NO. 73427-0-I

COURT OF APPEALS OF THE
STATE OF WASHINGTON

LSF STRUCTURES LTD., a foreign corporation;
and LIGHTWEIGHT STEEL FRAMING 2007 LTD.,
a Washington corporation,

Appellants,

vs.

W.G. CLARK, CM, INC., a Washington corporation;
BRIX CONDOMINIUM, LLC, a Washington
limited liability company; et al.,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants LSF Structures Ltd. and Lightweight Steel Framing 2007 Ltd. ("LSF") (collectively, "Appellants") filed a lawsuit for the purpose of compelling arbitration of a construction contract dispute. Respondents W.G. Clark, CM, Inc. and Brix Condominium, LLC ("Brix") failed to fully pay Appellants the amount of $1,017,868.90 for subcontractor services and materials provided by Appellants to a condominium construction project in the Capitol Hill area of Seattle, Washington. Respondents filed a motion for summary judgment alleging that Appellants had failed to satisfy a condition precedent to litigation or arbitration, that is, to submit Appellants "full claim in writing" to Respondents thirty (30) days prior to filing "any claim in mediation, arbitration, or litigation." In response to the summary judgment motion, Appellants submitted the Declaration of Al Malcolm, which detailed Appellants cost claim, including the steps that Appellants had taken to submit that claim to Respondents more than thirty days prior to filing the lawsuit. The trial granted summary judgment and dismissed the lawsuit with prejudice.

The trial court in this case erred in three ways: (1) the trial court erred in not applying Washington's strong public policy in favor of arbitration, codified, for example, in RCW 7.04A.060(3), which provides that whether or not a condition precedent to arbitrability has been fulfilled is a question for an arbitrator to decide; (2) the trial court failed to recognize that the Declaration of Al Malcolm raised genuine issues of

material fact about whether Appellants complied with the condition precedent, precluding summary judgment; and (3) the trial court erred in not applying Washington's strong public policy against dismissal for failure to comply with a condition precedent without a showing of prejudice to the other party. The trial court's dismissal left Appellant without a mechanism to enforce the arbitration provisions of the subcontract between the parties. The trial court's decision runs directly contrary to Washington's strong public policy in favor of arbitrating disputes and avoiding unnecessary litigation.

Appellants LSF Structures Ltd. and Lightweight Steel Framing 2007 Ltd. ("Appellants") respectfully request that this Court reverse the Order Granting Motion for Summary Judgment ("Order") entered by the King County Superior Court on April 10, 2015, which dismissed the underlying lawsuit (the "Lawsuit") with prejudice.

II. ASSIGNMENT OF ERROR

Error No. 1

The trial court erred in considering whether Appellants had complied with a condition precedent to arbitration under Section U.3 of the Subcontract because that question is a threshold issue for the arbitrator, pursuant to RCW 7.04A.060(3).

Error No. 2

The trial court erred in finding that there were no genuine issues of material fact about whether Appellants complied with the condition precedent in Section U.3 of the Subcontract between the Parties.

Error No. 3

The trial court erred in dismissing Appellants' claim despite Washington's strong public policy against dismissal for failure to comply with a condition precedent absent a showing of prejudice to the other party.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1

Did the trial court err in considering the question of whether Appellants satisfied a condition precedent to arbitration (including the filing of a lawsuit to enforce arbitration where a claim is subject to an agreement to arbitrate) where that issue is a question for the arbitrator, pursuant to RCW 7.04A.060(3)? (Assignment of Error 1.)

Issue No. 2

Did the trial court err by dismissing on summary judgment Appellants' lawsuit to enforce arbitration despite genuine issues of material fact about whether Appellants complied with a condition precedent to fling a claim and despite Respondents having waived their right to enforce the condition precedent? (Assignment of Error 2).

Issue No. 3

Did the trial court err by dismissing Appellants' claims on summary judgment in light of Washington's strong public policy against dismissals for failure to comply with a condition precedent absent a showing of prejudice to Respondents? (Assignment of Error 3).

III. STATEMENT OF THE CASE

On or about May 2007, Appellants LSF Structures Ltd. and Lightweight Steel Framing 2007 Ltd. ("LSF") (collectively, "Appellants") entered into a contract (the "Subcontract") with Respondent W.G. Clark, CM, Inc. ("W.G. Clark"), a Washington corporation, to provide steel framing and drywall services on a construction project (the "Project") known as Brix Condominiums, located on Capitol Hill in Seattle, Washington. CP 79 at ¶ 2; CP 20-52. W.G. Clark was the general contractor on the Project and Respondent Brix Condominium, LLC ("Brix"), a Washington limited liability company, was the developer and owner of the real property upon which the Project was located. *Id*.

