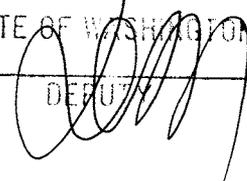


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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY   
DEPUTY

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WALDNER CONSULTING, INC.

Appellant,

v.

MILLER CONTRACTING, INC.

Respondent.

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REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

A.	TABLE OF AUTHORITIES . . . . .	iii
B.	ARGUMENT ON REPLY. . . . .	1
	<b>ISSUE 1: When interpreting a contract, should specific terms be ignored in favor of “taking the contract as a whole”?</b> . . . .	1
	a. <u>Incorporation by Reference– Additional Authority.</u> . . . . .	1
	b. <u>Miller Does Not Address Subcontract Language that Supports Waldner’s Position.</u> . . .	6
	<b>ISSUE 2: Did Waldner fail to cooperate in the submission of Waldner’s claim?</b> . . . . .	7
	a. <u>Waldner Immediately Provided All Supporting Documentation to Miller.</u> . . . . .	8
	b. <u>Waldner Consulting, Inc. Appeared at the Settlement Meeting.</u> . . . . .	12
	<b>ISSUE 3: Did 180 days pass between rejection of Waldner’s claim and the filing of suit by Waldner.</b> . . . . .	14
C.	CONCLUSION . . . . .	19

A. TABLE OF AUTHORITIES

CASES

*Absher Constr. Co. v. Kent Sch. Dist. No. 415*,  
77 Wn.App. 137, 143, 980 P.2d 1071 (1995) . . . . . 15

*A-C Construction, Inc. v. Bakke Corp.*,  
153 Or. App. 41, 956 P.2d 219 (1998) . . . . . 3

*Adventists v. Ferrellgas, Inc.*,  
102 Wn.App. 488, 7 P.3d 861 (2000) . . . . . 4

*American Safety Casualty Ins. Co. v. City of Olympia*,  
174 P.3d 54, 2008 WL 4532121 Wash. . . . . 15, 16, 17

*Bishop v. Hansen*,  
105 Wn.App. 116, 120, 19 P.3d 448 (2001) . . . . . 10

*Guerini Stone Co. v. P.J. Carlin Construction Co.*,  
240 US 264 (1916) . . . . . 1, 2

*Guy Stickney, Inc. v. Underwood*,  
67 Wn.2d 824, 827, 410 P.2d 7 (1966) . . . . . 7

*John W. Johnson, Inc. v Basic Constr. Co., Inc.*,  
429 F2d 764 (DC Cir 1970). . . . . 2

*McKinney Drilling Co. v Collins Co., Inc.*,  
517 F Supp 320 (ND Ala 1981) . . . . . 3

*Mike M. Johnson, Inc. v. Spokane County*,

150 Wn.2d 375, 377-78, 78 P.3d 161 (2003) . . . . .	15
<i>S. Leo Harmonay, Inc. v Binks Mfg. Co.</i> , 597 F Supp 1014 (SDNY 1984), aff'd without op, 762 F2d 990 (2d Cir 1985). . . . .	2, 3
<i>Santos v. Sinclair</i> , 76 Wn. App. 320, 325, 884 P.2d 941 (1994) . . . . .	4
<i>VNB Mortgage Corp. v Lone Star Indus., Inc.</i> , 209 SE2d 909 (Va 1974) . . . . .	3
<i>United States Steel Corp. v Turner Constr. Co.</i> , 560 F Supp 871 (SDNY 1983). . . . .	3, 4
<i>Washington Metro. Area Transit Auth.</i> <i>ex rel. Noralco Corp. v Norair Eng'g Corp.</i> , 553 F2d 233 (DC Cir 1977) . . . . .	2

**STATUTES**

RCW 62A.2-201 . . . . .	10
RCW 62A.2-305 . . . . .	10

**OTHER AUTHORITY**

Gary, T. Bart, <i>Incorporation by Reference and Flow-Down Clauses</i> , 10-AUG CONSTRUCTION LAWYER, 1990. . . . .	4
---	---

## A. ARGUMENT ON REPLY

**ISSUE 1: When interpreting a contract, should specific terms be ignored in favor of “taking the contract as a whole”?**

a. Incorporation by Reference– Additional Authority .

