No. 927448

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 70432-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KING COUNTY,
Respondent,

v.

VINCI CONSTRUCTION GRANDS PROJECTS/PARSONS RCI/FRONTIER-KEMBER, JV, a Washington joint venture; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a Connecticut corporation; LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts corporation; FEDERAL INSURANCE COMPANY, and Indiana corporation; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation; and ZURICH AMERICAN INSURANCE COMPANY, a New York corporation,

Petitioners.

AMICUS CURIAE BRIEF OF CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

I. IDENTITY AND INTEREST OF AMICI CURIAE

The **Associated General Contractors of Washington** ("AGC") has existed since 1922 and is the State's largest, oldest and most prominent construction industry trade association. The three chapters of the AGC serve more than 1,000 general contractors, subcontractors, construction suppliers and industry professionals in the State of Washington. The **Associated Builders & Contractors of Western Washington** ("ABC") is a 501(c)(6) construction trade association, established in 1982, of 400 members consisting of general contractors, subcontractors, industry professionals and suppliers. The **National Electrical Contractors Association** (NECA") is the largest electrical contractors' association in Washington, and has 168 contractor members (57 in the Chapter), and has been in business since 1901 (NECA National) or 1949 (Puget Sound Chapter). The **National Utility Contractors Association of Washington** ("NUCA") was founded in 1978 and is the largest utility contractors association in Washington. NUCA represents over 53 utility contractors, as well as numerous other construction industry related firms.

Most non-residential construction projects in the United States are performed under the "design-bid-build" method of delivery, in which the project owner contracts with separate entities (i.e., designer and

contractor) for the design and construction of a project.[1] The completed design documents are then presented to contractors who base their bid or price for the work upon the plans and specifications.[2]

In the substantial experience of the AGC, NECA, NUCA, ABC, and their members, the accuracy of plans and specifications provided by a project owner has a direct impact on a contractor's bid to perform the work. Contractors who have confidence in the accuracy of the owner's plans and specifications are able to provide more accurate and refined pricing, and thus more competitive bids. Contractors are able to do this by relying upon the protection provided by the implied warranty in the event that the plans or specifications contain an error or omission. In short, the implied warranty of plans and specifications is a key component of the traditional and expected allocation of risk among the parties to a construction contract that has a direct effect on the contractor's bid price.

Amici curiae and their members urge the Court to accept review in order to protect the role that the implied warranty plays in the traditional

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[1] In the most recent year that the study is available, the Design Build Institute of America estimates that approximately 52.2% of non-residential construction projects in the United States are built pursuant to the design-bid-build method. *Design-Build Project Delivery Market Share and Market Size Report*, RS Means, for Design Build Institute of America (May 2014).

[2] Washington law also allows for certain alternate delivery methods in public works construction, including "design-build" and "construction manager/general contractor." *See* RCW 39.10, et. seq. As the project at issue in this appeal was delivered under the design-bid-build method, amici curiae's position as set forth herein is confined to the implied warranty in the context of design-bid-build projects.

and expected allocation of risk on Washington construction projects. Division One erroneously interpreted the implied warranty in a constrained manner that improperly shifts design responsibility away from King County (the owner of the project) and its designers, and onto VPFK, the contractor. Division One's decision is contrary to established Washington law and is contrary to the intent of design-bid-build construction contracts generally. If upheld, the decision will radically alter the landscape of construction contracting and impede the cost-effective procurement of public works construction projects in the State of Washington. For the reasons set forth herein, the Court should accept review of the lower court's decision.

II. ARGUMENT

A. The *Spearin* Doctrine is a Cornerstone of Construction Law, Relied Upon by the Construction Industry.

The implied warranty of plans and specifications has been a cornerstone of construction law in the United States for nearly 100 years, since the Supreme Court decision in *United States v. Spearin,* 248 U.S. 132 (1918). In *Spearin*, Justice Brandeis wrote that "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Spearin* firmly places

responsibility for the accuracy of plans and specifications upon the party who supplies the plans and specifications, the owner. The holding of *Spearin* is commonly known as "the implied warranty of plans and specifications" or the "*Spearin* Doctrine."

The *Spearin* Doctrine has been employed in federal government contracting since its inception. The federal government, which spends billions of dollars annually on acquisition and is the largest procurer of construction services in the world, views the principle of placing the risk of design and specification sufficiency on the owner – who is control of the process – to be fundamental.