Section U.3 of the Subcontract provided:

> Subcontractor agrees not to file any claim in mediation, arbitration, or litigation, until thirty (30) days after having submitted its full claim in writing to Mike Ducey, president of W.G. Clark Construction Co. along with detailed cost documentation and all points of argument in Subcontractor's favor.

CP 41.

On or about July 10, 2008, LSF received a Notice of Assignment of Subcontract ("Notice") from Brix, notifying LSF that as of June 30, 2008, W.G. Clark was no longer "in charge of construction for the Brix Condominium Project and had assigned its subcontract with [LSF] dated May 29, 2007 to Brix Condominium, LLC." CP 83-84. The Notice indicated that the assignment was

effective as of July 1, 2008, and that Brix had retained H.A. Andersen Co. ("Andersen") to serve as the new owner's representative / construction manager. *Id*. The Notice further stated: "[a]ccordingly, effective as of July 1, 2008, all references to "W.G. Clark" or "Member" in your subcontract shall be deemed to mean "Brix Condominium, LLC", the Services Addendum shall continue to serve as your Main Contract . . ." *Id*. The Notice went on to indicate that "all applications, lien releases and notices should be delivered" to Brix Condominium, LLC, Attn: Jim Donahue, with a copy to: H.A. Andersen Co., Attn: Martin Cloe, Senior Vice President. *Id*.

LSF continued to provide labor, materials, equipment and supplies to the Project until about July 29, 2008, when LSF was terminated by Brix. CP 80 at ¶ 6. Throughout its work on the Project, LSF provided W.G. Clark with monthly invoices, on or before the 25th of each month, requesting progress payments for work performed on the Project. *Id*. LSF was paid for its progressive work on the project through approximately May 2008, until Brix terminated W.G. Clark. *Id*. After May 2008, Brix did not pay LSF for its work even though LSF continued to provide labor, materials, equipment and supplies to the Project until July 2008. *Id*.

From July 2008 through September 2008, Al Malcolm ("Malcolm"), the President of LSF, attended meetings with personnel from Brix and H.A. Andersen Co. to discuss the Project and LSF's outstanding invoices. CP 79 at ¶ 1; CP 80 at ¶ 7. Appellants attended

meetings regarding the Project with Brix and Andersen personnel on or about July 10, 2008; July 18, 2008; July 29, 2008; and August 13, 2008. CP 80 at ¶ 7. Appellants also exchanged numerous emails, phone calls, and written correspondence with management personnel from Brix and H.A. Andersen regarding our outstanding invoices. *Id*.

Despite demand, Respondents have failed to pay Appellants services and materials provided to the Project in the amount of $1,017,868.90. CP 81, ¶¶ 8–10. Appellants provided Brix and H.A. Andersen's management personnel with a detailed breakdown of Appellants' cost claim, as required by section U.3 of the Subcontract, as well as other written cost documentation detailing the amounts of Appellants claim, on several occasions between July 2008 and September 2008. CP 81 at ¶¶ 8–10; CP 86, Ex. B. Respondents continued to refuse to pay Appellants on their outstanding invoices, but in response to Appellants' cost claim, Respondents provided Appellants with their own responsive detailed cost breakdown of their purported claims against Appellants, dated September 5, 2008. CP 81 at ¶ 10; CP 88–91. Respondents purported claim incorporated and included Appellants' detailed cost breakdown. CP 88-91. Appellants' claim consists of the unpaid amount of its invoices for the labor, materials, equipment and supplies that Appellants provided to the Project up to and including July 2008, plus interest, costs, and attorney's fees. CP 81 at ¶ 8.

Respondents actually sent the initial demand for arbitration to Appellants. CP 92 at ¶ 2. Appellants agreed to Respondents demand and the parties agreed to mediate and then arbitrate the dispute. CP 92 at ¶ 2; CP 105. After initially demanding arbitration, Appellants ultimately reversed their position and refused to arbitrate, despite their initial demand to do so, which Respondents had accepted. CP 92 at ¶ 2; CP 102–105. Respondents alleged that Appellants had not complied with a condition precedent to arbitration despite having previously received and responded to Appellants detailed cost claim. CP 86–91.

