Supreme Court No. 927448

Court of Appeals No. 70432-0-I

SUPREME COURT
OF THE STATE OF WASHINGTON

KING COUNTY,

Respondent,

v.

VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/FRONTIER-KEMPER, 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, an Indiana corporation; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation; and ZURICH AMERICAN INSURANCE COMPANY, a New York corporation,

Petitioners.

ANSWER TO PETITIONS FOR REVIEW

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GLOSSARY

Bond	Performance and Payment Bond issued by Sureties, Trial Exhibit 6
Brightwater Project	The King County regional wastewater treatment system at issue in this appeal
BT-1	Brightwater tunnel segment 1
BT-2	Brightwater tunnel segment 2
BT-3	Brightwater tunnel segment 3
BT-4	Brightwater tunnel segment 4
Central Contract	Contract documents governing VPFK's work on BT-2 and BT-3, Trial Exhibit 6
Central Tunnel	BT-2 and BT-3
Contract	Central Contract
Corrective Action Plan	Trial Exhibit 145
CP	Clerk's Papers
East Contract	Contract documents governing work on BT-1
East Tunnel	BT-1
EPB TBM	Earth pressure balance tunnel boring machine
JDC	Tunneling contractor working on the West Contract (BT-4)
Op.	*King County v. Vinci Const. Grands Projets*, __ Wn. App. __, 364 P.3d 784 (2015)
RP	Report of Proceedings for trial
STBM	Slurry tunnel boring machine

Sureties	Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company
Surety Br.	Opening brief filed by the Sureties in the Court of Appeals
Surety Pet.	Petition for Review filed by the Sureties in the Washington Supreme Court
Vinci	Vinci Construction Grands Projets
VPFK	Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV
VPFK Br.	Opening brief filed by VPFK in the Court of Appeals
VPFK Pet.	Petition for Review filed by VPFK in the Washington Supreme Court
West Contract	Contract documents governing work on BT-4
West Tunnel	BT-4

REFERENCED INDIVIDUALS

Eric Chambraud	Senior Vinci official
Francois Delille	VPFK project superintendent
Thierry Portafaix	VPFK board member and project manager
Jean Francois Ravix	Senior Vinci official
Steve Redmond	VPFK board member and Vice President of Frontier-Kemper
Dave Rogstad	VPFK board member and President of Frontier-Kemper
Lionel Suquet	VPFK project manager

I. INTRODUCTION

The Court should deny review – as to both VPFK and the Sureties – because the issues in this case are intensely factual and the Court of Appeals' analysis is entirely consistent with this Court's precedent.[1]

King County contracted with VPFK for construction of a portion of the regional wastewater treatment system called the "Brightwater Project." Unfortunately, VPFK quickly fell behind schedule due to its own serious mismanagement and equipment failures. When VPFK informed the County that it would finish its work almost *three years late* and at *significant additional cost* to the County and its ratepayers – and that it might not be able to finish the tunneling at all – the County hired another contractor to complete a portion of VPFK's work and sued VPFK for the additional amounts that the County paid to complete VPFK's work and other damages resulting from VPFK's breach. After a three-month trial and two weeks of deliberations, the jury awarded King County a net verdict totaling $129,578,522. As set forth in Section IV.A below, the Court of Appeals *correctly* affirmed that judgment.

At the outset of the Contract, the Sureties issued the performance bond to secure completion of VPFK's work. But when VPFK breached the Contract, the Sureties refused to perform and adopted VPFK's

[1] A glossary of abbreviations and list of referenced individuals can be found after the Table of Authorities.

defenses. As a result, when the jury rejected those defenses, it likewise rejected the Sureties' reason for failing to fulfill their duties under the Bond. Because King County had to sue the Sureties to force them to fulfill those duties, the trial court awarded attorney fees against the Sureties under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991), which holds that "an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action," and *Colorado Structures v. Insurance Co. of the West*, 161 Wn.2d 577, 608, 167 P.3d 1125 (2007), which holds that this same rule applies in cases that involve performance bonds. As set forth in Section IV.B below, the Court of Appeals *correctly* applied this Court's precedent when it affirmed the trial court's fee award. The Sureties' petition for review, like VPFK's, should be denied.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly applied this Court's precedent in affirming the trial court's summary judgment ruling regarding VPFK's defective specification claim based on the STBM requirement because "VPFK failed to create a material question of fact that the STBM [specification] was defective." Op. ¶ 78.

2. Whether the Court of Appeals correctly applied this Court's precedent in affirming the trial court's award of attorney fees because the

County, like the obligee in *Colorado Structures* and the insured in *Olympic Steamship*, was compelled to assume the burden of legal action to obtain the benefit of the Bond the Sureties issued.

III. RESTATEMENT OF THE CASE

A. The Brightwater Project.

The Brightwater Project has two major components: (1) the wastewater treatment plant; and (2) the conveyance facilities. RP 570-72. The conveyance facilities include a 13-mile system of tunnels, which for contracting purposes was divided into the West Contract, the Central Contract, and the East Contract. *Id.* The Central Contract included Brightwater tunnel segments 2 and 3 – denoted BT-2 and BT-3. RP 571.

King County advertised the Central Contract for construction bids in January 2006. RP 2649. The bid documents included considerable information about the soils through which the tunnels were to be built. Ex. 7-8. The bid documents also included a deadline for substantial completion, which was important to the County because the system would not be operational until all tunnels were completed. RP 679; Ex. 6 at 442.

The Central Contract required that the contractor use a slurry tunnel boring machine. Ex. 6 at 1022; RP 1106, 1219. King County designated an STBM based on its suitability for maintaining surface stability in areas of high underground water pressure. RP 2040, 2215.

