NO. 98753-0

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION I CASE NO.: 80649-1-I

CITY OF PUYALLUP,
a Washington municipal corporation,

Defendant/Appellant,

vs.

CONWAY CONSTRUCTION COMPANY,
an Oregon corporation,

Plaintiff/Respondent/Petitioner.

CONWAY CONSTRUCTION COMPANY'S PETITION FOR REVIEW

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I. INTRODUCTION

This appeal presents a significant legal issue with important ramifications for public works disputes. The published opinion of the Washington Court of Appeals ("the Opinion") acted contrary to controlling precedent of this Court in *King County v. Vinci Construction Grands Projects/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 398 P.3d 1093 (2017), which expressly held that the statutory fee remedy under RCW 39.04.240 is not an exclusive means to recover attorneys' fees in public works contracts.

Consistent with the Court's clear guidance in *Vinci* that RCW 39.04.240 is *not* an exclusive remedy, general contractor Conway Construction Company did not make a statutory offer of settlement in a public works dispute for fee-shifting purposes, because the public works contract itself granted the parties a separate and independent basis to recover attorneys' fees. The City of Puyallup ("the City") drafted this provision and included it in the City's own contract documents. After Conway prevailed in a hard-fought declaratory judgment action and follow-on damages trial, the City then attempted to void its own contract provision. The trial judge correctly applied this Court's decision in *Vinci* and awarded reasonable attorneys' fees and costs to Conway based upon the contract provision alone—one of the three modalities to recover fees under the American rule and an alternative remedy to RCW 39.04.240. The Court of Appeals should have affirmed.

In reaching the wrong result, the Opinion contradicted precedent of

this Court and misapprehended the legislative intent of RCW 39.04.240, which is a remedial statute intended to discourage public entities from engaging in drawn-out litigation at the taxpayers' expense, not to guarantee to the government a right to receive a settlement offer as suggested in the Opinion. Ironically, the Opinion would allow the City to escape the effects of the fee provision that the City wrote into its own contract.

A waiver theory is belied by the fact that the City, the drafter of the Contract, decided to add a contractual fee clause in addition to the fee provisions of RCW 39.04.240. Moreover, there was no evidence to support a theory of waiver. A waiver of rights in public works contracts must be clear and unequivocal. The City did not present any evidence of waiver, and the Court of Appeals did not conduct a waiver analysis. A plain read of the contract provision reveals that it is neither an express wavier nor an implied waiver of the parties' separate rights under RCW 39.04.240. The result is that—contrary to *Vinci*—RCW 39.04.240 is now the exclusive remedy to recover attorneys' fees, despite the fact that the parties to the public works contract agreed to a prevailing-party attorneys' fees clause. As this Court recognized in *Vinci*, RCW 39.04.240 was not intended to supersede other available avenues to recover attorneys' fees under the American rule.

Without correction, the Opinion will have far-reaching effects on existing and future public works contracts. This Court should accept review under RAP 13.4(b)(1) (conflicts with decisions of this Court) and RAP 13.4(b)(4) (presents issues of substantial public importance) to correct and clarify the law regarding alternate or additional remedies in public works

contracts.

II. IDENTITY OF PETITIONER

Petitioner is Conway Construction Company ("Conway"), a family-owned construction company whose business is almost exclusively focused on public works contracts.

III. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the published decision of Division I of the Washington Court of Appeals, 80649-1-I, which issued on May 4, 2020. This petition is timely because the Washington Court of Appeals denied Conway's motion for reconsideration on June 10, 2020.

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals disregard controlling precedent and erroneously conclude that RCW 39.04.240 is an exclusive remedy and that parties cannot contract for additional fee and cost remedies in public works contracts?

2. Did the Court of Appeals erroneously conclude that the purpose of RCW 39.04.240 is to guarantee to the government a right to receive an offer of settlement in a public works dispute before the contractor can recover its attorneys' fees pursuant to a contract provision that stands apart from RCW 39.04.240?

3. Did the Court of Appeals erroneously conclude that the presence of an alternative fee remedy in a public works contract, without more, constitutes an impermissible waiver of rights under RCW 39.04.240?

4. In the alternative, did the Court of Appeals erroneously

apply RCW 39.04.240 to a declaratory judgment action adjudicating a question of legal rights rather than monetary damages?

V. STATEMENT OF THE CASE

This lawsuit arose out of the City's improper termination of Conway from a public works contract for default. Conway filed this action and successfully overturned the default termination, obtaining declaratory judgment that the termination was for public convenience. In a follow-on phase of the case, Conway successfully recovered damages for the work it properly performed but for which it was never paid.

This case concerns a fundamental issue regarding the ability to contract for remedies in public works contracts beyond those that are provided for in RCW 39.04.240. If the trial court was correct, as Conway submits it is, then this Court should reverse the Court of Appeals and affirm the trial court's attorney fee and cost award.[1]

A. The City drafted a public works contract with a remedy for fees and costs, in addition to that provided for under RCW 39.04.240.