On July 28, 2014, Respondents timely filed a complaint to compel arbitration in accordance with the parties' prior agreement. CP 1–8. On February 20, 2015, Respondents filed their Motion for Summary Judgment ("MSJ"). CP 9-14. Appellants filed their Response, which was supported by a declaration from Al Malcolm and Appellants' counsel. CP 68-93. On April 10, 2015, the Court heard oral argument on Respondents' MSJ. CP 106; Narrative Report of Proceedings. On April 10, 2015, the trial court entered its Order Granting Motion for Summary Judgment ("Order"), granting Respondents' MSJ and dismissing the underlying Lawsuit with prejudice. CP 107-08. Appellants timely appealed the trial court's Order. CP 109-14.

IV. ARGUMENT

This Court reviews summary judgment orders *de novo*, performing the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). In granting Respondents' motion for summary judgment, and dismissing the Lawsuit with prejudice, the trial court erred in three ways: (1) the trial court erred in considering *prima facie* whether Respondents had complied with a condition precedent under section u.3 of the Subcontract because that question is a threshold issue for the arbitrator, pursuant to RCW 7.04A.060(3); (2) the trial court erred in finding that there were no genuine issues of material fact about whether Respondents complied with Section U.3 of the Subcontract, and finding that Respondents did not waive enforcement of the provision; (3) the trial court erred in dismissing the case without a showing of prejudice to Respondents.

I. THE TRIAL ERRED IN CONSIDERING WHETHER RESPONDENTS HAD COMPLIED WITH A CONDITION PRECEDENT UNDER SECTION U.3 OF THE SUBCONTRACT BECAUSE THAT QUESTION IS A THRESHOLD ISSUE FOR THE ARBITRATOR.

The Subcontract contains a clear arbitration clause in section U.2. CP 41. RCW Chapter 7.04A applies to the agreement to arbitrate in the Subcontract, which was entered into on May 29, 2007. RCW 7.04A.030 (2); *see* CP 20 (effective date of Subcontract is May 29, 2007). The parties do not dispute that the parties' claims are subject to arbitration, that Respondents initially demanded arbitration, and that

the parties agreed to arbitration. Appellants' lawsuit was filed for the purpose of compelling arbitration, and any condition precedent to the filing is really a condition precedent to arbitration, not litigation.

Under RCW 7.04A, whether a condition precedent to arbitrability has been fulfilled is for an arbitrator to decide. RCW 7.04A.060(3); *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 879-80, 224 P.3d 818 (2009). RCW 7.04A.060(3) provides that "[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." The trial court shall decide "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." RCW 7.04A.060(2).

Questions about procedural prerequisites to arbitration are threshold questions for the arbitrator. *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn. App. 281, 287-88, 135 P.3d 558 (2006) (whether a time limit bars arbitration should be decided by the arbitrator as a threshold question); *Heights at Issaquah Ridge v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 405, 200 P.3d 254 (2009). This is because these types of procedural questions cannot ordinarily be answered without consideration of the merits of the dispute. *Id*. at 288. This case is a perfect example, as LSF provided Respondents with materials outlining its claim. To determine whether those materials satisfy the condition precedent to arbitrability in Section U.3, if that section even applies (which it

should not because Respondents filed the arbitration demand, waiving enforcement of s. U.3) requires some consideration of the merits of the dispute.

Courts resolve the threshold legal question of arbitrability by analyzing the arbitration agreement. *Heights at Issaquah Ridge*, 148 Wn. App. at 403. "Washington has a strong public policy favoring arbitration of disputes." *Id*. at 403-04.

The parties do not dispute that there was an agreement to arbitrate the underlying dispute, in accordance with s. U.2 of the Subcontract. CP 41. Because the parties agreed to arbitrate, and because Respondents filed the initial claim to arbitrate, not Appellants, the Court should have held that an agreement to arbitrate existed and reserved any arguments about conditions precedent to arbitration for the arbitrator, pursuant to RCW 7.04A.060(3). Any doubts should have been resolved in favor of arbitration. *Issaquah Ridge,*148 Wn. App. at 405.

Instead, the trial court analyzed whether Appellants had complied with section U.3, a provision that is not even applicable unless Appellants file the claim. In the instant case, Respondents filed the initial claim to arbitrate by sending the initial demand for arbitration to Appellants. Thus, Respondents waived provision U.3, as described below. The court should have reserved any questions about compliance with section U.3 for the arbitrator and declined to grant Respondents' summary judgment motion.