Miller states that its Subcontract with Waldner is “clear and unambiguous” in Miller favor of Miller’s position.

Response Brief, 23. However, applying the applicable case law to the Subcontract requires a different conclusion.

The seminal decision regarding the incorporation by reference of construction contracts is *Guerini Stone Co. v. P.J. Carlin Construction Co.* 240 US 264 (1916). In *Guerini Stone*, the Supreme Court ruled that a subcontract which provided that “the work” should proceed in a manner “agreeable to the drawings and specifications” did not contain a clause incorporating into itself the provisions of the principal contract. 240 US at 265. The Court held:

The reference in the subcontract to the drawings and specifications was evidently for the mere purpose of indicating what work was to be done, and in what manner done, by the subcontractor. Notwithstanding, occasional expressions of a different view . . . , in our opinion the true rule, based upon sound reasoning and supported by the greater weight of authority, is that in the case of subcontracts, as in other cases of express agreements of writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.

*Guerini Stone*, 240 US at 277-278.

Following *Guerini Stone*, courts generally have held that an incorporation by reference clause binds a subcontractor only to the provisions concerning the nature and technical aspects of the work, unless a clear intention is expressed in the contractual language to incorporate administrative clauses concerning disputes or other procedures. See *Washington Metro. Area Transit Auth. ex rel. Noralco Corp. v Norair Eng'g Corp.*, 553 F2d 233 (DC Cir 1977); *John W. Johnson, Inc. v Basic Constr. Co., Inc.*, 429 F2d 764 (DC Cir 1970); *S.*

*Leo Harmonay, Inc. v Binks Mfg. Co.*, 597 F Supp 1014 (SDNY 1984), aff'd without op, 762 F2d 990 (2d Cir 1985); *United States Steel Corp. v Turner Constr. Co.*, 560 F Supp 871 (SDNY 1983); *McKinney Drilling Co. v Collins Co., Inc.*, 517 F Supp 320 (ND Ala 1981); *A-C Construction, Inc. v. Bakke Corp.*, 956 P.2d 219, 153 Or.App. 41 (1998), *VNB Mortgage Corp. v Lone Star Indus., Inc.*, 209 SE2d 909 (Va 1974).

In *S. Leo Harmonay, Inc. v. Binks Mfg. Co.*, the court stated that, under New York law, incorporation by reference clauses in a subcontract “bind a subcontractor *only* to the prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor.” Thus, the court held that a time schedule was incorporated into the subcontract because it related to the manner of the work, but a “no damage for delay clause was a

condition concerning disputes and was not incorporated into the subcontract.” 597 F Supp at 1024 (emphasis by the court).

In *United States Steel Corp. v Turner Constr. Co.*, the subcontract expressly bound the subcontractor to the terms and general conditions of the owner-general contractor agreement in the same manner as the general contractor was bound to the owner. Although suggesting, in general terms, that its decision would have been different if there had been clear language to the contrary, the court held that a forum selection clause in the prime contract was not binding upon the subcontractor in its action against the general contractor. 560 F.Supp. 871. See, also Gary, T. Bart, *Incorporation by Reference and Flow-Down Clauses*, 10-AUG CONSTRUCTION LAWYER, 1990.

Incorporation by reference must be clear and unequivocal. *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941 (1994), cited in *Adventists v. Ferrellgas, Inc.*, 102

Wn.App. 488, 7 P.3d 861 (2000).

Miller cites this rule, but then applies a “totality of the contract” analysis not supported by any authority:

Waldner’s argument set forth in its brief cherry picks and presents only a portion of the Subcontract language that incorporates the Prime Contract and only those portions that support its argument. *Taken as a whole*, however, there is no ambiguity in the contract....

