No. 102764-8

SUPREME COURT OF THE STATE OF WASHINGTON

No. 85120-9-I

WASHINGTON COURT OF APPEALS, DIVISION I

POWERCOM, INC., a Washington corporation,

Appellant,

v.

PORT OF SEATTLE; CLARK CONSTRUCTION GROUP, LLC; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; FEDERAL INSURANCE COMPANY; ZURICH AMERICAN INS. CO. (Bond Nos. 106308203/82298673/09190971 and Bond Nos. 106356881/82298695/09207256); VALLEY ELECTRIC CO. OF MT. VERNON, INC.; ARGONAUT INSURANCE COMPANY;

Respondents.

RESPONDENT CLARK CONSTRUCTION GROUP, LLC'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

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I. INTRODUCTION

This case does not merit further review. The legal principle at issue in this appeal is uncontroversial and uncontested: waiver of Little Miller Act rights must be "clear and explicit." The Court of Appeals held so in this case. *PowerCom, Inc. v. Valley Elec. Co. of Mt. Vernon, Inc.*, __ Wn. App. 2d ___, 540 P.3d 1181, 1184 (Wash. Ct. App. 2024). Respondent Clark Construction Group, LLC does not argue otherwise.

This case therefore presents only the fact-bound question of whether PowerCom's contract effectuates a clear and explicit waiver. It does. The Court of Appeals agreed, relying on PowerCom's express promise "that it will … pursue no independent litigation" of its pass-through claims. *Id.* at 1185. Independent litigation of these claims, the court reasoned, "clearly encompasses" Little Miller Act suits to collect on the claims. *Id.* at 1186 (quotation mark and citation omitted). That conclusion is plainly correct.

Remarkably, PowerCom's petition never discusses the language that the Court of Appeals relied on. Instead, PowerCom inaccurately asserts that other courts have rejected "identical" contracts as insufficiently clear and explicit. Pet. 4, 22, 26. That is not true, and the Court of Appeals rejected this argument. None of PowerCom's caselaw is inconsistent with the outcome in this case.

Nor does PowerCom provide any other reason for this Court to review the Court of Appeals' decision. PowerCom does nothing to substantiate its claim that this case will have widespread effects (because it will not). And PowerCom's arguments about what the courts below might hold in *future* stages of this case only serve to emphasize the premature nature of PowerCom's petition.

The Court of Appeals got it right. PowerCom's arguments for review are unconvincing.

II. STATEMENT OF THE ISSUE

Clark raises no additional issues for review. The issue raised for review by petitioner is properly characterized as:

Whether the trial court acted within its discretion in staying PowerCom's pass-through claim.

III. STATEMENT OF THE CASE

A. The Parties' Agreements

This case arises from construction of the International Arrivals Facility at the Seattle-Tacoma International Airport (the "Project"). CP 3.

In 2015, the Port of Seattle hired Clark as the Project's design-builder and prime contractor. CP 3. In 2017, Clark subcontracted with Valley Electric to install security, alarm, video surveillance, and other systems. CP 3. And in 2018, Valley sub-subcontracted with PowerCom, including to install and test various electrical cables within Valley's scope of work. CP 5. This tiered contracting system is typical of large, complex construction projects.

At each tier, the contracting parties entered into written agreements that govern their relationships. The contracts contain interlocking dispute resolution procedures.

The top-level contract between Clark and the Port ("Main Contract") includes a multi-step "Dispute Resolution Process." CP 622-23. The process governs not only Clark's own claims against the Port, but any claims Clark asserts against the Port "on behalf of [a] Subcontractor, Sub-subcontractor, or Supplier." CP 621. These latter claims are known as "pass-through claims." Because subcontractors lack contractual privity with the Port, they *pass* their claims against the Port *through* intervening parties that do have contractual relationships with the Port and can assert the claims on the subcontractors' behalf. CP 321.

Under the Main Contract, all claims against the Port, including pass-through claims, go through several stages of alternative dispute resolution, followed by litigation. CP 622-26.

The second-tier contract between Clark and Valley (the "Subcontract") incorporates these pass-through claim

procedures. For pass-through claims, Valley "agree[d] to be bound to Clark to the same extent that Clark is bound to the [Port], by the terms of the [Main Contract]." CP 631. Valley must submit pass-through claims to Clark, and Clark must either present the claims to the Port or "authorize [Valley] to present" the claims itself. CP 631. Either way, on its pass-through claims, Valley expressly agreed to be bound "by any and all preliminary and final decisions or determinations made [under the Main Contract] by the party, board or court so authorized in the [Main Contract]." CP 631.