B. VPFK And Its Bid.

VPFK is a joint venture of three large construction companies: (1) Vinci Construction Grands Projets, (2) Parsons RCI, and (3) Frontier-Kemper. CP 3 ¶ 10. Before VPFK submitted its bid on the Central Contract, Vinci hired a consulting firm to review the information regarding soil conditions. Ex. 16. The consultant summarized the information provided by the County by warning that "soil conditions are very complex and at times erratic." Ex. 16 at 1.

With that understanding, VPFK concluded that the STBM requirement "satisfies our own selection criteria." CP 221. VPFK's conclusion was supported by the chief engineer for Herrenknecht – the STBM supplier and a manufacturer of all types of tunnel boring machines – who sent an email to VPFK stating that the "*preferred solution is a slurry TBM.*" Ex. 10 (emphasis added).

After studying the bid package, VPFK submitted a bid in which it offered to perform the work for approximately $212 million. Ex. 27 at 618943. King County accepted VPFK's bid and issued its Notice to Proceed on August 28, 2006. RP 679, 2649. VPFK was then required by the Central Contract to substantially complete its work within 1,540 days, or by November 15, 2010. RP 679; Ex. 6 at 442.

C. VPFK's Mismanagement Of The Project, Failure To Achieve Its Planned Rate Of Progress, And STBM Breakdown.

Due to delivery delays by VPFK's suppliers, the STBMs started mining later than planned. CP 38; RP 4162-63. When VPFK finally started mining, it fell even further behind schedule. RP 705-06, 1260. That occurred for three main reasons:

First, there was serious mismanagement. Early in the project, Dave Rogstad, a member of the joint venture board and president of Frontier-Kemper, wrote that he was "fast losing all confidence" in VPFK's project manager, Lionel Suquet. Ex. 29. Mr. Rogstad also reported that the project superintendent, Francois Delille, had problems communicating with English-speaking workers. Ex. 28. On October 10, 2008, Mr. Rogstad reported that Messrs. Suquet and Delille had "systematically destroyed" the morale of the VPFK staff and had "steadfastly refused" to accept offers of help from Vinci's partners. Ex. 62. Eric Chambraud, a senior Vinci official, also complained that the goals set by project management "are very very disappointing and give the unfortunate impression that the management team is giving up on any significant improvement and return to 'normal.'" Ex. 60 at 4-5.

Second, VPFK's field management improperly modified the slurry treatment plant, leading to flooding, premature wear on VPFK's

equipment, and breakdowns, which delayed the progress of both STBMs. CP 706-07, 1243-51, 7723-24, 7729; RP 1243-51. The equipment supplier made recommendations to VPFK to correct the problems, but the recommendations were "ignored." CP 7761. Mr. Rogstad also testified that flooding at the plant was "a serious issue" and suggested "numerous changes for the slurry treatment plant," but the Vinci project management team was "refusing to listen." RP 1493, 1510-11.

Third, delays were caused by the breakdown and need to repair both STBMs. RP 1260-61. In December 2008, VPFK discovered a problem with the BT-2 STBM cutterhead, which required repairs that took three months. RP 1267. Then, in May/June 2009, after metal pieces were found in the slurry treatment plant, VPFK discovered that both STBMs again needed repairs. RP 1269, 1409-10. As a result, the BT-2 machine was inoperable for about 10 months in 2009-10, and the BT-3 machine was inoperable for about seven months in 2009-10 and did not do any further tunneling after February 2010. RP 1266-69, 2031-32, 3201-02.

D. VPFK's "Dead Weight Strategy."

When the STBM damage was discovered in May/June 2009, Vinci (the majority owner of the VPFK joint venture) formulated a secret approach that it came to call its "dead weight strategy." Ex. 122. The first hint of this strategy was in an email between two top Vinci officers:

> I'm asking myself if, as a matter of strategy, we couldn't just tell the Client that this exceptional accident doesn't give us the opportunity to find an acceptable technical solution at present, and we cannot get it except under a different Contract.
>
> Must we absolutely rush to come up with a solution at our expense?

Ex. 117. This strategy was communicated to VPFK board member Thierry Portafaix as follows: "PB and JFR whom I saw yesterday, want us to examine scenarios where instead of rushing to try to solve problems, we do the opposite." Ex. 118.

This strategy was not communicated to Vinci's American partners, who understandably voiced frustration with Vinci's lack of progress. Steve Redmond of Frontier-Kemper sent an email insisting that VPFK "DO SOMETHING." Ex. 122. Mr. Portafaix forwarded Mr. Redmond's email to his superiors at Vinci with the following comments:

> His questions are valid but *he obviously did not understand our "dead weight" strategy in the face of these exceptional problems* . . . .
>
> Some people onsite have trouble understanding and accepting this strategy because:
>
> 1/ it is opposed to American pragmatism: they try again and again always looking forwards
>
> 2/ and also the natural urge for any organization to look for quick solutions
>
> 3/ and finally because *it contains the seeds of a threat to at least partially shut down the site for several months.*

Id. (emphases added).

Ignoring its partners' concerns, Vinci continued to pursue this dead weight strategy. Before attending a meeting with the County, Mr. Chambraud of Vinci sent the following reminder: "The whole discussion should be within the framework of the work stoppage strategy decided 10 days ago . . . ." Ex. 123. The next day, Mr. Chambraud's superior, Jean Francois Ravix, added his advice:

> Given the legislation in the United States, I prefer not to send this email to Thierry [Portafaix]; I'd rather leave it to Eric [Chambraud] to convey the message verbally because it could be used against us . . . .
>
> Do not propose a technical solution (ours or [Herrenknecht's]) to the Client. It must come from the experts thus involving the Client.

Ex. 124. As Mr. Ravix stated, Vinci apparently believed – *incorrectly* – that this email would not be disclosed in discovery.