Response Brief (emphasis added), 25.

While Miller concedes that portions of the subcontract support Waldner’s position, Miller does not directly address those portions of the contract adverse to Miller’s position. Rather, Miller argues that the contract should be “taken as a whole”. By making this “totality of the contract” argument, Miller contradicts the rule in Washington and other jurisdictions that incorporation by reference must be clear and unequivocal.

b. Miller Does Not Address Subcontract Language that Supports Waldner's Position.

Miller does not specifically address the limitation of the incorporation of the Prime Contract to “the Work” in paragraph 5 of the Subcontract. Paragraph 1 of the Subcontract defines “the work” only as *“that portion of the labour and materials and perform that portion of the work set out in the Prime Contract [the Glenn Springs Holdings contract with Miller], namely: Item D... (hereinafter called “the Work”)....”* CP 424.

Paragraph 18 of the Subcontract explicitly binds Miller– not Waldner– in the event of any controversy with Glenn Springs. CP 426. Miller does not address paragraph 18 in its Response Brief. Instead, Miller argues that the contract “taken as a whole” should overcome more specific provisions that favor Waldner.

This reasoning is the opposite of the rule that contract

ambiguities be construed against the drafter– Miller in this case. See *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966).

Applying the rule correctly in this case requires that the plain meaning of the specific Subcontract provisions be enforced. The paragraph 18 controversy clause of the Subcontract limits Waldner’s liability and duties in the event of a controversy without any mention of the Prime Contract’s claim procedures.

The Subcontract makes nothing close to an unequivocal incorporation of the claim procedures in the Prime Contract. Therefore, the Prime Contract’s claim procedures were not incorporated into the Subcontract.

**ISSUE 2: Did Waldner fail to cooperate in the submission of Waldner’s claim?**

a. Waldner Immediately Provided All Supporting Documentation to Miller.

Waldner's claim is straightforward. Waldner contracted with Miller to deliver a specific quantity of material by a specific date for a specific price. Waldner entered into the Subcontract after negotiating a discount price quote from a material supplier.

On February 16, 2005, Waldner received notice from Miller that the Port of Tacoma would substitute Waldner's material with material from another source. Upon the cancellation of half of the material order, Waldner's supplier, Dickson, demanded to be paid the regular price.

More than a month prior, Miller had agreed, in Change Order No. 16, to begin accepting the substitute material from the Port for an extra \$1.00 per ton to place identical material in the same spot. CP 63-64, 68, 435-436. This change arrangement would result in Miller receiving an extra

\$57,350.00 under the Prime Contract for performing the same work placing and compacting material from a different source.

On March 15, 2005, Waldner provided Miller with a Notice of Claim Against Contractor's Bond and Retainage Fund. Waldner's claim was based on the difference between the discount price for 200,000 tons of material and the higher posted price for regular purchases. CP 442.

The claim was accompanied by Dickson's price quote and sample invoices showing the regular posted price, and an explanation that the lower price quote was based on the higher quantity required in the SubContract.

On March 23, 2005, Miller requested additional "detailed back up" from Waldner. CP 481-483.

On March 31, 2005, Waldner further explained the basis of the claim and asked that Miller be more specific about what additional "backup" was needed. CP 488-490.

Miller never responded.

Miller alleges that it forwarded Waldner's request for clarification to Glenn Springs, but that Glenn Springs never responded. Response Brief, 19.<sup>1</sup>

Amazingly, Miller now argues that Waldner was uncooperative, despite Miller's and Glenn Springs's failure to specify what additional "detailed back up" they wanted.

This allegation contradicts the facts in the record.