The City and Conway entered into a public works contract ("the Contract") on or about September 21, 2015, to construct certain road and utility improvements at 39th Avenue Southwest, between 11th Street Southwest and 17th Street Southwest in the City of Puyallup, Washington. CP 2461 and Trial Ex. 5. It is undisputed that the City drafted the Contract

[1] The City assigned no error to the trial court's decision that the fees and costs were reasonable.

and that Conway had no input.[2]

The Contract contained no language purporting to waive statutory rights to attorneys' fees and costs under RCW 39.04.240. Rather, it contained an alternative attorney fee and litigation cost remedy, which was in addition to that provided for under RCW 39.04.240, and expanded the scope of recoverable costs, stating as follows:

> The Owner and Contractor each agree that in the event either of said parties brings an action in any court arising out of this Contract, the prevailing party in any such lawsuit shall be entitled to an award of its cost of defense.
> "Cost of Defense" shall include, without limiting the generality of such term, expense of investigation of plaintiff's claims, engineering expense, expense of deposition, exhibits, witness fees, including reasonable expert witness fees, and reasonable attorneys' fees. The obligation of payment under this clause shall be incorporated in any judgment rendered in such action either in the form of a judgment against plaintiff for any defendant or in the form of reduction of the judgment otherwise rendered in favor of plaintiff against any defendant, and shall be paid within thirty (30) days after entry of judgment.

Trial Ex. 2. The trial court applied the provision reciprocally. CP 3397. The City did not appeal the trial court's decision to apply the provision reciprocally, which was consistent with Washington law. RCW 4.84.330.

[2] Ambiguities in public works contracts are construed against the government as drafter. *See, e.g.*, *Byrne v. Bellingham Consol. Sch. Dist. No. 301*, 7 Wn.2d 20, 35, 108 P.2d 791 (1941); *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn. App. 634, 745 P.2d 53 (1987); *City of Seattle v. Dyad Constr., Inc.*, 17 Wn. App. 501, 565 P.2d 423 (1977).

B. The City developed a pretext in order to terminate Conway for default, and Conway successfully converted the termination to one for convenience.

The City eventually decided that it did not want to work with Conway anymore, so the City concocted a list of alleged performance issues in the construction that it claimed needed to be cured. The City did not actually want Conway to cure the items or even respond to them; the City simply wanted to terminate Conway. CP 2476.

After the City improperly terminated Conway for default, Conway sued, bringing an action for declaratory judgment to declare the default improper and have it converted to a termination for convenience. This part of the case was solely about the propriety of the City's termination of Conway for default. Conway later joined additional claims for monetary damages arising from the City's failure to pay for work actually performed. With the City's concurrence, the trial was bifurcated, and the trial court adjudicated the declaratory judgment action first. This complex, two-phase trial lasted for ten weeks over a four-month period.

At the conclusion of the first phase, the trial court ruled that the default termination was improper and converted it to one for convenience. In doing this, the trial court granted Conway's request for declaratory relief. This determination laid the groundwork for Conway's right to seek damages for breach of contract in the second phase of the case.

At the end of the second phase of trial, the trial court determined that the City (1) was liable to Conway for the work Conway had properly

performed, and (2) was not entitled to offset Conway's damages by a measure of the City's own costs for repairing alleged defects when the City failed to provide Conway with advanced notice and an opportunity to cure the alleged defects as required under the Contract. The Court entered judgment in favor of Conway. Having found for Conway in all aspects of the case, the trial court properly applied this Court's controlling precedent in *Vinci* and awarded Conway its reasonable costs and attorneys' fees pursuant to the costs of defense provision in the Contract referenced above.

C. Appeal

The City appealed several issues to Division II of the Washington Court of Appeals, and the appeal was later transferred to Division I of the Washington Court of Appeals. The Court of Appeals affirmed on all issues, except that it reversed the award of attorneys' fees and costs to Conway, straining to narrow this Court's holding in *Vinci* and finding an intent to waive RCW 39.04.240 without ever conducting a true waiver analysis.

Conway timely moved for reconsideration, but the Court of Appeals denied the motion. This petition timely follows.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review to correct the Opinion and ensure that future litigants and Washington courts consistently apply the American rule on attorneys' fees when it comes to public works contracts. If it stands, the effect of the Opinion will be significant, as it will render void all alternative contractual fee remedies in public works contracts throughout Washington.

Review by this Court is warranted under RAP 13.4(b)(1) and RAP 13.4(b)(4) not only to correct the error in this case, but also to clarify and correct the state of the law.

A. It was settled law that RCW 39.04.240 is not an exclusive remedy.

The result of the Opinion is that RCW 39.04.240 now becomes the exclusive contract remedy that prevents parties from agreeing to alternative fee remedies in public works contracts. Not only does the Opinion negate contract provisions that the City itself drafted after the enactment of RCW 39.04.240, but the result is contrary to this Court's broad holding in *Vinci*: "RCW 39.04.240 is not the exclusive fee remedy in a public works contract." *Vinci*, 188 Wn.2d at 627. Nothing in the legislative history of RCW 39.04.240 supports the Opinion, and review is warranted.

"Washington follows the American rule in awarding attorney fees." *Vinci*, 188 Wn.2d at 625 (quoting *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994)). The American rule permits a court to award fees "when doing so is authorized by a contract provision, a statute, or a recognized ground in equity." *Vinci*, 188 Wn.2d at 625. Here, the contract drafted by the City authorized fees. Separately, RCW 39.04.240 provides a statutory right to recover fees when a party makes an offer of settlement within a certain time and beats that offer at trial. *See* RCW 39.04.240. These are two independent bases—one contractual and one statutory—that are equally available under the American rule to recover attorneys' fees. The effect of the Opinion, however, is to nullify the contract provision for the

benefit of the City when the City itself drafted the clause.

