

NO. 49604-6-II

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**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

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ODYSSEY-GERONIMO JV,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF  
TRANSPORTATION,

Respondent.

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**RESPONSE BRIEF OF THE STATE OF WASHINGTON,**  
**DEPARTMENT OF TRANSPORTATION**

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## I. INTRODUCTION

Appellant Odyssey-Geronimo JV (OGJV) seeks additional payment for a bridge painting contract with the Respondent State of Washington, Department of Transportation (WSDOT). Its payment claim rests on new terms it now seeks to add to the contract or on new interpretations of included terms. OGJV argues that the contract's estimate of the "surface area of structural steel to be painted" should have included the air spaces, or voids, between steel truss members, because one of several different painting estimation methods allows, but does not require, including voids in estimates of surface areas of "closely fabricated items." However, the contract neither expressly nor impliedly incorporates this approach, which is inconsistent with the language of the contract that describes the "surface area of structural steel to be painted." The trial court correctly determined that the contract was unambiguous, and that it did not incorporate a claimed "industry standard" that required inclusion of voids in the estimate. The trial court's dismissal should be affirmed.

OGJV had opportunities to clarify this issue before contracting or very early in the contract performance, and did not. It could have asked WSDOT before submitting its bid whether the estimate included voids. It could have raised the issue during early project planning shortly after signing the contract. It could have notified WSDOT when it discovered the

alleged discrepancy one month after it began painting, when it did its own surface area estimate. OGJV took none of these steps.

The contract requires reservation of claims, including the “amount and basis” of a claim, as a condition precedent to the contractors seeking judicial relief. Any claims not reserved are waived. CP at 59. OGJV reserved only a claim based on the voids not being included in the estimate. The trial court correctly concluded that any other basis for a claim was waived.

Lastly, the trial court did not abuse its discretion in awarding attorney fees and other litigation costs to WSDOT under RCW 39.04.240. WSDOT’s hourly charges were supported with adequate descriptions of the work done, but the trial court reduced most of those charges by 50 percent because the detailed descriptions were not contemporaneously made. The trial court’s oral ruling includes the required findings and demonstrates appropriate exercise of discretion, and it should be affirmed.

## **II. RESTATEMENT OF ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Was summary judgment properly entered when there were no genuine issues of material fact as to (a) whether OGJV waived claims that were not reserved, and (b) whether the contract incorporated an unidentified industry standard?

2. Did the trial court correctly conclude that OGJV waived all claims not raised in its formal contract protest and certified claim?

3. Is the contract clear and unambiguous in describing the work as “surface area of structural steel to be painted?”

4. Did the trial court correctly conclude that the contract does not incorporate by reference an estimation method that includes voids?

5. Do agency employees, in their individual capacities and without employer authority, lack authority to concede their employer’s liability?

6. Did the trial court exercise its discretion by awarding expert witness fees as part of an attorney fees award?

7. Did the trial court abuse its discretion by awarding attorney fees based upon contemporaneous time records supplemented with task details?

### **III. STATEMENT OF THE CASE**

OGJV entered into a \$33.7 million contract with WSDOT to paint the Lewis and Clark Bridge (Bridge) crossing the Columbia River at Longview. The 87-year-old Bridge is a steel truss bridge with a complex latticework pattern of “lacing bars.” The Bridge’s steel superstructure is made of these lacing bars, with large air spaces between them, and flat steel members that also have numerous holes. CP at 70-72. Under the contract,

OGJV was to be paid a lump sum for the two major contract items: Cleaning and Painting (Bid Item 3) and Containment of Abrasives (Bid Item 7). CP at 774.