Likewise, Washington Courts have embraced the *Spearin* Doctrine in a long line of cases.[3] In fact, since the *Spearin* decision in 1918, virtually every jurisdiction in the United States has adopted the doctrine either expressly or in principle.[4] The *Spearin* doctrine has thus withstood the test of time and has been overwhelmingly adopted as a fundamental tenet of construction law throughout the United States.

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[3] *Dravo Corporation v. Municipality of Metropolitan*, 79 Wn.2d 214, 218, 484 P.2d 399, 402 (1971) citing *Maryland Cas. Co. v. Seattle*, 9 Wn.2d 666, 669 116 P.2d 280 (1941); *see also City of Seattle v. Dyad Construction*, 17 Wn.App. 501, 517, 565 P.2d 423 (1977).

[4] Larry D. Harris et. al., *Recent Developments in the Spearin Doctrine: Federal and State*, 14 AUG Construction Law. 3, at 3, 4 (1994)

B. The Implied Warranty Promotes Certainty and Lower Construction Costs, and is Essential to the Competitive Bidding Process.

1. Contractors Cannot Be Liable for Following Plans and Specifications That They Are Required to Follow In Competitive Bidding.

The *Spearin* Doctrine plays a fundamental role in competitive bidding for construction projects.[5] One of the prerequisites of competitive bidding is that the bidding documents must "define the scope and details of the work with sufficient clarity, adequacy and completeness to convey a clear understanding to bidders so as to permit bidders to compete on an equal footing."[6] The public entity provides detailed plans and specifications for bidding and every contractor bids according to the same plans from which they are not free to vary. As this court has stated:

> "Contractors have no right to depart from working plans made a part of the contract. If they do so, it is at their peril, and they become guarantors as to the strength and safety of the structures...an express contract admits of no departure from its terms...
>
> * * *
>
> when defendants [contractors] depart from the specification, they do so at their peril, and all attempted

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[5] Since the early 19th century, competitive sealed bidding has been the preferred method of public construction contract formation. Competitive bidding promotes significant policy considerations. It does this by utilizing a sealed bidding process which (1) allows all qualified bidders an equal right to compete for public contracts; (2) prevents favoritism, fraud or collusion by awarding contracts based on price alone after public opening of bids; and (3) secures a significant benefit to the taxpayers by obtaining the lowest and best price for the work. Philip L. Bruner and Patrick J. O'Connor, Jr., *Contract formation by competitive sealed bidding,* 1 Bruner & O'Connor Construction Law § 2:22.

[6] *Id.*

excuses for noncompliance become immaterial."[7]

If the contractors become financially accountable if they veer from the contract drawings and specifications, it is inconsistent to hold contractors responsible for the results when they adhere to the plans and specifications.

2. *Continued Upholding of the Spearin Doctrine is Essential to the Policy Purposes Furthered by Competitive Bidding.*

Division One's decision is an erroneously narrow reading and application of the implied warranty. If allowed to stand, Division One's decision will diminish the benefits of competitive bidding. If contractors cannot rely upon the implied warranty, they will be required to second-guess the accuracy of the plans and specifications at bid time. Contractors will deem it necessary to either (a) decline to bid the work; or (b) increase their bid price or otherwise place contingencies in their bids to protect against the risk of unknown errors and omissions. This will, in turn, increase the cost of construction to project owners. On public projects the increased costs will ultimately be absorbed by the taxpayers, and if the contingencies do not eventuate, windfalls will occur to the contractors. In either event, the net result is that the savings competitive bidding is designed to produce will not be realized.

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[7] *Valley Const. Co. v. Lake Hills Sewer District,* 67 Wn.2d 910, 915-916, 410 P.2d 796 (1965); *Robert G. Regan Co. v. Fiocchi,* 44 Ill. App. 2d 336, 340, 194 N.E.2d 665 (Ill. App. Ct. 1963).

A corollary effect is the disincentive that project owners (and designers) will have to provide plans and specifications that are free from error. Rather, project owners will effectively be allowed to pass the hidden risk of errors and omissions in the plans and specifications to contractors, essentially diluting the owner's responsibility to provide accurate plans and specifications.

Relieving owners from responsibility of the consequences of inadequate plans and specifications will deter contractors from bidding on public projects. Only those contractors who are financially capable of weathering such uncertainty or of making costly and unnecessary pre-bid analysis regarding the accuracy of the owner's representations will participate in the bidding.[8] Consequently the "democratic ideal of affording all citizens an equal right to compete for contracts under fair and open competition"[9] engendered by the competitive bidding process will be lost. The reduction in bids will reduce overall competition, which will further increase project costs. Removing the *Spearin* Doctrine from the construction process in Washington will have a grossly detrimental effect on competitive bidding while serving no public interest.