E. King County's Notice Of Default, VPFK's Deficient "Corrective Action Plan," And The "Interim Agreement" To Complete BT-2 And BT-3.

King County was unaware of this dead weight strategy during the project. Instead, all King County knew was that by October 2009 VPFK was one year behind schedule and had not even started to repair either STBM. RP 1198-99, 2031-32. That delay was not acceptable to the County, so it issued a notice of default and directed VPFK to provide a "corrective action plan." Ex. 142.

VPFK submitted what it called a corrective action plan on November 13, 2009. Ex. 145. Consistent with its dead weight strategy, VPFK proposed new and more time-consuming tunneling methods, which would delay substantial completion to December 22, 2011. Ex. 145 at 23. VPFK then proceeded to push that date back even further, first to February 2012 and then to February 2014. Exs. 151-52. Then, on February 19, 2010, VPFK stated that it was not sure whether it could even complete the mining. Ex. 153 at 3. And if it could, VPFK indicated that it would cost the County an additional $98 million plus or minus 15%. Ex. 153 at 1.

Fortunately, another option presented itself. JDC, the tunneling contractor working on the West Contract, was close to completing its work, and its tunnel boring machine was almost at the BT-3 ending point and was at the same depth as VPFK's inoperable STBM. CP 5406-08; RP 810, 2243. Although JDC's machine was an earth pressure balance tunnel boring machine (EPB TBM), JDC could substantially modify its TBM so that it could operate in the high pressures of the BT-3 alignment and maintain the surface structures from Ballinger Way to Kenmore. CP 5408-09; RP 2297-303. Even though that work would take several months and cost several million dollars, King County estimated that JDC could complete VPFK's BT-3 mining work in less time than VPFK had projected and likely at a lower cost. CP 5408, 5410; RP 2253.

King County later learned through discovery that VPFK in fact *wanted* King County to hire JDC to complete the BT-3 tunnel so that VPFK would not incur the additional cost for the work. Immediately prior to a February 2010 mediation, Mr. Ravix informed Mr. Chambraud:

> My strategy will be to ensure that the Client and the Mediators ask that Jay Dee's EPB finish the BT3 tunnel (mining and pipes) and that we finish BT2 with our slurry machine. In this case in addition to the PAT [*i.e.*, cost overrun on the project] being $87.2M instead of 115, we will have a much stronger case to get Change Orders on all pending issues.

Ex. 148. Consistent with its dead weight strategy, VPFK was continuing to look for ways to shift financial responsibility for its work to the County.

King County and VPFK thereafter entered into an "Interim Agreement" that would allow the County to hire JDC to finish that work and mitigate the damage caused by VPFK's default. Ex. 152. King County reserved the right to claim that VPFK was in default, and VPFK reserved its defenses. *Id.* The County also subsequently agreed with VPFK on a new schedule to complete BT-2, with up to $5 million in incentives. Ex. 155. VPFK then completed BT-2 by the new deadline, and King County paid VPFK for the work, including the full incentive payment. CP 5407; RP 1978-79, 2294, 2329, 4369. JDC, in turn, completed BT-3 in *less time* than VPFK had projected and for *less money* than VPFK had demanded. CP 5410; RP 2253.

F. The Sureties' Denial Of King County's Claim Against The Bond.

As mandated by RCW 39.08.010, the Contract required VPFK to obtain a performance bond. Ex. 6 at 112. The Sureties claim that the County "alone drafted" the Bond (Surety Pet. 2), but no evidence supports the assertion that King County used anything other than an industry standard and surety-approved form document. Regardless, the Sureties – *five large and sophisticated insurance companies* – agreed to provide it.

The Sureties were notified of King County's notice of default one day after the County issued it. CP 6988-94. After months of meetings and correspondence, the Sureties did not object to the Interim Agreement (which preserved the County's claim against the Sureties and their defenses to that claim); instead, they consented to King County's decision to hire JDC while continuing to deny liability on their Bond by adopting the defenses VPFK had asserted. Ex. 161 at 2; Ex. 162 at 20-21.

G. Procedural Background.

King County commenced this lawsuit against VPFK and one of its Sureties, Travelers, in April 2010. CP 1-14. The remaining Sureties intervened as defendants. CP 1433 ¶ 2. The case was tried for almost three months, from September 12 to December 6, 2012. RP 1-7106. King County presented a single claim for default and asserted damages totaling

$155,831,471. CP 1-14, 1317. VPFK, for its part, submitted over a dozen different claims, with various amounts of alleged damages. CP 1317-29.

The Sureties, in turn, consistently adopted VPFK's claims and defenses. In their answers, the Sureties denied that VPFK "was responsible for the damages claimed by the County." CP 95 ¶ 1, 139 ¶ 1. The Sureties also retained their own experts to testify in support of VPFK's defenses (CP 1435 ¶ 7), joined VPFK's motions for summary judgment (CP 671-74, 5140-47), and, *most significantly*, argued in their own motion that "the obligations of the surety under the bond [become] coextensive with those of the principal" (CP 4953). In their trial brief, the Sureties again asserted the same defenses as VPFK. CP 9295-323.

This alignment continued through trial. In their proposed jury instructions, the Sureties emphasized that they "are entitled to assert the defenses of VPFK in defense of the County's claim that VPFK breached the contract." CP 7855. The Sureties and VPFK were also represented at trial by the same legal team (lawyers from Oles Morrison and Duane Morris). CP 1435 ¶ 7. Then, in closing, defense counsel emphasized that the Sureties' consultants had "confirmed what VPFK had been saying all along, that there was no default." RP 7022.

