to develop punch lists of items that need to be corrected and **all items were corrected.**" (emphasis added). Unfortunately, the District Court's finding is clearly erroneous when one examines Petra's citation to the record on this issue. *See,* Ex. 764, p. 18 of the Heery "Facility Assessment" dated March 23, 2010: "To address the results of the AHU (Air Handling Unit) piping rework observations, there are items of concern...From our cursory review, the facility's mechanical, electrical and plumbing systems do appear to have **several significant concerns.** When we consider the **current items** with the **historical items** of concern, Heery would recommend that a report from the construction team and design team be sought." (emphasis added).

[80] Ex. 764, Heery "Facility Assessment" dated March 23, 2010, p. 18 (emphasis added).

[81] Ex. 2143, p. 6.

[82] Ex. 764; Ex. 2143 which evidences that major issues with the "mechanical, electrical and plumbing systems," existed as of September 2008 and were not corrected as of March 2010, nearly one and one-half years later.

Work of those contractors ever recommended by Petra to be acceptable, nor "fully performed."[83]

Thus, the indisputable evidence in the record establishes that the District Court simply ignored Heery's September 2008, and March 2010 reports of serious deficiencies in the "mechanical, electrical and plumbing systems"[84] and its subsequent uncontroverted admission that the "mechanical, electrical and plumbing systems" never operated properly.[85] The District Court's failure to enforce the express contractual terms against Petra, and the District Court's failure to find Petra materially breached its duty of inspection/rejection as to the Work of the mechanical, electrical, and plumbing prime contractors is clear error as a matter of law. [86]

5. Petra Materially Breached the CMA by Failing to Follow the CMA Provisions with Regard to Seeking an Equitable Adjustment.

As should also be obvious from the record, and a point upon which Petra makes no comment, Petra's failure to follow the express provisions of the CMA generally, and Section 7 specifically, with regard to its demand for additional compensation also constitutes a material breach of the CMA. Once again, had Petra complied with the express provisions of the CMA which concern the manner, method, and presentment of a request for an equitable adjustment, the matter could have been timely and appropriately addressed before construction of the Project proceeded to the point that it did. Had Petra given the City an opportunity for an informed decision to give its approval, both the City and Petra could have taken action to minimize, if not entirely avoid, the necessity of the costly and protracted litigation that ensued. This admitted and

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[83] Ex. 2017, p. 43, §9.10.1.

[84] Ex. 2267, p. 9, "Construction Manager Staffing", point 8; Ex. 2547, p. 58, §III (c). Petra had a duty of inspection for compliance with the Contract Documents, and thus Petra failed this duty as to the "mechanical, electrical and plumbing systems," as identified by Heery.

[85] Heery's conclusion from the 2010 report is exactly what had been demonstrated by the Preliminary TAB (Test, Adjust, Balance) Report that was provided by Hobson in 2008 (Ex. 2804).

[86] It is impossible to deny that a fully functional "mechanical, electrical and plumbing systems" in a City Hall building are not the "heart of the contract," and thus Petra's failure to inspect/reject this failed Work is a material breach.

singular breach must be considered material given the consequential result – this very litigation itself.

6. The District Court Erred in Disregarding the Multiple Additional Breaches of the CMA by Petra.

Once again, it is not the City's position that the Contract Documents obligated Petra to be the guarantor of the work.[87] Rather, as explained and supported by citations to the record in the City's Appellant's Brief, the Contract Documents expressly identified what specific services Petra was to provide and which services the District Court expressly and implicitly found Petra unquestionably failed to provide. The District Court erred, as a matter of law, in failing to consider the undisputed damages the City incurred as a result of these multiple and material breaches of the Contract Documents.[88]

Petra's brief writing strategy is clear: Petra seeks to divert the Court's attention to anything and everything, except for the uncontradicted citations to the record of admissions by Petra's witnesses which the District Court erred in failing to recognize. The District Court failed as a matter of law to recognize that Petra's did not perform their express contractual duties.

In each instance where an admitted failure to comply with the Contract Documents occurred Petra chose not to respond.[89] Petra simply could not, with candor to the tribunal, argue against the truth of the record. The District Court's failure to apply, and enforce the express provisions of the Contract Documents is in direct contravention to nearly one hundred years of legal precedence in Idaho.

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[87] Petra's Brief, p. 13.
[88] Appellant's Brief, pp. 72 & 76.
[89] Tr. p. 7993, LL. 2-25; Tr. p. 7996, LL. 12-22; Tr. p. 7999, LL. 3-22; Tr. p. 8000, LL. 3-18; Appellant's Brief, Appendix G; Tr. p. 7988, L. 20 – p. 7989, L. 5; Appellant's Brief, Appendix H; Tr. p. 7992, L. 6 – p. 7996, L. 22; Appellant's Brief, Appendix I.

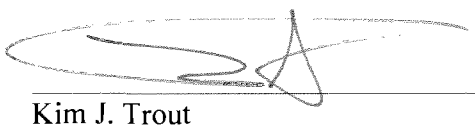
III. CONCLUSION

At the core, this case requires the application of express contract principles. In order to achieve its result, the District Court disregarded express contractual duties which would bar Petra's claims, failed to find Petra in breach of express duties, drew improper legal conclusions excusing Petra's required performance, and rewrote the Contract Documents. In essence, the District Court nullified portions the Contract Documents.

The fundamental failure of the District Court was, and remains, an item-by-item legal application of contract principles to the express Contract Documents. A correction of the legal errors in application to the core findings mandate reversal, with direction, to the District Court: 1) Dismissing Petra's claims and reversing the award of attorney's fees at trial; 2) Finding Petra in material breach of the Contract Documents and directing the award of damages as calculated from the record and documentary evidence; and 3) awarding the City its attorney's fees, at trial, and upon appeal.