Washington law is clear: a party to a contract with an attorney fee provision is entitled to its fees and costs if final judgment is rendered in its favor. RCW 4.84.330; *see also* RCW 4.84.010. This is consistent with Washington common law, which provides that the "prevailing party" is the party that receives an affirmative judgment in its favor. *See, e.g.*, *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 98, 285 P.3d 70 (2012). It is undisputed that Conway was the only party who received final judgment in its favor.

In *Vinci*, King County successfully sued three construction firms and their five sureties for breach of contract and insurance coverage under a performance bond arising from a public works project. *Id*. at 622–24. The jury awarded King County $130 million in damages, and the trial court awarded the county another $15 million in attorneys' fees and costs pursuant to *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). The sureties contested the fee award, arguing that the county could not recover fees under *Olympic Steamship* because RCW 39.04.240 provides the exclusive fee remedy for public works disputes. This Court disagreed, expressly stating that RCW 39.04.240 "is not the exclusive fee remedy available" in a public works contract. *Vinci*, 188 Wn.2d at 634. This Court also held that parties to public works contracts may recover fees under other available remedies. *See Vinci*, 188 Wn.2d at 627–30.

To reach this conclusion, this Court recognized that it would be necessary to determine legislative intent:

> [I]n order to find that RCW 39.04.240 provides the exclusive means for recovering attorney fees in this action, we must find either that the legislature explicitly intended such exclusivity or that RCW 39.04.240 is so inconsistent with *Olympic Steamship* that they both cannot simultaneously apply.

Id. at 628. This Court's analysis of legislative intent confirmed that "[t]here is nothing in the legislative history indicating that RCW 39.04.240 was intended to proscribe alternative fee remedies." *Id*. at 628. This Court also recognized that the legislature had been concerned about public agencies and the cavalier nature in which they approached litigation:

> Testimony for the original bill stated quite plainly that "[t]he purpose of the bill is to encourage settlements." H.B. Rep. on Engrossed S.B. 6407, at 2, 52d Leg., Reg. Sess. (Wash. 1992). Because **"[p]ublic agencies seem to react to litigation as if their attorneys are free,"** the legislature expected an award of fees to result in "decision[s] to pursue the law suit … on the merits of the case and not on the costs of going to court." *Id*. There is no indication that the bill was a reaction to a court decision allowing for equitable remedies, and **in the final bill report for RCW 39.04.240, *the legislature recognized that attorney fees may be awarded as authorized by* statute, *contract*, or equitable common law grounds**. Final B. Rep. on Engrossed S.B. 6407, at 1, 52d Leg., Reg. Sess. (Wash. 1992).

Id. at 628–29 (emphasis altered and added). Moreover, the testimony in favor of the bill pointed out that the contracts were "very one-sided" and that "the public agency has little incentive to compromise or settle now." *Vinci*, 188 Wn.2d at 629.[3]

[3] The original version of the statute was limited to cases of $250,000 or less, and this maximum pleading amount was removed by amendment seven years later. *Vinci*, 188 Wn.2d at 629. Before the amendment, there would have been nothing to prevent parties in cases over $250,000 from including a contract provision awarding fees and costs to the prevailing party. And there was nothing in the

It is clear that the purpose of the remedial bill was to prevent public agencies—who "seem to react to litigation as if their attorneys are free"—from writing fee waivers into public works contracts and forcing contractors into protracted litigation. The purpose of the bill was not to grant a public agency a right to receive a settlement offer. The bill balanced the playing field by protecting contractors, not public agencies, because it provided a new or alternative right to attorneys' fees in public works contracts when the contract itself did not provide such a remedy. But nothing in the statute or the legislative history shows any intent to displace the American rule or otherwise prevent parties from seeking attorney fees or other remedies by statute, contract, or equitable grounds.[4]

The Opinion contradicted not only *Vinci*, but also the clear legislative history and the remedial purposes for which the bill was passed. The Opinion attempts to dismiss *Vinci* as a case limited solely to an insured's equitable basis to recover attorneys' fees under *Olympic*

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legislative history of the amendment to indicate any intent to proscribe alternative or greater fee remedies. *See generally id*. (stating that "[w]hile clearly encouraging resolution of claims through settlement, there was no language indicating an intent to foreclose existing alternative equitable remedies recognized at common law").

[4] RCW 39.04.240 applies simultaneously with other alternative fee remedies that the legislature provided for in public works statutes. For example, the prevailing party in an action to collect interest for unpaid amounts due under a public works contract is entitled to an award of reasonable attorneys' fees. *See* RCW 39.76.040. Similarly, a claimant in an action against a public works bond has a fee remedy. *See* RCW 39.08.030(1)(b). So does a claimant in an action to foreclose upon a public contract retainage lien. *See* RCW 60.28.030. None of these alternative fee remedies are contingent upon any party making an offer of settlement under RCW 39.04.240. Instead, they parallel RCW 39.04.240 and can be invoked independently without any statutory offers of settlement having been exchanged. There is nothing distinct about the City's alternative contractual fee remedy.

Steamship, but the holding in *Vinci* is broader: "Although a statutory fee provision exists for public works contracts under RCW 39.04.240, we hold that it is not the exclusive fee remedy available." *Vinci*, 188 Wn.2d at 634.