Rejecting both VPFK's and the Sureties' arguments, the jury found liability and awarded the County $155,831,471 (100% of its claimed

damages) for default. CP 1317. The jury also awarded VPFK damages totaling $26,252,949 for some of its claims. CP 1318-29.

In accordance with the Bond and the Central Contract (Ex. 6 at 492; Ex. 3001 at 1), the trial court entered judgment jointly and severally against VPFK and the Sureties (CP 4538). In addition, because King County was compelled to assume the burden of legal action to obtain the benefit of the Bond, the court also awarded attorney fees and costs totaling $14,720,387.19 against the Sureties. CP 4490.

Even on appeal, the Sureties adopted VPFK's assignments of error, issues presented, and substantive arguments. Surety Br. 8, 39, 43. VPFK and the Sureties were then represented at oral argument by the same attorney. *See infra* at 32 n.8. The Court of Appeals affirmed *all* of the trial court's rulings. Op. ¶¶ 45-129.

IV. ARGUMENT

A. VPFK's Petition For Review Should Be Denied.

1. Contrary To VPFK's Argument, The Court Of Appeals' Holding Regarding Defective Specification Claims Is Not Contrary To This Court's Precedent.

VPFK's lead argument is that "Division One's holding that a contractor cannot assert a defective specification claim if it believed the owner's plans would work conflicts with prior holdings of this Court." VPFK Pet. 11. *There is no such holding.* The Court of Appeals held that

"VPFK failed to create a material question of fact that the STBM [specification] was defective." Op. ¶ 78. The trial court did likewise. CP 1083 ¶ 2 ("There is no evidence that the specifications were defective.").

In addition to mischaracterizing the Court of Appeals' ruling, VPFK fundamentally misunderstands how its prior statements regarding the STBM requirement (as set forth on page 4 above) fit within the summary judgment framework. Under Washington law, "[a] party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case." *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006). Then, "the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact." *Id.* at 351. This Court has consistently held that "[c]onclusory statements and speculation will not preclude a grant of summary judgment." *E.g., Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012).

In its summary judgment motion regarding the defective specification claim, King County submitted the evidence referenced in the Court of Appeals' opinion, including *deposition testimony* that VPFK "preferred" the STBM over the alternative and did not believe the specification was defective. Op. ¶ 73; CP 238-39. The burden then

shifted to VPFK to present evidence demonstrating an issue of fact – rather than relying on conclusory statements and speculation. The trial court found that VPFK failed to present such evidence, and the Court of Appeals agreed. CP 1083 ¶ 2; Op. ¶ 78. Neither ruling hinges on VPFK's preference for the STBM; they are instead based on the *absence of evidence* that the STBM requirement was defective. *Id.*

It follows that the Court of Appeals' analysis does not conflict with *Seattle School District v. King Plumbing & Heating Co.*, 147 Wash. 112, 265 P. 463 (1928), as VPFK claims. VPFK Pet. 13. The plaintiff in *Seattle School* argued that the contractor was responsible for choosing Cromwell thermostats when in fact "the [plaintiff] ultimately elected to have Cromwell thermostats installed." *Seattle School*, 147 Wash. at 117-18. That is why, as VPFK notes (VPFK Pet. 14), the fact that the contractor chose Cromwell thermostats was "wholly immaterial" (*Seattle School*, 147 Wash. at 117). Consistent with *Seattle School*, the Court of Appeals did not fault VPFK for choosing an STBM. Instead, it held only that "VPFK failed to create a material question of fact that the STBM [specification] was defective." Op. ¶ 78.

The other cases cited by VPFK also do not support its argument. In *Shopping Center Management Company v. Rupp*, 54 Wn.2d 624, 343 P.2d 877 (1959) (VPFK Pet. 14), the Court *distinguished* its decision in

Seattle School on grounds that are applicable here: it noted that the adequacy of the design in *Seattle School* was solely the responsibility of the owner whereas the contractor in *Shopping Center* had guaranteed the satisfactory operation of the equipment. *Id.* at 631-33. The Court also clarified that the holding in *Seattle School* applies only "in the absence of an express warranty" by the contractor. *Id.* at 631.

Huetter v. Warehouse & Realty Co., 81 Wash. 331, 142 P. 675 (1914) (VPFK Pet. 15), is to the same effect. The Court there held:

> If a contractor cannot perform by reason of defective plans which he is required to follow, which render the contract impossible of performance, which were not prepared or provided by him, but were prepared and provided by the owner, ... there would seem to be no just reason why the contractor may not recover for work done in strict compliance with such plans and specifications....

Id. at 337. Like the Court in *Shopping Center*, the Court also held in *Huetter* that the contractor cannot recover for such additional work if it "has warranted that the plans and specifications are correct." *Id.* at 335 (internal quotation marks and citation omitted).

The Court of Appeals' opinion is consistent with these cases. Unlike the contractor in *Seattle School*, VPFK *expressly warranted* that it would timely complete the work using an STBM. CP 5435 (representing that "the Contract Time is adequate for the performance of the Work as

represented by the Contract").[2] Nor is there any evidence that using an STBM would "render the contract impossible of performance," as required to establish a defective specifications claim under *Huetter*. 81 Wash. at 337. Indeed, VPFK completed BT-2 using an STBM. CP 5407; RP 870. Based on these legal principles, the Court of Appeals correctly affirmed the trial court's summary judgment ruling.[3]

Finally, VPFK argues that it presented evidence in response to the County's summary judgment motion that the County's specifications were defective because they required VPFK to perform its work in "unpredictable and frequently changing soils and without making any provision for ground improvements." VPFK Pet. 12-13. These arguments likewise fail. First, VPFK *knew* when it submitted its bid that "soil conditions are very complex and at times erratic." Ex. 16 at 1. Second, VPFK's argument regarding ground improvements does not pertain to the specification of *an STBM* but rather concerns *other* specifications; the County did not move for, and the trial court did not grant, summary

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[2] Also significant here, the Court held in *Shopping Center* that the "apparent conflict" between the cases cited by the parties largely "disappears" when the Court considers the applicable guaranty provisions. 54 Wn.2d at 632 (internal quotation marks and citation omitted). Given VPFK's express warranty, the same is true in this case.