However, Miller has no other means of avoiding liability for

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1

Miller now suggests that Waldner's documentation should have included a contract from Waldner's supplier, Dickson, and proof of Waldner's "fixed costs". However, Waldner purchased the material based on a price quote, which was enforceable under the UCC, RCW 62A.2-201. Dickson's pass-through claim is pursuant to RCW 62A.2-305. Waldner's claim is for lost commissions based on Waldner's employment as a broker of materials rather than as a contractor with "fixed costs" such as wages and equipment. See *Bishop v. Hansen*, 105 Wn.App. 116, 120, 19 P.3d 448 (2001). Miller's confusion about the nature of Waldner's claim is reflected in Miller's use of a construction subcontract form for Waldner's supply contract.

breach under the terms of the Subcontract. The controversy clause, paragraph 18 of the Subcontract, excuses Miller from liability for payment to Waldner only in the event that Waldner fails to “supply to [Miller] all information and assistance required by [Miller] for the purpose of negotiating or settling the third party claims or liability.” CP 426.

Waldner provided all the information that Miller needed to assert the claim on Waldner’s behalf. Waldner’s claim is simply based on a difference in price for two different quantities of material.

Miller’s strained argument that Waldner failed to cooperate is non-factual. It is a contrivance based on a lack of other options given the limitations of Miller’s Subcontract controversy clause.

b. Waldner Consulting, Inc. Appeared at the Settlement Meeting.

The second allegation of failure to cooperate contrived by Miller is that Waldner did not appear to discuss the claim at a meeting between the Port of Tacoma, Glenn Springs Holdings on May 25, 2006. Miller Response Brief, 6, 20, 29. This is false.

Counsel for Miller faxed a letter to Waldner's attorney, Douglas Hales, after business hours two days before the meeting was to take place. Waldner's attorney received notice of the fax the following day and contacted Jeff Waldner, who was also out of state at the time. Mr. Hales contacted Richard Dickson of Wm. Dickson Company, Waldner's supplier. Mr. Dickson attended the meeting the following day on behalf of Waldner. CP 502.

Astonishingly, Miller claims on appeal that Waldner failed to cooperate because Waldner, with only one business

day's notice, sent a representative from its supplier rather than Jeff Waldner, who was out of state at the time.

The fact that a representative from Dickson, Waldner's supplier, attended the meeting is clear proof that the lack of cooperation allegations are fictitious. Any of the other parties at the meeting could have raised any concerns about claim documentation with Mr. Dickson, if any such claims had existed at the time. Additionally, Miller's current failure to acknowledge Mr. Dickson's presence or purpose (in representing Waldner's and Dickson's combined interests in the claim) at the meeting is a misleading revision of the facts. In making this non-factual allegation, Miller again betrays an effort to shoehorn an allegation of lack of cooperation to assert the Subcontract's controversy clause, paragraph 18.

Both of Miller's failed allegations of lack of cooperation demonstrate the weakness of Miller's position and emphasize

Miller's liability to Waldner for Miller's breach of the Subcontract.

**ISSUE 3: Did 180 days pass between rejection of Waldner's claim and the filing of suit by Waldner?**

For the reasons given above, the Glenn Springs Prime Contract claim procedures were not incorporated into the Miller Subcontract with Waldner. However, even if the claim procedures did "flow down" to the Subcontract, as Miller argues, Waldner's claims were timely asserted and Waldner's suit against Miller was timely filed.

Waldner was not a party to the Prime Contract, and was not in any position to know how or when "substantial completion" of the job would occur. However, it is clear from the conduct of Glenn Springs and its principal, the Port of Tacoma, that the 180-day limitation period was waived

while the claim was under consideration by the Port.

A party to a contract may implicitly waive its right to demand compliance with contractual procedures when it enters into settlement negotiations, even if the other party did not follow the agreed-upon procedures. *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 377-78, 78 P.3d 161 (2003). Waiver by conduct ‘requires unequivocal acts of conduct evidencing an intent to waive.’” *American Safety Casualty Ins. Co. v. City of Olympia*, 174 P.3d 54, 2008 WL 4532121 Wash., quoting *Mike M. Johnson*, 150 Wn.2d at 391 (quoting *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn.App. 137, 143, 980 P.2d 1071 (1995)).