The third-tier contract between Valley and PowerCom (the "Sub-subcontract") also incorporates this process. For pass-through claims, PowerCom, like Valley, agreed to be bound by the Main Contract's dispute resolution process. CP 646. And PowerCom specifically agreed to be bound "by any and all … resulting decisions, findings, determinations or awards made thereunder by the person so authorized in the Main Contract, or by an administrative agency, board, court of competent

jurisdiction or arbitration." CP 646. In other words, PowerCom specifically agreed that its claims against the Port would be passed through to Clark for resolution under the Main Contract, and that the results of that process would bind PowerCom on its pass-through claims.

As particularly relevant here, PowerCom also "agree[d] that it will not take, or will suspend, any other action or actions with respect to any [pass-through] claims and will pursue no independent litigation with respect thereto, pending final determination" of its pass-through claims under the Main Contract. CP 646. In other words, PowerCom expressly waived the right to bring any other litigation to vindicate pass-through claims prior to the conclusion of the Main Contract's dispute resolution process.

These three, interlocking contracts create a consistent scheme governing claims against the Port related to the Project: subcontractors' claims against the Port must be passed up the chain—from PowerCom, to Valley, to Clark—and asserted by

Clark against the Port as contemplated by the Main Contract. This system of pass-through claim adjudication is common in large construction projects throughout the nation.

B. Proceedings Below

1. On October 19, 2022, PowerCom filed the operative complaint against Valley, Clark, the Port, and the sureties that Valley and Clark engaged to provide payment bonds for the Project. CP 1. PowerCom's claims arise from a smattering of disputes that occurred during the Project. *See, e.g.*, CP 6-8. Clark—like each of the defendants—denies all of PowerCom's claims.

The only claim at issue in this appeal is PowerCom's Little Miller Act claim. PowerCom seeks to recoup costs and expenses that it alleges it incurred as a result of the COVID-19 pandemic. PowerCom asserts that COVID-19 protocols implemented on the Project "caused inefficiencies for PowerCom and its crews for a period of over a year and a half," including by shutting down the work site, requiring social distancing, creating temperature

check-in stations, and eliminating tool sharing. CP 9-10.

PowerCom concedes that it submitted this claim to Valley as a pass-through claim against the Port for resolution under the Main Contract. Pet. 8. PowerCom further concedes that Valley submitted the claim (along with its own COVID-19 claim) to Clark; and that Clark submitted those claims (along with Clark's own COVID-19 claim) to the Port for resolution. CP 10-11. The Port has so far denied these claims, but litigation of these claims remains ongoing. Clark strongly disagrees with the Port's position, and is working to bring all the COVID-19 claims to a favorable resolution.

2. On January 18, 2023, PowerCom moved to compel arbitration of its claims, and to stay its claims in the trial court. CP 312-13. Clark voluntarily agreed, solely for efficiency, to arbitrate PowerCom's non-pass-through claims. CP 990. The Port declined to arbitrate any claims. PowerCom's petition does not present any issues for review related to the disposition of its arbitration motion.

In response to PowerCom's motion, Clark asked the trial court to stay PowerCom's pass-through claim. CP 990-91. Clark pointed to the provision in PowerCom's agreement binding it to the Main Contract's dispute resolution process and requiring it not to pursue independent litigation pending the completion of that process. RP 13-14. That process remained (and remains) ongoing: as contemplated by the Main Contract, Clark has filed a lawsuit against the Port asserting its own claims and subcontractors' pass-through claims. CP 990; *see Clark Constr. Grp. v. Port of Seattle*, King County Cause No. 22-2-20747-7 SEA. Clark's, Valley's, and PowerCom's COVID-19 claims were and are being actively adjudicated in that lawsuit, and the results would bind PowerCom and resolve the pass-through claim it is asserting in this case. CP 990-91; *see also* CP 646.