[3] *L.W. Foster Sportswear Co. v. United States*, 405 F.2d 1285 (Ct. Cl. 1969) (VPFK Pet. 14), also does not support VPFK's argument. *L.W. Foster* is not a Washington case, and even if it were the court there merely held that "'an experienced contractor'" – like VPFK – "'cannot rely on government-prepared specifications where ... he knows or should have known that the prepared specifications could not produce the desired result.'" *Id.* at 1290 (citations omitted). No such issue is presented here.

judgment regarding those other specifications. Op. ¶ 78. Third, as noted previously, such "conclusory statements and speculation will not preclude a grant of summary judgment." *Elcon Constr.*, 174 Wn.2d at 169. Such fact-bound issues do not in any event warrant this Court's review.

2. The Court Of Appeals Correctly Concluded That Some Of VPFK's Arguments Regarding The STBM Requirement "Were Differing Site Conditions Claims."

VPFK next argues that the Court should grant review to "make clear" that contractors may pursue "both" a defective specifications claim *and* a differing site condition claim "where the ground conditions render the prescribed machine and method for using it incapable of achieving the proper result." VPFK Pet. 18. VPFK misstates the applicable legal principle, and this issue does not otherwise warrant the Court's review.

VPFK contradicts this argument earlier in its brief. According to VPFK, it could pursue a differing site conditions claim if ground conditions "differed materially from those indicated by the plans." *Id.* at 16. VPFK then notes, "[o]n the other hand," that it could pursue a defective specifications claim if the STBM "could not operate properly" in ground conditions that "did *not* differ materially from those indicated in the plans." *Id.* at 16-17 (emphasis in original). This *either/or* framework is consistent with VPFK's counterclaim, quoted by the Court of Appeals, which alleged that the STBM requirement was defective "[i]f the actual

ground conditions encountered are what should have been anticipated based on the Contract Documents." Op. ¶ 69; CP 75 ¶ 50.

The Court of Appeals properly applied this framework. Where, for example, VPFK alleged that ground pressures in the tunnel "were much higher than anticipated," the Court of Appeals correctly determined that "this claim is a differing site condition claim." Op. ¶ 75. The same is true regarding VPFK's other claims, such as predictability of soil conditions, transitions between plastic and non-plastic soils, and tunnel face instability. Op. ¶¶ 76-77. Since VPFK alleged that the STBM requirement was defective because conditions differed from those indicated in the Contract, the Court of Appeals *correctly* concluded that these are differing site condition claims, which were dismissed on summary judgment, presented to the jury, or settled before trial. *Id.*

Nor does the Court of Appeals' analysis conflict with *City of Seattle v. Dyad Construction, Inc.*, 17 Wn. App. 501, 565 P.2d 423 (1977), as VPFK claims. VPFK Pet. 17. In *Dyad*, the court did not hold that a contractor can pursue both a defective specifications claim *and* a differing site condition claim based on the exact same circumstances. To the contrary, the contractor alleged a defective specifications claim based on its "inability" to complete the work *in the indicated conditions*. 17 Wn. App. at 505. Thus, even if relevant under RAP 13.4(b)(1), the Court of

Appeals' ruling is consistent with its previous ruling in *Dyad*, and it is likewise consistent with the federal cases cited by VPFK.[4] This fact-bound inquiry does not warrant discretionary review.

3. The Court Of Appeals Correctly Rejected VPFK's Implied Warranty Argument.

VPFK next asserts: "Division One's holding that a contractor who achieves a proper result, at great expense, only by departing from the owner's plans, cannot pursue a defective specification claim is in conflict with prior holdings of this Court." VPFK Pet. 19. In support of its assertion that such a conflict exists, VPFK argues that, under *Huetter*, an owner that drafts the plans for a project "impliedly warrants that, if the contractor follows the plans, they will be 'adequate to produce [the specified] result.'" *Id.* (quoting *Huetter*, 81 Wash. at 336).

Here again, the Court of Appeals' analysis does not conflict with this Court's precedent. Similar to *Huetter*, the Court of Appeals acknowledged in its opinion that King County, by furnishing the plans and specifications for the Brightwater Project, "impliedly guarantee[d] that the

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[4] *See Comtrol, Inc. v. United States*, 294 F.3d 1357, 1362 (Fed. Cir. 2002) ("where the alleged defect in the specification is the failure to disclose the alleged differing site condition," the contractor's claim is "governed by the specific differing site conditions clause and the cases under that clause"); *M.A. DeAtley Constr., Inc. v. United States*, 71 Fed. Cl. 370, 375 (2006) (distinguishing *Comtrol* because contractor asserted a "distinct basis" for its defective specifications and differing site condition claims); *Appeal of Maitland Bros.*, ASBCA No. 23849, 83-1 BCA ¶ 16,434 (contractor alleged defective specification claim because it was unable to complete the work in the indicated conditions).

plans are workable and sufficient." Op. ¶ 68. VPFK's complaint is not with the recitation of this legal principle, but with how the Court of Appeals applied it to the facts at issue – which is another fact-bound issue that does not warrant discretionary review.