The contracting process began in late 2009, when WSDOT published notice of a pre-advertisement conference to be held in Kelso, Washington, to allow potential bidders to visit the Bridge site with WSDOT engineers and ask questions about the project. CP at 44-45, 73-76. Neither company that made up the joint venture, Odyssey Contracting Corporation (Odyssey) or Geronimo Painting Company (Geronimo), attended the conference. CP at 73. After confirming to Odyssey that attendance at the Kelso conference was not required for it to submit a bid, WSDOT sent Odyssey all available materials from the conference including meeting minutes, the potential bidders' questions with WSDOT's answers, and WSDOT's conference presentation. CP at 85-86. Also included were extensive photographs and a set of as-built plans for the Bridge. CP at 85-86. Odyssey and Geronimo made no other inquiries of WSDOT before submitting the bid. CP at 155-57.

The bid package provided prospective bidders with all documents comprising the contract: WSDOT's Standard Specifications, which are standard contract terms included in every construction contract; amendments to the Standard Specifications for the individual project; and

Special Provisions, which are specifically written for individual contracts. CP at 47-48. One Special Provision is at issue in this case. It included an approximation of the square footage of the surface area of structural steel to be painted and provided that “[t]he **surface area of structural steel to be painted** as specified above is approximate and is intended for use as a guide in determining the amount of preparation and paint involved.” CP at 79 (emphasis added). The bid documents estimated the surface area of the structural steel to be painted as 901,900 square feet. CP at 135.

Odyssey and Geronimo formed a joint venture to bid as Odyssey-Geronimo JV (OGJV). Neither company had ever painted a bridge in Washington or done any work for WSDOT. CP at 172:22-24, 177:15-17. They did not visit the Bridge before bidding. CP at 157. Despite having the Bridge plans, OGJV did not perform its own estimate of the surface area of structural steel to be painted before submitting its bid, and did not inquire of WSDOT as to how the estimate was prepared. CP at 108-11, 159.

After being awarded the contract, OGJV submitted a revised painting plan in October 2010. CP at 87. The next day, WSDOT held a pre-painting conference with OGJV. CP at 88. OGJV still did not inquire as to WSDOT’s estimation method or whether it included voids. CP at 88-91. OGJV then performed its own estimate, or “take-off,” in

June 2011, using the as-built Bridge plans provided by WSDOT, and estimated the square footage as 1,201,440 square feet. CP at 220-21. This occurred approximately a month after OGJV began painting the Bridge. CP at 93 (started prime coat painting on May 13, 2011).<sup>1</sup>

OGJV's estimating method assumed that the Bridge's superstructure was solid without voids, thus adding the air spaces to the actual square footage of the structural steel to be painted. CP at 180-87, 220-43. This added 339,980 square feet, or 38 percent, to the steel square footage. *Id.* Although this apparent difference in a critical contract term was discussed at the highest levels of OGJV management as early as June 2011, OGJV did not notify WSDOT of its different estimate until 18 months later, in December 2012. CP at 102. OGJV has never explained its delay in notifying WSDOT except to say that it "wasn't on [their] radar at that time." CP at 772:20.

OGJV continued painting throughout the entirety of the 2011 and 2012 painting seasons without letting WSDOT know it wanted 38 percent more money on the contract. Only after the end of the 2012 season, when it had painted over half of the Bridge, did OGJV raise for the first time with WSDOT the issue now before this Court. CP at 98-101, 102.

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<sup>1</sup> OGJV asserted in its brief that it had started painting the previous fall. Although cleaning had started, painting did not start until May 2011. CP at 93.

On December 10, 2012, OGJV advised WSDOT that it expected to be paid for the area of the voids. CP at 102. Although the record shows that OGJV had made its own estimate of surface area in June 2011, as explained above, OGJV stated to WSDOT on January 22, 2013, that it had “recently” performed its own calculation of the surface area which showed a significantly greater surface area than the figure in the contract. CP at 103. OGJV demanded additional compensation through the equitable adjustment provisions of the contract, stating that the surface area of structural steel to be painted was underestimated because it did not include voids. CP at 102-107. In support of its contract protest, OGJV attached its “recent” estimate—the one it prepared in June 2011. When questioned, Theodore Kartofilis, OGJV’s Project Manager, testified that the square footage discrepancy—which is the crux of his company’s \$10 million lawsuit—had simply not been on his radar in 2011. CP at 772:20.