Respondents attempt to make a meaningful distinction between a condition precedent to filing an underlying litigation that seeks to enforce arbitration and a condition precedent to arbitration in this case. The Parties agreed to arbitrate. Appellant filed the Lawsuit so that it would have a mechanism to compel Respondents to arbitrate. Because Respondents filed the initial demand for arbitration, not Appellant, the second paragraph of Section U.3 of the Subcontract does not apply, as the Subcontractor (Appellants) had not filed a claim in arbitration – Respondents simply agreed to Appellants' demand for arbitration.

Even if s. U.3 applied, the provision should not be interpreted to permit Respondents to frustrate the only legal mechanism available to Appellants to compel the mediation and arbitration that the Parties agreed to by dismissing the underlying lawsuit. This is contrary to Washington's strong public policy in favor of arbitration of disputes, and results in the extensive and unnecessary litigation that RCW 7.04A.060(3) was designed to avoid. If Respondents refuse to arbitrate, despite their prior agreement to do so, Appellants are left with no mechanism to compel arbitration. Respondents would be able to assert endlessly in bad faith – as they have done – that whatever materials Appellant provided to Respondents to comply with Section U.3 were inadequate, as arbitrarily determined by Respondents. Appellants would be unable to seek relief in Court by filing a lawsuit to compel arbitration if Respondents could simply dismiss any such action by pointing to Section U.3 and asserting a meaningless

distinction between a condition precedent to arbitration and a condition precedent to the "litigation" brought for the purpose of compelling arbitration.

The trial court's dismissal of Appellants' lawsuit is contrary to Washington's strong public policy in favor of arbitration of disputes. Appellants provided Respondents with a statement of claim years ago, and after initially demanding and agreeing to arbitration, Respondents decided to rest on a technical contract interpretation to frustrate Appellants' attempt to enforce the agreement to arbitrate.

II. THE TRIAL COURT ERRED IN FINDING THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT ABOUT WHETHER RESPONDENT COMPLIED WITH SECTION U.3

Even if Appellant's *prima facie* compliance with Section U.3 of the Subcontract was a matter properly before the trial court for consideration, the trial court erred in granting Respondents' motion for summary judgment because: (1) Appellants raised genuine issues of material fact about whether they complied with section U.3 of the Subcontract before they filed the Lawsuit; (2) Respondents waived their right to enforce Section U.3 of the Subcontract by filing the arbitration claim and demanding and agreeing to mediation and arbitration.

1. There Are Genuine Issues Of Material Fact About Whether Appellants Complied With Section U.3 Before They Filed The Lawsuit

Appellants responded to Respondents' summary judgment with a detailed declaration by Al Malcolm that included the breakdown of

Appellants' cost claim that was provided to Respondents prior to filing. CP 79–91 (Declaration of Al Malcolm ("Al Malcolm Dec.") and Exhibits). Between July 2008 and September 2008, Appellants provided detailed claim documentation to Brix and Andersen. *Id*. By doing so, Appellants complied with the condition precedent to litigation or arbitration in Section U.3 (if it even applied); or, at least, through the Al Malcolm Dec. raised genuine issues of material fact about whether Appellants complied with U.3, sufficient to preclude summary judgment.

Respondents failed to meet their burden to show that there were no genuine issues of material fact about whether Appellants complied with Section U.3. In making that determination, the Court is required to resolve all ambiguities and draw all factual inferences in favor of the non-moving party (Appellants). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14 (1986). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2nd Cir. 1994).

In their motion for summary judgment, Respondents filed the Declaration of Mike Ducey ("Ducey"), President of Respondent W.G. Clark, in which Ducey stated that "to my knowledge" LSF never provided its full claim in writing. CP 19 at ¶ 4. However, whether or not W.G. Clark received LSF's claim is irrelevant to the issue relating

to s. U.3, as LSF's claims were sent by LSF to Brix and Andersen personnel because Brix terminated W.G. Clark and took an assignment of W.G. Clark's contractual obligations. CP 80 at ¶¶ 3-6; CP 83-84.