Moreover, the Court of Appeals' factual analysis is correct. Under *Huetter*, as noted previously, a contractor is entitled to additional compensation only if the plans that the contractor "is required to follow ... render the contract impossible of performance." 81 Wash. at 337. That cannot be the case if, as the Court of Appeals concluded, "the Contract does not prohibit the contractor from using ground improvements when conducting interventions." Op. ¶ 68. As a result, VPFK cannot argue – legally or logically – that the County impliedly warranted that such improvements were "unnecessary" (*id.*), nor can it establish impossibility as required by *Huetter*. Because the Court of Appeals correctly stated and applied this legal principle, VPFK's petition for review should be denied.

B. The Sureties' Petition For Review Should Also Be Denied.

1. The Court Of Appeals Correctly Applied "Well Settled Law" In Rejecting The Sureties' Arguments Regarding The County's Entitlement To Attorney Fees.

The Sureties seek review of the Court of Appeals' ruling that "[u]nder *Olympic Steamship* and *Colorado Structures,* the County was entitled to recover attorney fees from the Sureties." Op. ¶ 103. The sole

basis for seeking review of that ruling is RAP 13.4(b)(4) (Surety Pet. 5-6), but there is no "issue of substantial public interest that should be determined by the Supreme Court" as required to grant such review. To the contrary, as the Court of Appeals noted, *Olympic Steamship* and *Colorado Structures* are "well settled law." Op. ¶ 110.

Olympic Steamship long ago established an insured's right to recover attorney fees in litigation against its insurer. 117 Wn.2d at 53. In *Colorado Structures*, the Court rejected the defendant's argument that performance bonds are somehow different from an insurance policy with regard to recovery of attorney fees. The Court explained: "given the underlying principles of *Olympic Steamship* and the nature of a performance bond, which guarantees the performance of the principal, we fail to find a material distinction." 161 Wn.2d at 598. In so holding, the Court emphasized several complementary considerations:

- The Court emphasized the importance of providing an economic incentive for sureties to either promptly complete the principal's work or pay the obligee. The Court explained that "[i]f the maximum risk to the surety is the penal amount of its bond, a surety has nothing to lose." *Id.* at 602. The Court added: "Without the application of *Olympic Steamship* and awarding attorney fees in addition to the policy limits of a surety bond when appropriate, an insurer would have absolutely no incentive to refrain from litigation over even the most clear coverage provisions." *Id.* at 607.
- The Court relied on the disparity of power at the point in time when an event occurs that arguably triggers the surety's obligation to make payments. *Id.* at 602. The Court noted that

this disparity "is compelling" and that the "obligee has no leverage over the surety to compel payment, except litigation." *Id.* The Court added: "If the transaction costs of litigation are too high relative to the bond, obligees will simply cut their losses." *Id.*

- The Court held that "when an insurer unsuccessfully contests coverage, it has placed its interests above the insured. Our decision in *Olympic Steamship* remedies this inequity by requiring that the insured be made whole." *Id.* at 607 (internal quotation marks and citation omitted). The Court applied this consideration to the parties before it and concluded that the obligee, like the policyholder in *Olympic Steamship*, should be awarded attorney fees so as to "be made whole." *Id.*

Based on these considerations, the Court held that "*Olympic Steamship* attorney fees apply to performance bonds." *Id.* at 608.[5]

The Sureties argue that discretionary review is warranted because there is no majority opinion in *Colorado Structures* on the attorney fees issue. VPFK Pet. 5, 12. That is incorrect. Four justices joined the lead opinion in *Colorado Structures*. 161 Wn.2d at 587, 608. A fifth justice dissented on the first issue presented and then stated: "As to the second issue, I agree with the majority that *Olympic Steamship* applies to surety bonds." *Id.* at 638. Previously, the Sureties appropriately recognized that concurring opinion in the Court of Appeals when it argued that "[i]n *Colorado Structures*, a *bare majority* of the Supreme Court extended the

[5] The Court also emphasized that "all surety bonds are regarded as 'in the nature' of insurance contracts, and controlled by the rules of interpretation of such contracts." *Id.* at 598. The Court likewise held that ambiguous bond provisions are "construed in favor of liability of the surety." *Id.* at 588 (internal quotation marks omitted).

Olympic Steamship exception to a general contractor's action against a subcontractor's surety for payment under a performance bond ...." Surety Br. 20 (emphasis added). It is disingenuous to now argue otherwise.[6]

The Sureties next claim that there is "no authority extending the benefit of a fee recovery under *Colorado Structures* to a prevailing governmental entity under a statutory bond in a dispute over a public works contract." Sureties Pet. 6. The Sureties do not explain, nor can they, why a private obligee should be entitled to recover attorney fees under *Colorado Structures* and *Olympic Steamship* while a governmental obligee – city, county, or state – cannot. Nor do they point to anything in *Colorado Structures* that would so limit the Court's holding. If anything, there should be *greater* protection when the public fisc is involved.

Moreover, the same considerations identified in *Colorado Structures* apply equally in cases that involve a governmental obligee:

- Absent a right to recover attorney fees, sureties that issue bonds on public projects "would have absolutely no incentive to refrain from litigation." *Colo. Structures*, 161 Wn.2d at 607. Here too, rather than hire a contractor to complete VPFK's work or pay King County, the Sureties "flatly denied coverage under the Bond, forcing the County to compel it to honor its commitment to do so." Op. ¶ 118.
- When King County sent a letter of default to VPFK, the situation was dire: VPFK was months behind schedule, both

[6] The Court has recognized that a plurality decision is controlling when the concurring justices state that they agree with the holding. *See In re Francis*, 170 Wn.2d 517, 532 n.7, 242 P.3d 866 (2010).

STBMs were inoperable, and VPFK had not even started to repair either STBM. RP 4545-46. Faced with a half-finished project and tunnel boring machines 300 feet underground, King County had to act promptly and had no leverage to force the Sureties to perform their contractual obligations.