Clark thus argued that in accordance with the parties' contracts, and in the interests of judicial economy, PowerCom's pass-through claim in this case should be stayed pending the resolution of that claim between Clark and the Port. CP 991; RP

7-8, 20 (PowerCom acknowledging at argument that Clark had requested a stay of PowerCom's pass-through claim).[1]

3. On March 17, 2023, the trial court granted PowerCom's motion in part, denied it in part, and stayed the pass-through claim. CP 736-38. As relevant here, the trial court granted Clark's request for a stay of the pass-through claim "pending resolution of Clark's lawsuit against Port of Seattle …, which such lawsuit includes Plaintiff's pass-through COVID-19 claim." CP 737.

4. On March 20, 2023, PowerCom appealed. As relevant here, PowerCom argued that the trial court stay violated its rights under the Little Miller Act to bring an independent claim against

[1] PowerCom asserts that Clark failed to argue in the trial court that PowerCom's contract waived its right to bring a Little Miller Act claim. Pet. 13-14. The Court of Appeals correctly rejected this waiver argument. *PowerCom*, 540 P.3d at 1184 n.6. Clark clearly raised the issue. RP 13-15. Indeed, before the trial court *PowerCom's own lawyer* described "Clark's argument" as being "that Powercom's statutory Little Miller Act claim can be waived." RP 20. PowerCom's counsel went on to refer to Little Miller Act "waive[r]" four more times. RP 20-21.

Valley and Clark's sureties. *PowerCom*, 540 P.3d at 1184.

Clark argued "that PowerCom contractually waived by 'clear and explicit language' its right to recover under the Little Miller Act pending resolution of Clark's lawsuit against the Port." *Id.*

The Court of Appeals "agree[d] with Clark." *Id.* The court noted the trial court's "inherent power to stay its proceedings where the interest of justice so requires," a decision reviewed for "abuse of discretion." *Id.* (citations omitted).

The Court of Appeals then observed that while the Little Miller Act provides subcontractors a cause of action against a prime contractor's surety, "[a] subcontractor may waive its right to sue under the Little Miller Act." *Id.* (citations omitted). Waivers "must be manifest by the plain language of the contract." *Id.* at 1185 (quoting *3A Indus. v. Turner Constr. Co.*, 71 Wn. App. 407, 413, 869 P.2d 65 (1993)) (cleaned up).

Applying this uncontroversial principle, the court pointed to the "plain language" of PowerCom's contract, which says:

> PowerCom agrees that it will not take, or will suspend, any other action or actions with respect to [pass-through] claims and will pursue no independent litigation with respect thereto, pending final determination of any dispute resolution procedure between the Port and Clark.

Id. (cleaned up). The Court of Appeals held that this "unambiguous language clearly" and "explicitly manifests PowerCom's agreement to relinquish the right to resolve pass-through claims in the first instance to Clark and to pursue no independent litigation until that process is complete." *Id.* The court therefore concluded that the "trial court did not abuse its discretion by staying PowerCom's pass-through COVID-19 related claim." *Id.* at 1186.

IV. ARGUMENT

PowerCom does not identify any grounds warranting review under RAP 13.4(b). As set forth below, Division One's decision correctly applied settled law to an unambiguous contract. The outcome is consistent with how courts have treated similar cases across the nation. The Court of Appeals' proper

interpretation of the contract does not create any issue of substantial public interest under RAP 13.4(b)(4). This Court should deny review.

A. The Court of Appeals' Decision Is Correct

The Court of Appeals correctly held that PowerCom's contract waives the right to bring a Little Miller Act claim pending a final determination of the dispute resolution process between Clark and the Port. *PowerCom*, 540 P.3d at 1184-86. As a result of that holding, the court correctly held that the trial court did not abuse its discretion in staying PowerCom's pass-through claim. Contrary to PowerCom's repeated assertion, none of its caselaw is inconsistent with the Court of Appeals' decision.

1. Washington's Little Miller Act, and similar statutes throughout the nation, provide subcontractors on government projects a right of action against the prime contractor's surety bond in the event the subcontractors are not timely paid. RCW 39.08.030; *see PowerCom*, 540 P.3d at 1184.