Section U.3 of the Subcontract was amended by an assignment of contract by W.G. Clark to Brix, effective July 1, 2008. CP 83-84. The notice ("Notice") to LSF regarding the assignment stated that "[a]ccordingly, effective as of July 1, 2008, all references to "W.G. Clark" or "Member" in the Subcontract shall be deemed to mean "Brix Condominium, LLC", the Services Addendum shall continue to serve as your Main Contract . . ." *Id*. The Notice went on to indicate that "all applications, lien releases and notices should be delivered" to Brix Condominium, LLC, Attn: Jim Donahue, with a copy to: H.A. Andersen Co., Attn: Martin Cloe, Senior Vice President. *Id*. Thus, on July 1, 2008, pursuant to the assignment, the notice to Mike Ducey at W.G. Clark required under section U.3 of the Subcontract was required to be sent to Brix and Andersen, not Ducey. *Id*. As such, in accordance with the assignment, Ducey would not be expected to have knowledge about, or receipt of, Appellants' claim, as such a claim would properly have been sent to Brix and Andersen.

It is telling that Respondents provided no similar declaration from Andersen – the relevant party after the assignment – in support of their motion for summary judgment. Rather, Respondents relied on the Declaration of Matt Adamson – counsel for Brix – who made the bald, conclusory, hearsay statement, relating to matters outside of his

own personal knowledge, that indicated the following legal conclusion based on counsel's review of the litigation file: "LSF has never complied with section U3 of its subcontract in any submittal to Brix Condominium, LLC." CP 15–16 at ¶ 2. However, it would be improper to rely on the hearsay declaration of Respondents' counsel, which simply states the ultimate question at issue as a self-serving legal conclusion and is not a factual declaration based on counsel's personal knowledge of whether or not anyone at Brix or Andersen received a statement of LSF's claim, or the contents of that statement. Counsel's conclusory declaration is not a statement of fact sufficient to preclude summary judgment as much as a legal opinion on a matter to be determined by the arbitrator. No other evidence in support of summary judgment was provided by Respondents except a conclusory declaration of the controller at Brix, Barbara Cowan, who stated that if any claim had been submitted to Brix, she would have known about it. CP 64-65.

Counsel's statement cannot satisfy Respondents' threshold requirement to demonstrate that there are no genuine issues of material fact regarding LSF's compliance with section U.3. Further, the Al Malcolm Dec. submitted by Appellants, which declaration is based on personal knowledge, directly contradicts Respondent's counsel's conclusory legal conclusion and hearsay statement. Malcolm declares that he provided Brix and H.A. Anderson management personnel with a breakdown of LSF's claim, and includes the detailed cost materials.

CP 80-81 at ¶¶ 7-10; CP 86. This evidence raises a genuine material issue of material fact that should have precluded summary judgment and dismissal of the Lawsuit.

The trial court cannot decide at summary judgment whether or not section U.3 was complied with because there is an incomplete record. In *Staples*, in the same procedural setting as the instant case, the Supreme Court held that the yardstick for compliance with a condition precedent is substantial compliance. *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 415 (2013). At summary judgment, the facts before the court may not prove substantial compliance, "but at the summary judgment stage they do not need to because we are required to view all facts in light most favorable to [the non-moving party]. It is enough that the record demonstrates a genuine question of material fact." *Id*. The same principle is applicable to this case: Appellants are not required to prove substantial compliance to defeat Respondents' summary judgment; rather, they were only required to raise a genuine issue of material fact, which they did through the Al Malcolm Dec. and the inclusion of some of the cost documentation supporting that declaration.

For reasons unknown, the trial court nevertheless granted summary judgment, apparently erroneously overlooking the Al Malcolm Dec., relying on conclusory declarations on the ultimate question submitted by Respondents, and holding Appellants – the non-moving party – to a strict compliance standard. The Al Malcolm Dec.

raised a genuine issue of material fact sufficient to preclude summary judgment, and Appellants should not be required to do more to preclude summary judgment.

2. Respondents Waived Enforcement Of Section U.3 By Filing The Initial Claim For Arbitration And Agreeing To Arbitration

Respondents waived enforcement of s. U.3 by filing the initial demand for arbitration, which was accepted by Appellants, and agreeing to mediate and arbitrate the dispute. The parties do not dispute that Respondents filed the initial demand for arbitration, and that the parties agreed to mediate and arbitrate the dispute. *See, e.g.*, CP 92; CP 102–105. Appellants properly argued at summary judgment that this constituted a waiver of Respondents' right to enforce section U.3 of the Subcontract. CP 75-76.

"Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Issaquah Ridge*, 148 Wn. App. At 407. "Waiver is a voluntary of and intentional relinquishment of a known right." *Verbeek Props., LLC v. GreenCo Environmental, Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205 (2010). Respondents' filing of the initial demand for arbitration, and subsequent agreement to arbitrate, constitutes conduct that is inconsistent with Respondents' later assertion that it seeks to enforce a clause that explicitly applies only in a circumstance where Appellants file a claim in arbitration or litigation.