- Awarding attorney fees under *Colorado Structures* is also necessary to ensure that King County is "made whole." 161 Wn.2d at 607. The amount of fees incurred by the County in the trial court is substantial: totaling over $14 million. CP 4490 ¶ 26. The Sureties did "not dispute the reasonableness of the amounts requested" in the trial court (CP 4487 ¶ 9), nor have they done so on appeal.

Both legally and logically, *Colorado Structures* applies equally in cases that involve a governmental entity like the County.

Contrary to the Sureties' assertion (Surety Pet. 6), it is completely irrelevant that a governmental entity can in some cases *also* recover attorney fees under RCW 4.84.250-.280 as modified by RCW 39.04.240. In both *Colorado Structures* and *Olympic Steamship*, the Court held that fees were recoverable in equity even though the plaintiffs *also* could have recovered statutory attorney fees under RCW 4.84.080 *and* prevailing party attorney fees under the parties' agreement. *Colo. Structures*, 161 Wn.2d at 597 (trial court awarded fees "under the contract"); *Olympic Steamship*, 117 Wn.2d at 52 (fees recoverable "pursuant to Supplementary Payments ¶ D of [Olympic's] policy"). The right to recover fees under *Colorado Structures* is *in addition to* a litigant's other rights and does not – as the Sureties claim – turn on whether some other remedy is available.

McGreevy v. Oregon Mutual Insurance Co., 128 Wn.2d 26, 904 P.2d 731 (1995), confirms that point. The insurer there argued that *Olympic Steamship* fees cannot be awarded where the legislature "has specifically provided for attorney fees in cases where a Consumer Protection Act violation is found to have been committed by an insurance company." *Id.* at 38. The Court disagreed because "there is nothing in the language of the Consumer Protection Act" showing "that the Legislature intended to make that Act the exclusive means to recover attorney fees in a case involving a dispute over the coverage of an insurance policy." *Id.* at 38-39. As a result, the CPA is "one avenue" – and "not the exclusive means" – to recover fees. *Id.* at 39.

The same reasoning applies here. Contrary to the Sureties' argument that the Court of Appeals addressed the wrong issue (Sureties Pet. 9), *McGreevy* shows that it was necessary to determine – as the Court of Appeals did – whether RCW 39.04.240 precludes the recovery of attorney fees under *Colorado Structures*. The Court of Appeals correctly held that "the language of the statutes does not explicitly convey the legislature's intent that RCW 39.04.240 be the exclusive method of recovering attorney fees in a dispute over a performance bond in a case arising out of public works contracts." Op. ¶ 109. Nor does that statute require a governmental entity to make a settlement offer. Thus, as in

McGreevy, *Colorado Structures* is "one avenue" – and "not the exclusive means" – for an obligee like the County to recover its fees. *McGreevy*, 128 Wn.2d at 39. In this respect as well, there is no issue of public importance that has not already been resolved by this Court.

Lastly, the Sureties claim that allowing a fee award here is somehow unfair. Even if those arguments were relevant under RAP 13.4(b)(4) – which they are not – they lack merit:

- Bargaining power (Surety Pet. 8): The Court recognized in *Colorado Structures* that construction project owners typically have more bargaining power than an insured, but held that "*more important is the disparity of enforcement power.*" 161 Wn.2d at 603 (emphasis added). Here too, when King County turned to the Sureties for assistance, it had no power to enforce the Bond short of litigation.
- Costs of litigation (Surety Pet. 8): Contrary to the Sureties' unsupported assertion that they "played no role in the lengthy trial" (Surety Pet. 12), Sections III.F and III.G above show that they were active participants in the litigation. The Court of Appeals similarly noted that the Sureties "denied liability," "did not acknowledge that VPFK was in default," and "expressly adopted VPFK's defenses." Op. ¶ 118.
- Notice (Surety Pet. 9-10): This Court decided *Olympic Steamship* in 1991 and *Colorado Structures* in 2007 – long before the Sureties denied liability on the County's claim. Ex. 162 at 20-21. Thus, as the Court of Appeals noted (Op. ¶ 110), the Sureties "cannot now argue that they lacked notice of their potential liability" when they forced the County to disprove VPFK's defenses in order to obtain the benefit of the Bond.

In short, there is nothing unfair about awarding fees in accordance with this Court's precedent. Nor does the fee award involve any issue of substantial public interest that should be determined by this Court.

2. The Court Of Appeals' Ruling Also Does Not Conflict With This Court's Cases Regarding Segregation Of Attorney Fees.

Turning to the Court of Appeals' ruling regarding the *amount* of recoverable fees, the Sureties claim that "this Court's cases authorize *Olympic Steamship* fees only for coverage, not claims disputes, and require the party seeking fees to segregate recoverable and unrecoverable fees." Op. 11. According to the Sureties, the Court of Appeals' ruling is "[i]n conflict with this authority" and this Court should therefore grant review under RAP 13.4(b)(1). There is no such conflict.

Initially, the Sureties ignore the applicable standard of review. In *Blair v. Washington State University*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987), the Court held that the trial court "did not abuse its discretion" in determining that the plaintiffs were "entitled to all fees awarded" – on both successful and unsuccessful claims – because the evidence presented and fees incurred were "inseparable." In *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 151 P.3d 976 (2007), the Court emphasized that "it is the trial judge who has watched the case unfold and who is in the best position to determine which hours should be included in the [fee

award] .... That is why the law requires us to defer to the trial court's judgment on these issues." *Id.* at 540 (citation omitted).