In response to OGJV’s protest, WSDOT undertook a lengthy effort to develop a more precise measurement of the area of steel based on the as-built Bridge plans using computer-aided design (CAD). CP at 756-58. WSDOT made a revised calculation of the steel surface area of 998,191 square feet, or an increase of about 10.7 percent over the approximate measurements included in the bid documents. CP at 108. WSDOT unilaterally made an equitable adjustment to the two lump sum bid

items for Cleaning and Painting (Bid Item 3) and Containment of Abrasives (Bid Item 7) totaling \$1,562,198. CP at 115-19. OGJV was not satisfied with this payment because it was not based on OGJV's estimate, which had included the unpaintable voids when estimating the "surface area of structural steel to be painted." CP at 122.

The contract provides for a non-binding dispute resolution process. Invoking that process, OGJV submitted a claim to the Disputes Review Board (Board). CP at 55-62, 107. This Board was made up of three expert engineers, with one member appointed by WSDOT, one by OGJV, and one by the first two members. The parties submitted an agreed statement of dispute asking the Board to resolve whether voids were included in the contract provision specifying that "[t]he surface area of structural steel to be painted is approximate and is intended for use as a guide in determining the amount of preparation and paint involved." CP at 122. The Board assumed, without analysis, that the industry standard advocated by OGJV was incorporated generally into the contract. However, it then determined that the Special Provision was clear and unambiguous as to the meaning of the term "surface area of structural steel to be painted," and agreed with WSDOT that, according to its plain language, the approximate square footage area included only the surface area of the structural steel to be painted, and did not include voids. CP at 136. The Board also opined that

there was not a clear “industry standard” for calculating the steel surface area. Even though it assumed that the industry standard advocated by OGJV was incorporated into the contract, the Board concluded that the Special Provision took precedence over the Standard Specifications. CP at 136-37, 52.

OGJV finished painting the Bridge within the 500 working days allowed in the contract. CP at 112. OGJV’s principals withdrew a total of \$9.7 million from the joint venture, representing a profit of about \$6 million. CP at 175:9-12.

OGJV submitted a certified claim to WSDOT at the conclusion of the contract, as required by the Standard Specifications. CP at 138-50, 59-61. OGJV sought payment for the voids, based on its contention that the painting industry standard required that they be included in the estimate of the surface area to be painted. CP at 140. To reach that conclusion, OGJV pointed to the paint application section of the Standard Specifications, which refers to definitions in the SSPC (Society for Protective Coatings) Manual<sup>2</sup>. OGJV’s Project Manager explained in his deposition:

So if there's no definition in the PDCA or the SSPC set of definitions, then you go down until you find one. And whenever you find one, like here, then that comes all the way to the surface and it becomes the same like as it was written

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<sup>2</sup> The Standard Specifications refer to SSPC as the “Steel Structures Painting Council.” The SSPC now calls itself the Society for Protective Coatings, but still uses the term “SSPC.”

in the first paragraph because it's one of the pieces of terminology that's used in this section.

CP at 168:1-15. However, to reach this conclusion, it was necessary for OGJV to refer to three separate documents: the SSPC Manual, which includes Technical Updates, one of which then references a manual produced by a different painting industry organization, the Painting and Decorating Contractors of America (PDCA). CP at 125, 189-219. The PDCA Manual includes several estimating models that allow, but do not require, the inclusion of voids in estimating the surface area of “closely fabricated” structures. CP at 218-19. OGJV’s certified claim was that the voids should have been included in the contract estimate of the surface area of structural steel to be painted, because a definition twice removed from the contract itself “comes all the way to the surface” and prevails over a specific term actually included in the contract. In its claim, OGJV referenced WSDOT’s effort to recalculate the actual steel area measurement, but rejected that effort as having “no relevancy” to its claim. CP at 141.