B. No settlement offer was required.

The Opinion stated that the legislature intended "[w]hen a party does not make an offer of settlement in a lawsuit involving a public works contract, it cannot recover attorney fees," and "government entities should receive an early opportunity to settle public works contract litigation." Opinion at 11 and 12. This is inaccurate and misapprehends the legislative history of RCW 39.04.240, which arose to dis-incentivize government entities from engaging in protracted litigation as a strategy to curtail claims.

In *Vinci*, this Court recognized that RCW 39.04.240 requires the prevailing party make a timely settlement offer in order to recover attorneys' fees *under that statute*. *Vinci*, 188 Wn.2d at 634. In contrast, there is no requirement that a party make a settlement offer in order to obtain *Olympic Steamship* fees. *Olympic Steamship Co.*, 117 Wn.2d at 54. Despite the statutory requirement to make an offer of settlement to recover fees under RCW 39.04.240, this Court recognized that a prevailing party does not have to make such an offer in order to recover fees under some other basis per the American rule:

> The Sureties correctly point out that an award of fees under RCW 4.84.250–.280 as applied by RCW 39.04.240 requires that the prevailing party make a timely settlement offer. RCW 4.84.260; Sureties' Suppl. Br. at 6. However, this is a condition precedent to recovery under this statutory scheme; **it does not represent a limitation on awarding attorney**

> **fees** in the context of public works contracts and insurance coverage. **There is no language within either RCW 4.84.250–.280 or RCW 39.04.240 suggesting that the legislature intended to exclude all other means of recovering attorney fees.** The legislature simply took an existing statutory remedy and **made it available** to actions arising out of a public works contract.

Vinci, 188 Wn.2d at 628 (emphasis added).

The Contract—which was drafted entirely by the City—contained a fee provision, and Conway was the party in whose favor judgment was entered. If the City did not want to create this additional avenue to a fee award, it should not have written the Contract this way. It was not necessary for Conway to make an offer of settlement under RCW 39.04.240 in order to obtain a fee award under the plain language of the Contract. Review is warranted.

C. The Court of Appeals incorrectly concluded—without analysis—that the parties intended to waive RCW 39.04.240.

There was no waiver of RCW 39.04.240, express or implied, in the language of the Contract. Nevertheless, the Court of Appeals must have concluded, without analysis, that the parties intended to waive RCW 39.04.240. But there was no waiver, only a provision for an additional path to fees and costs.

The anti-waiver portion of the statute reads as follows:

> The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of *these rights* is void as against public policy.

RCW 39.04.240(2) (emphasis added).

"Waiver is the intentional relinquishment of a known right." *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). There can be no waiver unless "the person against whom waiver is claimed . . . intended to relinquish the right, advantage, or benefit[,] and his action must be inconsistent with any other intent than to waive it." *Id*.

The statute voids only specific contract provisions that "provide[] for waiver of *these rights*." RCW 39.04.240(2) (emphasis added). Thus, in order to run afoul of RCW 39.04.240(2), the contract provision would have to state expressly that the parties waive their rights under the statute, that the parties' contract is the exclusive means to recover attorneys' fees, or other similar language. In this case, there is no language in the Contract that expressly waived—let alone addressed—the remedy under RCW 39.04.240. *See* Trial Ex. 2.

Therefore, although the Opinion did not directly address it, the Court of Appeals must have concluded the existence of the contractual fee provision somehow impliedly waived RCW 39.04.240. This alone would be error, as the statutory language only contemplates and prohibits express waivers of the statute's rights, nothing more. But even if an implied waiver could render a contractual fee provision void, the Court of Appeals erred in finding an implied waiver without the requisite evidence.

"To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors." *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989). Here, there were no such

acts or conduct evidencing an intent to waive any remedies. The City drafted an alternative attorney fee and cost remedy that pertained to a defined term, "Cost of Defense." Trial Ex. 2. The City has never asserted that it intended to waive a statutory right to attorney fees, and there is no evidence of such intent.

This Court has consistently and steadfastly required unequivocal acts to find an implied waiver of rights in public works contracts. *See, e.g.*, *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 773, 174 P.3d 54 (2007); *Mike M. Johnson, Inc. v. Spokane Cnty.*, 150 Wn.2d 375, 391–92, 78 P.3d 161 (2003). In ignoring this Court's weight of authority, the Opinion creates an unequal application of waiver law, where contractors must demonstrate unequivocal acts by the government in the context of strict notice and forfeiture provisions, but no such evidence is necessary to find the government impliedly waived statutory fee remedies such that the government can avoid a contractual fee remedy that it drafted.

In light of the legislative history of the statute, it is clear that the anti-waiver provision of the statute was intended to address potential abuse by public agencies in attempting to take away attorneys' fees rights from contractors in public works contracts pursuant to RCW 39.04.240. That construction recognizes that such contracts essentially amount to contracts of adhesion, with take-it-or-leave-it terms for the bidder. This clear legislative intent is contrary to the Opinion's implied conclusion that the alternative remedy waived RCW 39.04.240.

It is notable that the alternative rights that the City drafted into the

Contract were beyond the limited remedy that would ordinarily be recoverable under RCW 39.04.240 (i.e., "a reasonable amount to be fixed by the court as attorneys' fees" under RCW 4.84.250). In stark contrast to that limited remedy, the City's language intended to provide a broader remedy called "Cost of Defense," which included "without limiting the generality of such term," not just attorney fees and specified costs, but also "expense of investigation of plaintiff's claims, engineering expense, expense of deposition, exhibits, witness fees, including reasonable expert witness fees, and reasonable attorneys' fees." Trial Ex. 2. This was intended to be a broad alternative remedy. No reading of the Contract language itself supports the conclusion that the parties intended to waive rights; instead, they intended to broaden rights. The Court of Appeals did not have a basis for concluding that there was a waiver of rights.