The trial court here rejected the Sureties' argument regarding segregation of attorney fees after watching the case unfold over two-plus years of pre-trial proceedings and three months of trial. Critical here, the trial court found that "[t]hroughout the litigation, the Sureties adopted VPFK's defenses." CP 4487 ¶ 12. The record supports that finding (*see* Sections III.F-G above), and the Sureties – as the Court of Appeals noted – "do not contest this finding" (Op. ¶ 113). Based on this and the other findings that the Court of Appeals reproduced in its opinion (Op. ¶ 114), the Court of Appeals correctly concluded that "[t]he trial court did not abuse its discretion when it determined that the attorney fees could not be segregated" (Op. ¶ 118).

Ignoring the standard of review, the Sureties claim that the Court of Appeals' ruling conflicts with cases in which this Court has recognized that an insured cannot recover fees under *Olympic Steamship* where the dispute relates to damages – a "claims dispute" – as opposed to coverage issues – a "coverage dispute." Surety Pet. 12. The Sureties misread Washington law regarding such disputes. In *Colorado Structures*, the Court explained:

> Generally, when an insured must bring suit against its own insurer to obtain a legal determination interpreting the meaning or application of an insurance policy, it is a coverage dispute. This case *would be* in the nature of a claims dispute if West [the surety] had *agreed to pay* under the bond, but had a factual dispute with Structures [the obligee] as to the amount of the payment.

161 Wn.2d at 606 (second emphasis added). The cases cited by the Sureties say the same thing.[7] As these cases make clear, an insurer can avoid *Olympic Steamship* fees only if the insurer *agrees to pay* under the bond or policy and disputes *solely* the amount of the claim.

The Court of Appeals correctly stated and applied this body of law. Tracking the above discussion, the Court of Appeals recognized that this exception to *Olympic Steamship* applies "where the surety or insurer acknowledges coverage, agrees to pay under the policy or bond, but disputes the value of the claim." Op. ¶ 117. Thus, contrary to the Sureties' argument that the Court of Appeals' reasoning "would make every tort action against an insured defendant a coverage dispute" (Sureties Pet. 14), the Court of Appeals correctly stated what sureties and insurers should do under this Court's precedent to avoid *Olympic Steamship* fees. The Sureties' problem is that they ignored that precedent

[7] In *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 279, 876 P.2d 896 (1994) (Surety Pet. 12), attorney fees were not recoverable under *Olympic Steamship* because the insurer "did not dispute liability." In *Matsyuk v. State Farm Fire & Casualty Co. of Illinois*, 173 Wn.2d 643, 661, 272 P.3d 802 (2012) (Surety Pet. 12), in contrast, the Court held that the plaintiff *was entitled to recover Olympic Steamship* fees because "coverage was disputed" and the plaintiff had filed suit "to obtain the benefit of the insurance contract."

and instead denied coverage under the Bond and adopted VPFK's defenses. Op. ¶ 117. Consequently, *because of the Sureties' own actions*, this exception to *Olympic Steamship* does not apply here.

The Court of Appeals' ruling also does not conflict with "this Court's decisions requiring segregation." Surety Pet. 15. In *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994) (Surety Pet. 15), the Court altered the mix of successful and unsuccessful claims so it remanded the fee award "for recalculation." Critical here, the Court recognized that "[w]here ... the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees." *Id.* In *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 930 P.2d 288 (1997) (Surety Pet. 15), the Court did not decide any segregation issue.

Under *Blair*, *Hume*, and other similar cases, even if this case involves both claims disputes and coverage disputes, the trial court did not abuse its discretion in finding that "the claims could not and were not required to be segregated" because the claims "involved a common core of facts" and because the Sureties not only "denied coverage" but also "adopted all of VPFK's defenses." Op. ¶ 114 (quoting CP 4489 ¶ 19). Nor did the Court of Appeals err in affirming that ruling. Op. ¶ 118. Indeed, the Bond itself states that when the contractor is "in default under

the Contract," the Sureties "shall promptly remedy the default" (Ex. 3001 at 1), further confirmation that the fees at issue cannot be segregated. This fact-intensive ruling also does not warrant this Court's review.[8]

C. King County Is Entitled To Attorney Fees In Responding To The Petitions For Review.

The Court of Appeals awarded attorney fees under *Colorado Structures* and *Olympic Steamship*. Op. ¶ 130. Pursuant to RAP 18.1(j), this Court should award King County its fees in answering these petitions.

V. CONCLUSION

For the foregoing reasons, the Court should deny review and award King County its fees in answering the petitions.

DATED: February 26, 2016

PETERSON | WAMPOLD | ROSATO | LUNA | KNOPP

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[8] The Sureties also assert that the Court of Appeals' ruling is somehow "absurd and inequitable" because "[t]he County's counsel negotiated *with VPFK's* counsel an agreement for payment of the fees awarded on appeal." Surety Pet. 15 (emphasis in original). That is entirely irrelevant to the segregation issue. It is also factually incorrect. The County's counsel negotiated fees on appeal with Frederic Cohen, who argued the appeal for both VPFK and the Sureties and told the Court of Appeals: "I am appearing on behalf of VPFK ... as well as the surety defendants." Recording available at https://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20150309. Moreover, the Sureties had previously informed the Court of Appeals that "[t]he burden of the fee award will ultimately fall on VPFK, which must reimburse the Sureties for payments to the County." Surety Br. 27. It therefore made sense for Mr. Cohen to negotiate and attempt to minimize the amount of the appellate fees awarded to the County, and the County's counsel reasonably understood that Mr. Cohen was authorized to do so.

CERTIFICATE OF SERVICE

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Enclosed for filing in the above-referenced matter are (a) King County's Motion for Leave to File Overlength Answer; and (b) Answer to Petitions for Review.

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Case number: 927448

Name, phone number, bar number, and e-mail address of the person filing the document: Leonard Feldman, 206-624-6800, WSBA No. 20961, email: feldman@pwrlk.com.

Thank you for your attention to this matter.

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