After lengthy discovery, WSDOT moved for summary judgment. CP at 20. OGJV filed its own motion for partial summary judgment, but noted it for two weeks later than WSDOT’s motion. CP at 307. The Thurston County Superior Court granted WSDOT’s motion

and dismissed OGJV's claim, and therefore did not consider OGJV's motion. CP at 808-10.

Within 120 days of the complaint being filed, WSDOT sent a written offer of settlement to OGJV, offering over \$1.3 million. CP at 840. OGJV rejected the offer, and did not send a written demand to WSDOT during that 120 days. After its summary judgment motion was granted, WSDOT moved for an award of attorney fees pursuant to RCW 39.04.240, which allows for attorney fees in public works contract litigation when a defendant has made an offer of settlement within 120 days of the complaint being filed, and subsequently obtains a more favorable judgment. Judge Anne Hirsch awarded WSDOT \$374,689.04 in attorney fees and expert witness fees. CP at 1006-09.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

The Appellate Court reviews an order of summary judgment *de novo*. See *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013). The Appellate Court must “perform[ ] the same inquiry as the trial court,” reviewing the trial court record in the light most favorable to the nonmoving party, drawing all reasonable inferences in the nonmoving party's favor, to determine if a genuine material issue of fact

exists. *Id.* (citing *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006)); CR 56(c).

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c). Summary judgment is designed to do away with unnecessary trials on issues that cannot be factually supported and could not result in a favorable outcome for the nonmoving party. *See Jacobson v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). In its response, the nonmoving party cannot rely on the allegations made in its pleadings, but must set out specific facts showing that there is a genuine issue for trial. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

**B. OGJV Waived All Claims Unrelated To Its Contention That Voids Should Have Been Included in the Estimate of “Surface Area of Structural Steel To be Painted”**

OGJV has waived all claims not based on its contention that voids should have been included in the estimate of the steel surface area to be painted, because it raised only that claim in its contract protest and certified claim. Therefore, any argument it makes based upon the actual square footage of the Bridge has been waived.

**1. OGJV's protest was limited to the method of measurement**

OGJV's contract protest letter continued to reject WSDOT's method of recalculation.

We request that WSDOT put aside its new takeoff that is inapplicable to the resolution of this matter for an equitable adjustment to our contract because the new take-off is not based on commonly accepted industry practices for bridge painting estimating and historical cost data.

CP at 748-55. OGJV did not submit a written protest on any other basis. As late as June 2014, after the work was completed, OGJV stated in a letter to WSDOT, "OGJV rejects WSDOT's methodology for calculating the surface area." CP at 748.

After WSDOT developed a more detailed and accurate measurement of the structural steel area to be painted, it offered to adjust the two affected lump sum Bid Items 3 and 7 (cleaning and painting and containment of abrasives) upward by 10.7 percent. CP at 115, 116-19. OGJV disagreed with this adjustment, and requested that the matter be submitted to the Disputes Review Board. CP at 107. This dispute was also limited to the issue regarding the voids. CP at 122-25. OGJV's protest thus was limited to the question of whether the estimate should have included the voids.

**2. OGJV's certified claim is limited to its contention that the voids should have been included in the contract estimate**

The Standard Specifications include a strict requirement that at the time a contract is closed out, the contractor *must* specifically reserve any claims for additional payment. CP at 59. Any claims not reserved are waived. In addition, the contractor must set out the claims with enough specificity that WSDOT can determine the “basis and amount of the claim.” CP at 59. Further, this section states that “[f]ull compliance by the Contractor with the provisions of this section is a contractual condition precedent to the Contractor’s right to seek judicial relief.” CP at 61. This section of the Standard Specifications makes it very clear that any unreserved claims are waived.