In *Mike M. Johnson*, the contractor gave several notices of its claim, but did not strictly adhere to the contract claim requirements. The county responded to the claim notices by repeatedly denying formal recognition of any claim and by

disclaiming any waiver of defenses. The contractor never filed a formal claim. *Id.* at 382-384. On appeal, the contractor argued that the county waived compliance by its conduct. However, the Supreme Court held that no waiver occurred because the county's correspondence consistently asserted that the county did not intend to waive the contractual requirements. *Id.* at 391-392.

Likewise, in *American Safety Casualty*, the contract provided for immediate protest when a claim arose, and a 180-day suit limitation period after final acceptance and closeout of the project. The contractor did not strictly comply with either claim requirement, and filed suit more than 180 days after final acceptance.

On appeal the bond company argued that the City argued that the City had waived the contract claim procedures by entering into settlement negotiations after expressly

reserving its right to assert defenses “just twice prior to the end of the project, and just once after the project’s completion.” The Supreme Court reasoned that the City did not “unequivocally” waive defenses in light of its express assertions to enforce the contract provisions without any express assertions to the contrary. *American Casualty*, 174 P.3d at 59.

The case at hand demonstrates an *unequivocal* waiver by Glenn Springs and its principal, the Port of Tacoma. That is, they showed an intent to waive the strict claim provisions of the Glenn Springs contract by entering into settlement discussions without any *equivocating* reservation of rights to assert contract defenses.

Port officials requested copies of documents from Waldner on March 2, 2006 (CP 503) and held a meeting to address Waldner’s claim on May 25, 2006. CP 502. On

November 15, 2006, the Port rejected the claim in a letter to Miller. CP 499. Waldner filed suit against Miller on February 15, 2007 after Miller refused to sue Glenn Springs on Waldner's behalf. CP 1, 523. Waldner's lawsuit was less than 180 days after Port's rejection of Waldner's claim.

Miller cross-claimed against Glenn Springs more than 180 days after the Port rejected Waldner's claim. CP 46-54.

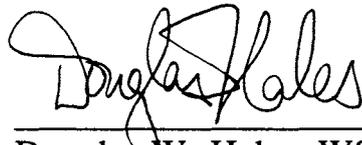
Under the terms of the Subcontract, Waldner was forbidden from suing Glenn Springs directly. Waldner was dependent on Miller to assert Waldner's claims as provided in the contract. The Subcontract did not require Waldner to sue Miller first. If Miller intended to preserve a claim against Glenn Springs for contribution to Waldner's claim, then Miller should have sued Glenn Springs, whether or not Waldner sued Miller.

## B. CONCLUSION

The Subcontract's controversy clause explicitly limits Waldner's responsibilities in the event of a claim to supply Miller with "information and assistance" for negotiating or settling the claim. The explicit limitations in the controversy clause do not incorporate the claim provisions of the Prime Contract. Therefore, the 180-day limitation period in the Prime Contract does not extend to Waldner. Even if the 180-day limitation did apply to Waldner's Subcontract, Waldner timely notified Miller of Waldner's claim and timely filed suit against Miller. Waldner immediately notified Miller of the claim, provided Miller with all relevant information regarding the claim, and was represented at a claim settlement meeting, even after extremely short notice by Miller. Waldner filed suit less than 180 days after the Port of Tacoma eventually rejected Waldner's claim.

The trial court's dismissal of Waldner's suit against  
Miller should be reversed.

RESPECTFULLY SUBMITTED  
this 17th day of November, 2008.



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Douglas W. Hales WSBA #22555  
Attorney for Appellant Waldner Consulting, Inc.

CERTIFICATE OF SERVICE

On penalty of perjury under the laws of the State of Washington, I certify that on the date given below I served copies of the foregoing document by first class mail to the following:

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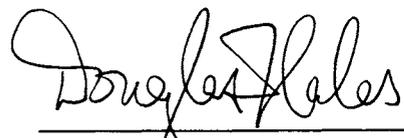
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DATED this 17th day of November, 2008 at Olympia, Washington.

  
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Douglas W. Hales