But the right to file a Little Miller Act suit can be waived, including when a subcontractor agrees to be bound by a prime contract's dispute resolution process. A "stricter standard for incorporation" of the prime contract's dispute process applies. *Wash. State Major League Baseball Stad. Pub. Fac. Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502, 526, 296 P.3d 821 (2013). Merely referencing the prime contract's "general conditions" in the subcontract, without specifically referencing the dispute process, does not suffice. *Fanderlik-Locke Co. v. United States*, 285 F.2d 939, 943 (10th Cir. 1960). But as this Court has explained, "courts have found incorporation of disputes clauses in the prime contract … where there is 'a provision in the [subcontract] making the 'disputes' clause expressly applicable.'" *Wash. State Major League Baseball Stad.*, 176 Wn.2d at 526 (citation omitted).

PowerCom's contract meets and exceeds the standard for waiving the right to bring a Little Miller Act suit. The Sub-subcontract not only—at length—sets forth PowerCom's

agreement to be bound by the Main Contract dispute process and "by any and all … resulting decisions" of that process. CP 646. It also expressly states that PowerCom agrees "that it *will not take, or will suspend, any other action* or actions with respect to any [pass-through] claims *and will pursue no independent litigation with respect thereto*" while the Main Contract dispute process is ongoing. CP 646 (emphasis added).

Indeed, as the Court of Appeals observed, other courts have held similar language justifies a stay of Miller Act remedies. *PowerCom*, 540 P.3d at 1185-86. In *United States v. David Boland, Inc.*, for example, a federal district court held that language requiring the subcontractor to "first pursue and fully exhaust" contractual dispute resolution "before commencing *any other action*" "clearly encompasses" Miller Act claims. 922 F. Supp. 597, 598 (S.D. Fla. 1996) (emphasis added), *aff'd sub nom. Trans Coastal Roofing v. Boland*, 226 F.3d 646 (11th Cir. 2000) (Table); *see also United States v. Daniel, Urbahn, Seelye & Fuller*, 357 F. Supp. 853, 861 (N.D. Ill. 1973) (finding waiver

because "the disputes clause is explicitly set out in the subcontract itself" rather than incorporated by general reference); *United States v. Dick/Morganti*, No. C 07-02564, 2007 WL 3231717, at *2 (N.D. Cal. Oct. 30, 2007) (finding waiver because of language requiring subcontractor "to stay *any action* … until the dispute resolution and appeals process … is exhausted" (emphasis added)).

2. PowerCom concedes that its Little Miller Act rights can be waived by "a clear and explicit waiver." Pet. 17. And PowerCom does not dispute that its Little Miller Act claim is "independent litigation" of pass-through claims that its contract bars it from bringing. Indeed, PowerCom does not address, anywhere in its argument, the key contractual language on which the Court of Appeals relied.

PowerCom instead points to a handful of cases that, it claims, stand for the proposition that the language in its contract is not sufficiently clear to justify a stay. PowerCom claims that these cases involved "identical" or "nearly identical" contracts.

Pet. 4, 22, 26. That is not so, and none of these cases—all of which PowerCom cited before the Court of Appeals—undermines the Court of Appeals' decision.

First, PowerCom points to *Fanderlik-Locke*. But in that case, the subcontract merely contained a reference to binding the subcontractor to the "general conditions" of the prime contract. 285 F.2d at 943. PowerCom's contract, in contrast, contains paragraphs of text carefully incorporating the Main Contract dispute process, binding PowerCom to follow it, making its determinations conclusive on PowerCom, and barring PowerCom from pursuing "independent litigation." This case is nothing like *Fanderlik-Locke*, as the Court of Appeals in this case pointed out. *PowerCom*, 540 P.3d at 1185.

Second, PowerCom cites *United States v. Weststar Engineering, Inc.*, 290 F.3d 1199 (9th Cir. 2002). But in that case, the relevant contract merely stated that the subcontractor would be paid "when and if" the prime contractor was paid by the government. *Id.* at 1202. The contract did not incorporate a

separate dispute resolution process, nor did it expressly bind one party not to pursue independent litigation.

Third, PowerCom cites *United States ex rel. Tusco, Inc. v. Clark Construction Group, LLC*, 235 F. Supp. 3d 745 (D. Md. 2016). But in that case, the defendants *did not argue* that the subcontract waived any of the subcontractor's Miller Act rights. *Id.* at 760 n.20. And at any rate, the contract did not include language barring independent litigation of pass-through claims. *Compare id.* at 749 (block quote), *with* CP 646.