D. Review is also warranted because the availability of fees and costs in public works contracts is an issue of substantial public interest.

Public works contracts are matters of public interest. Public works refers to "all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality…." RCW 39.04.010(4). Except for certain districts, public works law applies to "every city, county, town, port district, district, or other public agency authorized by law to require the execution of public work…." RCW 39.04.010(3).[5]

[5] The public's right of access to public works information was important enough that the legislature saw fit to ensure that filed plans, specifications, estimates,

Since public works contracts enable important progress in and maintenance of infrastructure, it is axiomatic that the public has an interest in the efficient performance and management of public works contracts, including how (or whether) contract provisions, especially those unilaterally demanded by a municipality, will be upheld and enforced. If the Opinion is left standing, public works contracts across the state of Washington will be excised of their alternative, additional fee and cost remedies. If this cost of defense provision constitutes a waiver of RCW 39.04.240, without any express waiver language and without any evidence of unequivocal acts to imply a waiver, then every provision in a public works contract affording the parties an alternative path to recover costs and fees must also constitute a waiver of RCW 39.04.240. This case presents issues of substantial public interest, and review is warranted.

E. In the alternative, if RCW 39.04.240 is an exclusive fee remedy in any portion of this case, it would apply only to the damages phase.

RCW 39.04.240 is *not* an exclusive fee remedy in public works contracts, and this particular contract provision did not waive any rights that might be available under RCW 39.04.240. If, however, this Court were to agree with the Court of Appeals on that issue, review is still warranted because the Court of Appeals erred when it applied RCW 39.04.240 to the

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accounts, records, and certificates would "at all reasonable times be subject to public inspection." RCW 39.04.100.

declaratory judgment portion of the case. Regardless of exclusivity, RCW 39.04.240 does not apply to up-or-down legal questions, like a determination of insurance coverage or the propriety of the default termination. *Vinci*, 188 Wn.2d at 630–31 (recognizing that RCW 4.84.250, and therefore RCW 39.04.240, does not apply to disputes that are "legal in nature"). The statute applies RCW 4.84.250 *et seq.* to public works cases, and the underlying RCW 4.84.250 only applies "in any action for damages." RCW 4.84.240. The entire first phase of the case was not an action for damages, but rather an action for declaratory relief to overturn the improper termination for default. There should be no question that the Contract's attorney fee and litigation cost provision applies to the entirety of the first phase of the case at a minimum.

VII. REQUESTS FOR APPELLATE FEES AND COSTS

Pursuant to RAP 18.1, Conway requests its fees and costs on appeal. Attorneys' fees can be awarded based on an agreement, a statute, or some recognized ground in equity. *Hamm v. State Farm Mut. Auto Ins. Co.*, 151 Wn.2d 303, 325, 88 P.3d 395 (2004) (citing *Dayton*, 124 Wn.2d at 280).

In this case, the Contract provides for attorneys' fees and costs, and it is correct to apply the provision bilaterally, because it was drafted unilaterally. *See* RCW 4.84.330. Therefore, Conway should be awarded its fees and costs incurred with this petition.

VIII. CONCLUSION

The availability of attorneys' fees and costs in disputes over public works contracts is an important and recurring issue that warrants consideration by this Court. The Opinion, which is published, conflicts with this Court's binding precedent and is a matter of substantial public importance.

The Opinion is contrary to mandatory precedent of the Washington Supreme Court. In addition, the Opinion misperceived the fee and cost remedy in the Contract, characterizing it as a waiver when there was no waiver language and no conduct unequivocally implying that a waiver was intended by the parties.

The Washington Legislature decided that parties should not be permitted to waive the right to attorney fees under RCW 39.04.240. But nothing in RCW 39.04.240 or its legislative history prevents parties from adding alternative remedies such as the one that the City drafted here.

For the reasons stated herein, this Court should accept review.

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Dated: July 10, 2020.

SCHWABE, WILLIAMSON & WYATT, P.C.

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APPENDIX

APPENDIX

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Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CONWAY CONSTRUCTION COMPANY, Respondent, v. CITY OF PUYALLUP, Appellant.	No. 80649-1-I DIVISION ONE PUBLISHED OPINION

LEACH, J. — In this public works contract case, the City of Puyallup (the City) appeals a trial court decision finding that it improperly terminated Conway Construction Company's (Conway) contract for road improvements and awarding Conway damages plus attorney fees and costs. Substantial evidence supports the trial court's findings of fact and they support its legal conclusions. But, Conway was not entitled to recover attorney fees because it did not submit an offer of settlement as required by statute. So, we affirm the trial court's judgment for damages but reverse its award of attorney fees to Conway.

FACTS

The City and Conway contracted for road improvements (the project). The public works contract included a "Public Works Contract" form and incorporated by reference several voluminous documents, including the Washington State Department of Transportation Standard Specifications for Road, Bridge, and Municipal Construction.

During construction, the City became concerned about the quality of pavement concrete, defects in utilities, and other construction defects, and issued notices to Conway describing these concerns. The City also observed unsafe work conditions, such as lack of trench shoring, and reported those concerns to the Washington State Department of Labor & Industries (L&I).