Section U.3 of the Subcontract applies only if the Subcontractor (Appellants) file a claim in arbitration. CP 41 ("Subcontractor agrees not to file any claim in mediation, arbitration, or litigation until thirty (30) days after having submitted its full claim in writing . . ."). There is no similar requirement though for a claim in arbitration filed by Respondents, and agreed to by Appellants, which is the procedural background of this matter. In the instant case, where Respondents filed the arbitration demand, Appellants are not required to file a full claim, and Respondents waive their right to rely on s. U.3. As such, the trial court should have denied Respondents' motion for summary judgment because s. U.3 is not operative unless it is Appellants who file the initial claim, and Respondents waived their right to enforce s. U.3 by filing the initial demand to arbitrate.

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIMS GIVEN WASHINGTON'S STRONG PUBLIC POLICY AGAINST DISMISSALS FOR FAILURE TO COMPLY WITH A CONDITION PRECEDENT WITHOUT A SHOWING OF PREJUDICE

Appellants' claims should not be dismissed because Washington law holds that failure to strictly comply with a condition precedent (as distinct from a notice provision) does not warrant dismissal, absent a showing of prejudice to the other party, unless the contract explicitly states that dismissal is the remedy. It is undisputed that the Subcontract in this case has no such provision. In *Shepler*, this Court held that failure to comply with a condition precedent is not a bar to recovery where a

contract does not explicitly state that such a failure constitutes a waiver of claims. *Shepler Construction v. Leonard*, 175 Wn. App. 239, 246 (Div. 1. 2013); *see also, Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994). These cases were both referenced by Appellants' counsel at oral argument. *See* Narrative Report of Proceedings.

In *Staples*, the Supreme Court held that public policy considerations override the application of traditional, technical contract principles. *Staples*, 176 Wn.2d at 417. While it has long been held in Washington that strict compliance is generally required for statutory notice provisions, *see e.g., Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 316, 53 P.3d 993 (2002), strong public policy considerations dictate that failure to comply with a condition precedent, as alleged in this case, is not a bar to recovery where a contract does not explicitly state that such a failure constitutes a waiver of the claim or where there is no showing of prejudice. *Shepler Construction*, 175 Wn. App. at 248-49; *PUD 1 of Klickitat County*, 124 Wn.2d at 805 (failure to comply with a condition precedent is not a bar to recovery absent a showing of actual prejudice).

Just as in *Shepler*, the subject Subcontract does not expressly state that failure to follow dispute resolution procedures waives right to pursue claim. Even if the trial court held at summary judgment that there were no genuine factual issues about Appellants' compliance with section U.3, Washington's strong public policy would preclude dismissal in this case

for an alleged failure to comply with a condition precedent. As such, the trial court's grant of summary judgment should be reversed.

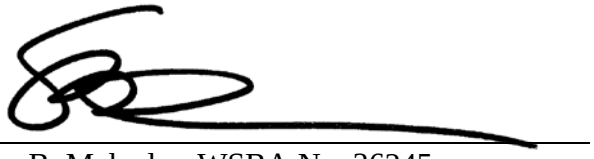
V. CONCLUSION

Respondents seek to needlessly delay or avoid the mediation and arbitration proceedings to which they previously agreed by litigating technical arguments in bad faith in an effort to frustrate Appellants' attempts to compel arbitration. This type of behavior runs directly contrary to Washington's strong public policy in favor of arbitrating disputes and avoiding unnecessary litigation.

For the above reasons, this Court should reverse the Order entered by the trial court dismissing Appellants' claim with prejudice. Appellant requests its costs and attorney's fees in accordance with section U of the Subcontract.

RESPECTFULLY SUBMITTED this 13th day of May, 2016.

SEAN B MALCOLM PLLC

By 

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Certificate of Service

I hereby certify that I caused the foregoing document to be filed with the Court and served upon the below named individual(s) in the identified manner on this 13th day of May, 2016:

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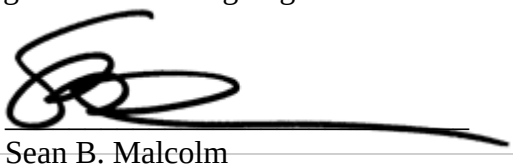
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



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