Respectfully submitted this 29th day of June, 2012.

TROUT • JONES • GLEDHILL • FUHRMAN • GOURLEY, P.A.

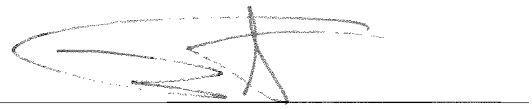


Kim J. Trout
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic 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 June, 2012.



Kim J. Trout

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 29, 2012 a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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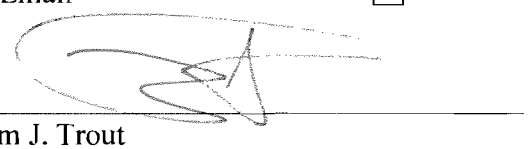

Kim J. Trout

APPENDIX A

NO.	PETRA'S FOOTNOTED ASSERTIONS	PETRA'S CITATION REFERENCE	CITY'S RESPONSE REBUTTAL
102	Petra helped schedule inspections, and observed construction but was not responsible for inspections.[102]	[102] Testimony of Gene Bennett, at 5511:5-6.	Petra cites to the testimony of Mr. Gene Bennett in an attempt to state that Petra was not responsible for inspections, however the actual testimony of Mr. Bennett simply states that "[t]hey would also schedule inspectors to inspect the work..." Mr. Bennett is referring to Petra employees. See, Tr. p. 5510, LL. 13-23. The Contract Documents speak differently. Petra had an express contractual duty of "inspections" pursuant to the Contract Documents. See, Ex. 2267, p. 9: "Provide regular inspections of work in progress in support of Project Superintendent for the, project duration." Ex. 2267, p. 23: "Daily inspection for correctness and quality of work being installed by the Petra Project Management team confirming that the work is being installed in accordance with the contract design and best construction practices; Ex. 2017, p. 42, §9.8.1: "Substantial Completion is the stage in the progress of the Work as certified in writing by the Construction Manager and Architect, when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use.

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NO.	PETRA'S FOOTNOTED ASSERTIONS	PETRA'S CITATION REFERENCE	CITY'S RESPONSE REBUTTAL
229	All confirmed that reheat was in full working order when Petra left the Project site.[229]	[229] Testimony of Mike Wisdom, at 6944:18-6946:7; Testimony of Ted Frisbee, Jr., at 6849:4-16.	Neither witness testifies to Petra's claimed assertion.
58	The City and LCA developed the design of the Project largely independent of Petra.[58]	[58] Testimony of Richard K. Bauer, at 9575:16-24.	Mr. Bauer's quoted contradicts Petra's assertion. Bauer says nothing about "independent" and nothing about the "City" Petra had an express contractual duty to "managing and coordinate the design" in Ex. 2003, p. 11, §4.1. The Contract Documents were never modified, and Petra's admission is a material breach of the Contract Documents.
188	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]	[188] Testimony of Todd Weltner, at 3538:12-3540:19.	Petra cites to the testimony of Mr. Todd Weltner, one of the City's experts, with respect to the masonry, in an attempt to state that Mr. Weltner erroneously failed to consider the appropriate tolerances. However, as is clear from the testimony of Mr. Weltner at the same cite, it is clear that Mr. Weltner was explaining, from the Project's Plans and Specifications, what the allowed tolerances were. Contrary to Petra's assertion, Mr. Weltner, in the quoted text, quotes directly from the technical Specifications for the masonry as contained in Ex. 2154, p. 68 §3.8.

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190	TMC completed two punch lists for the masonry veneer.[190]	[190] Testimony of Steve Christiansen, at 8254:4-8255:14.	Contrary to Petra's assertion that TMC completed two punch lists, the testimony cited makes reference to a single punch list where items were checked off. The Contract Documents, specifically the AIA A201, §§ 9.8.1, 9.8.2 and 9.8.3 (Ex. 2017), all required the LCA to provide written, certified lists for purposes of "substantial completion". No such lists were provided by Petra as the keeper of Project Records (Ex. 2003, §2.4) and none were presented in evidence at trial.
191	LCA approved TMC's completion of the first punch list.[191]	[191] Testimony of Tim McGourty, 7697:18-21.	Petra asserts that "LCA approved TMC's completion of the first punch list." However, the testimony of Tim McGourty cited actually only states that there was a "fairly extensive punch list which we first referred to, in which there was an on-site meeting with the architect." It is clear from the cited testimony, that Petra is trying to deceive this Court. The Contract Documents, specifically the Ex. 2017 (A201) §§9.8.1, 9.8.2, and 9.8.3 all required the LCA to provide written, certified lists for purposes of "substantial completion". No such lists were provided by Petra as the keeper of Project Records (Ex. 2003, §2.4) and none were presented in evidence at trial. Petra was responsible for "inspection" of the masonry pursuant to the Contract Documents and failed to make any inspection or reject non-conforming work by TMC.

APPENDIX A

NO.	PETRA'S FOOTNOTED ASSERTIONS	PETRA'S CITATION REFERENCE	CITY'S RESPONSE REBUTTAL
259	In short, the punch lists for the water features were completed and closed.[259]	[259] Testimony of Gene Bennett, at 5624:12-14.	Petra states that the punch lists for the water features were completed and closes and cites to testimony of Mr. Gene Bennett. Mr. Bennett stated that the punch lists were "closed" but does not state that they were completed. In fact, if you read further, Mr. Bennett states that retention wasn't released because there was masonry failures. There are no LCA and Petra certified punch lists for the water features as required by the A201, §§ 9.8.1, 9.8.2 and 9.8.3