On March 9, 2016, the City gave Conway a notice of suspension and breach of contract.[1] This notice identified nine items that it deemed contract breaches. These included defective and uncorrected work and safety concerns. It advised Conway that it had 15 days to remedy the listed issues. Conway denied any wrongdoing.

On March 21, 2016, the City informed Conway that it still needed to remedy the same nine items and that it had received further reports of safety violations. Conway again denied the safety violation allegations.

On March 25, 2016, the City issued a notice of termination for default to Conway. The City also withheld payments due to Conway.

On April 23, 2016, L&I issued a citation to Conway for a "serious" safety violation endangering Conway workers.

Conway sued the City asking the court to declare termination for default improper and deemed it to be for public convenience. Conway later amended its request to include breach of contract and unjust enrichment claims. After a bench trial, the court found the City breached the contract when it terminated Conway. It awarded Conway damages,

[1] This exhibit is dated March 9, 2015. This is an obvious scrivener's error because it references a Non-Conformance Report dated March 3,2016 and the parties had not yet entered their contract on March 9, 2015. Exhibits 53, 58, and 59 contain similar dating errors.

attorney fees, and costs. The City appeals.

STANDARD OF REVIEW

We review a party's challenge to a trial court's decision when the trial court has evaluated the evidence to determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the court's conclusions of law.[2] Substantial evidence is evidence sufficient to persuade a fair-minded person of its truth.[3] Evidence may be substantial even if there are other reasonable interpretations of the evidence.[4]

We defer to the trial court's determinations about persuasiveness of the evidence, witness credibility, and conflicting testimony.[5] We will not disturb a trial court's ruling if substantial, though conflicting, evidence supports its findings of fact.[6]

ANALYSIS

The City raises three issues on appeal. First, it claims the trial court used the wrong test to determine if the City properly terminated the project contract for default. Next, it claims the contract entitles it to an offset for Conway's defective work. Finally, it contends Conway is not entitled to recover attorney fees because it did not make a statutorily required offer of settlement. We agree that Conway is not entitled to recover attorney fees, but we reject the City's other claims.

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[2] Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001).
[3] Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 555-56, 132 P.3d 789 (2006).
[4] Sherrell v. Selfors, 73 Wn. App. 596, 600-01, 871 P.2d 168 (1994).
[5] Snyder v. Haynes, 152 Wn. App. 774, 779, 217 P.3d 787 (2009).
[6] Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

Contract Termination – Breach of Contract

Standard for Termination

We first address the City's claim that the trial court did not use the correct test to decide whether the City properly terminated Conway for default. The City contends the trial court should have used the following two part test (1) was Conway in default, and (2) was the City satisfied with Conway's efforts to remedy the breach. Conway claims the City had to satisfy a different two part test (1) was Conway in default, and (2) did Conway neglect or refuse to correct rejected work. Conway also asserts that any error the trial court made in applying the correct test was harmless.

The City correctly notes the parties' contract form contains two termination provisions. First, paragraph 22 of the contract provides that violation of a statute or regulation is "good cause" for terminating the contract:

> 22. Termination. The City shall be entitled to terminate this Contract for good cause. "Good cause" shall include, but shall not be limited to, any one or more of the following events:
>
> d. Contractor's failure to comply with Federal, state or local laws, rules or regulations

Second, the contract incorporates the Washington State Department of Transportation ("WSDOT") Standard Specifications for Road, Bridge, and Municipal Construction (2014), which provided the general terms of the contract. Section 1-08.10(1) of these specifications contains terms relating to termination of the contract and allows the contracting agency to terminate the contract upon the occurrence of any one or more of the following events:

1. If the Contractor fails to supply sufficient skilled workers or suitable materials or equipment;

2. [Inapplicable]

3. [Inapplicable]

4. If the Contractor disregards laws, ordinances, rules, codes, regulations, orders or similar requirements of any public entity having jurisdiction;

5. If the Contractor disregards the authority of the Contracting Agency;

6. If the Contractor performs Work which deviates from the Contract, and neglects or refuses to correct the rejected Work; or

7. If the Contractor otherwise violates in any material way any provisions or requirements of the Contract.

Once the Contracting Agency determines that sufficient cause exists to terminate the Contract, written notice shall be given to the Contractor and its Surety indicating that the Contractor is in breach of the Contract and that the Contractor is to remedy the breach within 15 calendar days after the notice is sent.... If the remedy does not take place to the satisfaction of the Contracting Agency, the Engineer may, by serving written notice to the Contractor and Surety either:

1. Transfer the performance of the Work from the Contractor to the Surety; or

2. Terminate the Contract …

The contract form contains the following provision addressing conflicts between the form and the attached specifications, "This Contract and any attachments contain the entire Contract between the parties. Should any language in any attachment conflict with any language contained in this Contract, the terms of this Contract shall prevail." So, if any provision of the specifications conflicts with paragraph 22, then paragraph 22 controls. The City relies on this conflict coordination provision to assert that once Conway violated a state safety regulation, paragraph 22 gave it the right to terminate the contract without providing the cure opportunity found in Section 1-08.10(1). We disagree.