Fourth, PowerCom cites *Pinnacle Crushing & Construction LLC v. Hartford Fire Insurance Co.*, Case No. C17-1908, 2018 WL 1907569 (W.D. Wash. Apr. 23, 2018). That case involved two subcontracts. The first did not include any language waiving a right to independent litigation, and so is not on point. *Id.* at *4 (block quoting the "Cherokee-SCI Subcontract"). The second *did* include such language, but the court's reasoning supports Clark. The court concluded that the contract was sufficiently "explicit[]." *Id.* at *5. The court held,

however, that the contract was unenforceable for the entirely unrelated reason that under the *federal* Miller Act, "a subcontractor can waive its Miller Act rights only after furnishing labor or material used in performing the contract." *Id.* (citing 40 U.S.C. § 3133(c)). Washington's Little Miller Act contains no such requirement. Compare 40 U.S.C. § 3133(c), *with* RCW ch. 39.08. *Pinnacle* thus supports the conclusion that the subcontract in this case is sufficiently clear to effectuate a waiver under *Washington's* Little Miller Act.

Finally, PowerCom points to *Apple Valley Communications, Inc. v. Budget Electrical Contractors, Inc.*, Case No. EDCV 19-1643, 2020 WL 8385651 (C.D. Cal. Dec. 8, 2020). That case is similar to *Pinnacle*. One contract contained no reference at all to the prime contractor's dispute resolution process. *Id.* at *8. And the other contained a clear and explicit Miller Act waiver, but was executed "before furnishing labor and material" and so was unenforceable on grounds relevant only to the *federal* Miller Act. *Id.*

The Court of Appeals' decision applied settled law to a clear contract. It considered and rejected the precedent PowerCom offers this Court. The decision below is correct; there is no reason for this Court to grant review.

B. This Case Does Not Merit Review for Any Other Reason

PowerCom seeks discretionary review solely under RAP 13.4(b)(4). But this case does not present "an issue of substantial public interest that should be determined by the Supreme Court." PowerCom provides no reason to think this case will have any widespread unexpected effect. And review at this stage of the case is premature.

First, PowerCom provides no support for its assertion that the Court of Appeals' decision "will have sweeping implications on the rights of every single contractor and material supplier under Washington's Little Miller Act." *See* Pet. 17.

PowerCom's contract expressly binds it to the Main Contract's dispute process for pass-through claims, and bars it

from pursuing "independent litigation" of those claims while that process is ongoing. CP 646. Contractors subject to similar provisions will not be surprised by the result in this case, which is dictated by plain contractual text and is consistent with caselaw throughout the nation. Indeed, the Court of Appeals' decision is wholly consistent with this Court's prior guidance, which noted that "courts have found incorporation of disputes clauses in the prime contract … where there is a provision in the contract between the sub and the prime making the 'disputes' clause expressly applicable." *Wash. State Major League Baseball*, 176 Wn.2d at 526 (quotation marks and citation omitted). The decision in this case fits comfortably within decades of relatively stable doctrine throughout the nation.

Second, PowerCom's arguments demonstrate that any review at this time would be premature. PowerCom's Little Miller Act claim has been stayed—not dismissed. And neither the trial court nor the Court of Appeals has ruled on PowerCom's argument, which it repeatedly raises in the petition, that

PowerCom will not be bound by the result of the dispute process. The Court of Appeals held only that the Sub-subcontract waives PowerCom's "right to sue under the Little Miller Act *pending a final determination of Clark's pass-through claims against the Port*." *PowerCom*, 540 P.3d at 1186 (emphasis added). The court did not rule on what remedies PowerCom may have following the completion of that process. While Clark's position is that PowerCom will be bound by the result of the dispute process, PowerCom rejects that position, and neither of the courts below has ruled on the question. PowerCom's assertion that the Court of Appeals' reasoning "*may*" or "*likely*" will "result in PowerCom losing its ability to return to court," Pet. 1, 4 (emphasis added), only emphasizes the premature nature of this petition.

V. CONCLUSION

This Court should deny the petition for review.

DATED: February 28, 2024

This document contains 3,517 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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I hereby certify that on February 28, 2024, I caused a true and correct copy of the foregoing to be served on the following counsel of record in the manner indicated below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: February 28, 2024, at Seattle, Washington.

s/ Christy A. Nelson
Christy A. Nelson

CORR CRONIN LLP

February 28, 2024 - 1:29 PM

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Respondent Clark Construction Group, LLC's Answer to Appellant's Petition for Review

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