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[8] 14 AUG Construction Law. 3, at 3, 4 (1994).

[9] 1 Bruner & O'Connor Construction Law § 2:22; *see also,* Philip L. Bruner and Patrick J. O'Connor, Jr., *Owner risk of defective design—Implications of dependency of foundation design upon soils and of owner's implied warranty of adequacy of its detailed design plans and specifications,* 4A Bruner & O'Connor Construction Law § 14:28.

C. The *Spearin* Doctrine Promotes Important Public Policy Considerations.

It is a fundamental principal in construction contracts as well as construction law that risk should be allocated to the party best suited to control and bear it.[10] The contractor has no influence or control over the design which is entirely within the public owner's purview. The *Spearin* Doctrine stands for the principal that it is inequitable to hold a party responsible for something it has no ability to control or prevent. It is further intuitive that the public owner should bear the risk of defective plans and specifications because the owner additionally has the ability to transfer some risk and liability to the design professional responsible for the defect.[11] In the contractor-owner-designer relationship, the contractor is the party least culpable when the plans and specifications fail.

D. The Decision Below Erroneously Interprets the Implied Warranty of Plans and Specifications.

This appeal arises out of the trial court's grant of summary judgment to King County, dismissing VPFK's claim that the County had breached the implied warranty of plans and specifications by specifying

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[10] Allocation of Risk—The Case for Manageability, 13 The International Construction Law Review 549, 552 (October 1996); *see also,* Philip L. Bruner and Patrick J. O'Connor, Jr., *Risk analysis: General risk allocation principles—Control/benefit risk allocation model,* 2 Bruner & O'Connor Construction Law § 7:10; *see also,* Dr. Donald Charrett, Philip Loots, *Challenges in Achieving Successful Megaprojects,* 10 Construction L. Int'l 18, 22 (2015).

[11] Patrick O'Connor, Jr., *The Rights and Responsibilities of Design Professionals,* Construction Briefings No. 2002-5 (May 2005).

the STBM method of construction for the ground conditions at the project. In affirming that decision, Division One erred in applying the law regarding the implied warranty of plans and specifications in several respects.

First, Division One held that because "there was no evidence that a machine other than the STBM could effectively accomplish the task of boring the site specific tunnel drives," the owner's implied warranty did not apply.[12] Any requirement, however, that a contractor establish the existence of a viable alternative to the specified method in order to establish a breach of implied warranty claim vitiates the central concept of the *Spearin* Doctrine—that the plans and specifications as provided are, in fact, warranted as accurate. The existence of a viable alternative to the specified method has no bearing on whether the specified method would result in success. Being required to prove otherwise is inconsistent with the implied warranty.

Second, both the trial court and Division One cited VPFK's preference for the STBM method as grounds for the finding that there was "no evidence" to support VPFK's breach of implied warranty claim. To withhold the implied warranty protections if the contractor "agrees" with

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[12] *King County v. Vinci Const. Grand Projects*, 191 Wn.App. at 173, 364 P.3d 784 (2015).

the plans and specifications, as the trial court did, is illogical and inequitable. As Division One has applied the *Spearin* Doctrine, a contractor will not be entitled to the owner's warranty if it agrees the owner's specification will work—a scenario which could occur countless times in the case of latent defects. If that were true, then the only time the warranty would be available would be in cases where the specifications contain a patent defect about which the contractor inquires. Whether the contractor prefers the owner's specified method has no bearing on the existence or extent of the owner's implied warranty.

III. CONCLUSION

The *Spearin* Doctrine is grounded in policy and common law principals that parties should be responsible for their own acts and for conditions uniquely within their control. Such control based risk allocation incentivizes all parties to work efficiently, reducing overall project costs and saving taxpayer money. Abandoning this longstanding doctrine and notion of common sense would work gross inequities and inefficiencies in the construction industry to the detriment of the citizens (taxpayers) of the State of Washington. These amici curiae therefore respectfully request that this Court accept review of Division One's decision, and preserve this traditional and expected allocation of risk as has long been applied by Washington Courts.

Respectfully submitted this 25th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on March 25, 2016, true and correct copies of the foregoing document to the counsel of record listed below, via the method indicated:

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Dear Clerk: Attached please find a Motion for Leave to File Amicus Brief along with the Amicus Brief in Support of Petition for Review for filing by Michael P. Grace, WSBA 26091 of Groff Murphy PLLC and John P. Ahlers, WSBA 13070 of Ahlers & Cressman, PLLC. The case name and case number(s) are listed above in the subject heading. Please confirm when filed. Thank you.

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