Washington courts "'follow the objective manifestation theory of contracts.'"[7] So, we "focus on the agreement's objective manifestations to ascertain the parties' intent."[8] We look to the face of the agreement, but when the language is ambiguous, we may also look to extrinsic evidence of intent.[9]

Paragraph 22 and section 1-08.10(1) do not conflict in the way asserted by the City. Paragraph 22 defines one act of default, and section 1-08.10(1) identifies additional acts of default. Paragraph 22 is silent about termination procedure and opportunity for cure. This silence does not place paragraph 22 in conflict with section 1-08.10(1)'s procedural and cure provisions. Instead, section 1-08.10(1) supplements paragraph 22 by providing specific procedures and timelines for action. The City's own conduct before termination shows that it understood this to be the relationship between these provisions. Its notices and correspondence with Conway repeatedly referenced section 1-08.10(1) and never relied on paragraph 22. These notices also identified a cure period. Only in litigation did the City discover a conflict.

The City also claims Conway had to remedy all asserted breaches within 15 days to satisfaction. The contract allows the City to terminate "if the [c]ontractor performs [w]ork which deviates from the [c]ontract, and neglects or refuses to correct rejected [w]ork." It also states that once the City gives notice, Conway "is to remedy the breach within 15 calendar days after the notice is sent . . . [and] [i]f the remedy does not take place to the satisfaction of the [c]ontracting agency, the [e]ngineer may . . . [t]erminate

[7] Kelley v. Tonda, 198 Wn. App. 303, 311, 393 P.3d 824 (2017) (quoting Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).
[8] Martin v. Smith, 192 Wn. App. 527, 532, 368 P.3d 227 (2016).
[9] Kelley, 198 Wn. App. at 312.

the [c]ontract." So, the City was only justified in terminating the contract for rejected work if Conway neglected or refused to correct the rejected work. The trial court used the appropriate test in determining whether the City was justified in terminating Conway for rejected work.

As the City notes, the "neglect or refuses to correct" provision applies only to rejected work breaches and not violation of law breaches. So, Conway had 15 days to cure the safety breach. But, to the extent the trial court used the wrong test for the safety violation, that error was harmless because Conway cured the only safety breach within 15 days.

Termination Justification

The City claims that once it demonstrated that Conway defaulted due to the safety violation, the liability phase of the case should have ended.

In contract disputes like this one, where the Government is a party, the Government has the burden of proving whether termination of a contract for default was justified.[10]

The trial court found the City was unjustified in terminating Conway because Conway addressed the safety issues when it worked directly with L&I:

> Finding of Fact No. 59: While the City complains of ongoing safety concerns existing on the site, **at the time of termination the unsafe trench detailed in these findings was being addressed** during the suspension period between Conway and the Department of Labor and Industries. In Remedy Item No. 9 of Exhibit 44, **the City essentially deferred the safety issue to the Department of Labor and Industries,** stating, "If the contractor does not correct the deficiency to L&I's satisfaction, the City will suspend operation until the work site is deemed safe again by L&I." After at least two inspections of the Project site and meetings with Conway's principals, the Department of Labor and Industries perceived no ongoing safety issues. In

[10] Lisbon Contractors, Inc. v. U.S., 828 F.2d 759, 765 (Fed. Cir. 1987).

> Exhibit 119, the City admitted there were no further safety issues on site after March 9, 2016. **This item consequently is found to have been cured by the end of the suspension period**.

After the City provided notice to Conway, that it had breached the contract, Conway had 15 days to cure the identified safety breach. It did so by working with L&I to address the safety concerns and then by notifying the City about its actions.

Because L&I detected no ongoing safety issues after the original safety issue, which Conway addressed, the court found any breach by Conway was resolved. Substantial evidence established that Conway resolved the safety regulation breach, which the City asserts justified termination.

Subsequently Discovered Evidence

The City next claims it can justify termination with subsequently discovered evidence. It relies on Mega Construction Company, Inc. v. United States[11] as support for the claim that L&I's citation for the safety violation after the City terminated the contract justified the decision to terminate. But, Mega Construction explains how the termination was justified because of not only discovered violations after the termination, but because of the violations discovered before the termination.[12]

In this case, the trial court held that Conway cured the pre-termination breach within 15 days of notice. So, any post-termination violations are irrelevant and Mega Construction is not analogous.

[11] 29 Fed. Cl. 396 (Fed. Cl. 1993).
[12] 29 Fed. Cl. at 421-22.

Good Faith

The City also asserts that because Conway breached a specific condition of default, the only remaining questions were whether the City was satisfied with Conway's performance and whether the City exercised good faith in its exercise of discretion. It claims the trial court made no finding that the City acted in bad faith. But, the trial court found that Conway was not in breach at the time of termination, so the trial court did not err in failing to make a good faith effort analysis.

Set-Off for Defective Work

The City next claims the trial court should have considered claims for replacing the defective work it discovered after it terminated Conway. The City asserts the contract "specifically allows a set-off for defective work, even where the termination is one for convenience."

The relevant contract provision states:

> The total payment for any one item in the case of a deletion or partial termination shall not exceed the Bid price as modified by approved change orders less the estimated cost (including overhead and profit) to complete the Work and less any amount paid to the Contractor for the item.

This contract provision applies only to cases involving deletion, such as when the "[e]ngineer may delete [w]ork by change order," or partial termination. Here, the City completely terminated the entire contract, so no "deletion" or "partial termination" occurred. This provision does not apply.

The City also claims the trial court refused to consider claims for replacing defective work first discovered after the City terminated Conway. The City frames this defect issue as a timing issue. But, the trial court did not rely on timing of discovery to reject this claim. It rejected it because the City did not provide Conway an opportunity to

cure, or timely investigate, the alleged defects as required by the contract.[13] No Washington case law addresses whether a breaching party is entitled to a set-off when it did not give the other non-breaching party an opportunity to cure alleged defects. But, Shelter Products, Inc. v. Steelwood Construction, Inc.[14] addressed this issue. We find this case persuasive and follow it here. There, the court held that a breaching party is not entitled to a set-off for allegedly defective work upon the breaching party's termination for convenience where the breaching party did not give the other party notice of defects and opportunity to inspect, cure, or complete work.[15]

The City acknowledges that it did not give Conway an opportunity to cure or investigate these defects. And, the City provides no persuasive reason why we should not follow Shelter Products.[16] The City's assertion that Ducolon Mech. Inc., v. Shinstine/Forness, Inc. entitles it to set-off its costs for Conway's defective work lacks merit because both parties breached the contract.[17] Here, only the City failed to cure a breach, so Ducolon is not analogous or helpful.

Because the City breached by terminating the contract, and did not provide Conway an opportunity to cure alleged defects, the City was not entitled to its claimed post-termination damages and costs.

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[13] The contract provides that upon Conway performing work that deviates from the contract that it neglects or refuses to correct, it has 15 days to cure. So, this contract provision requires the City to inform Conway of defects and give them an opportunity to cure.
[14] 257 Or. App. 382, 402, 307 P.3d 449 (2013).
[15] Shelter Products, 257 Or. App. at 398-99.
[16] The trial court cited to Shelter Products in its conclusion of law that the City's claim for post-termination damages and costs are denied.
[17] 77 Wn. App. 707, 713, 893 P.2d 1127 (1995).

Attorneys' Fees

The City asserts the trial court should not have awarded Conway attorney fees because Conway was required to make an offer of settlement. As a result, Conway is not the prevailing party for purposes of awarding fees. We agree.

An appellate court reviews de novo whether the prevailing party was entitled to attorney fees.[18] RCW 39.04.240(1) states, "[t]he provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party." This statute also creates two exceptions (1) the maximum dollar limitation in RCW 4.84.250 does not apply, and (2) the time period for serving offers of settlement on the adverse party is not less than 30 days and not more than one 120 days after completion of the service and filing of the summons and complaint.

RCW 4.84.260 states, "The plaintiff . . . shall be deemed the prevailing party . . . when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff . . . as set forth in RCW 4.84.280."[19] When a party does not make an offer of settlement in a lawsuit involving a public works contract, it cannot recover attorney fees.[20]

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[18] Ethridge v. Hwang, 105 Wn. App. 447, 459-60, 20 P.3d 958 (2001).
[19] RCW 4.84.260.
[20] Hertz v. Riebe, 86 Wn. App. 102, 107, 936 P.2d 24 (1997); Filipino American League v. Carino, 183 Wn. App. 122, 130, 332 P.3d 1150 (2014) ("the unambiguous language of RCW 4.84.290 authorizes an award of fees on appeal only where the party is eligible for an award under RCW 4.84.250. RCW 4.84.250 and RCW 4.84.260 required the League to make an offer of settlement to become a prevailing party. The League made no such offer. Therefore, it is not the prevailing party within the meaning of RCW 4.84.250 and RCW 4.84.290.").

Conway claims that "[i]t was not necessary for Conway to make an offer of settlement under RCW 39.04.240 in order to obtain a fee award" because "RCW 39.04.240 is not an exclusive remedy." Conway asserts the contract's fee provision provides a different remedy than RCW 39.04.240. Conway relies on King County v. Vinci Construction Grands Projects/Parsons RCI/Frontier-Kemper, JV.[21]

The City asserts this response is precluded by RCW 39.04.240(2), which states:

> The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.

The City claims this statute voids the parties' contract to the extent it waives the City's statutory right, under RCW 4.84.260, to receive an offer of settlement before being exposed to an attorney fee claim. Conway does not respond directly to this argument.

King County v. Vinci does not support Conway's position. There, our Supreme Court considered whether RCW 39.04.240(1) abrogated a common law right of attorney recovery available in certain types of insurance litigation. The court did not address any argument involving the anti-waiver provisions of RCW 39.04.240(2).

Our legislature has determined that government entities should receive an early opportunity to settle public works contract litigation by requiring an early settlement offer from a claimant who wishes to preserve a claim for attorney fees. And, the legislature has declared void any contract provision waiving the government entity's right to receive an early settlement offer before being exposed to an attorney fee claim as part of the

[21] 188 Wn.2d 627, 398 P.3d 1093 (2017).

consequences of losing a lawsuit involving a public works contract. The statute is unambiguous. So, because Conway did not make a timely settlement offer, it was not a prevailing party for purposes of awarding attorney fees. We reverse the trial court's fee award to Conway.

The City Attorney's Fees

The City requests attorney fees if it prevails on the contract termination issue. Because it does not, we deny the City's request for attorney fees.

CONCLUSION

We affirm in part and reverse in part. Substantial evidence supports the trial court decision that the City failed to justify its contract termination. Also, the City was not entitled to post-termination damages, because it did not give Conway an opportunity to cure alleged defects.

We reverse on the trial court's award of attorney fees to Conway and otherwise affirm the trial court. We deny attorney fees for both parties on appeal.

Leach, J.

WE CONCUR:

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: that on the 10th day of July, 2020, I served the foregoing **PETITION FOR REVIEW** on the following parties and/or counsel of records via *Electronic Court E-Service* as follows:

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