OGJV’s claim submitted with the Final Contract Voucher Certificate reserved only the claim that the surface area of structural steel to be painted should have included the voids. CP at 138-50. Although OGJV argues that the certified claim reserved other bases for more compensation, a closer look at the claim shows otherwise.

The claim begins with a factual statement, which states in part:

Using the contract referenced definition of “surface area”, it has since been determined by OGJV . . . that the surface area of the Work completed is 38% greater than the original contract quantity provided by WSDOT.

The work items that were based on the WSDOT provided surface area were Bid Item 3, CLEANING AND PAINTING, and Bid Item 7, CONTAINMENT OF ABRASIVES. These work items were Lump Sum and therefore not equitably adjusted during the course of the project. Prior to the bid, both OGJV and WSDOT estimated the bid price of these work items by using the surface area provided in the contract.

OGJV is claiming additional compensation for these two major lump sum items in an amount proportional to the surface area quantity omitted by WSDOT at bid time.

CP at 139. “The amount proportional to the surface quantity omitted by WSDOT” is the area of the voids. The “38% greater amount” is based on OGJV’s inclusion of voids in its own take-off.

The certified claim then identified the contract provisions relevant to the claim, all of which related to OGJV’s claim that the definition of “surface area” in the PDCA Manual was incorporated by reference into the contract, and that it required measurement of voids. CP at 140.

The certified claim then set out alleged supporting facts. The first paragraph summarized WSDOT’s issuance of Change Order 8, which compensated OGJV for the additional actual steel surface area that had been underestimated. The bullet points under this paragraph begin with the assertion that the PDCA Manual standard is incorporated by reference into the contract: “The definition of ‘surface area’ is referenced in the contract

pursuant to the PDCA Standard 10, and there are no other conflicting or inconsistent definitions set forth in the Contract Documents.” CP at 140.

The remaining factual allegations address the point that the WSDOT contract estimate did not include the voids. OGJV dismissed WSDOT’s efforts to more accurately measure the Bridge as “having no relevancy to the claim.” CP at 141-42.

By using a definition that is not supported by the Contract Documents or accepted industry practices, WSDOT determined there was a 10.7% increase in surface area. *This exercise was disputed by OGJV for having no relevancy to the claim*, however WSDOT proceeded with the 7 month internal recalculation.

CP at 141 (emphasis added).

OGJV’s certified claim also discussed what it referred to as the “WSDOT Pre-Bid Takeoff,” which was prepared early by WSDOT to support a request for a legislative appropriation. There has been no contention, and there is no evidence, that this early WSDOT take-off included voids. OGJV did not explain in the certified claim how this early takeoff provided an alternative amount and basis for its claim, as the contract requires. CP at 141.

Although OGJV stated in the certified claim that the 10.7 percent adjustment in Change Order 8 was inadequate, its basis was that “Bid Item 7 [Containment of Abrasives] was not increased in proportion to the increase

in surface area.” CP at 142. This again goes back to OGJV’s contention that the “surface area” included the area of the voids.

The certified claim then provided two alternative methods of calculating the amount of the claim. CP at 143. The first simply multiplied the two lump sum bid items by 38 percent, the amount by which the OGJV take-off differed from the bid estimate.

As a result of WSDOT’s error, OGJV claims it has performed additional surface preparation and painting for 339,980 SF of surface area at the contract unit bid price of \$32.05/SF [ $\$32.05/\text{SF} = (\$13,864,000 + \$15,044,000/901,900\text{SF})$ ]. Accordingly, the additional costs that are compensable to OGJV amount to the sum of \$10,896,359.

CP at 143, 765:16 (“that’s all you owe us.”). The second calculation method was intended to comply with a contract requirement that claims be broken down into labor, materials, and other components. However, this method also was based on the contention that voids should have been included in the estimate. “OGJV provides the following alternative calculation of its additional costs and damages *attributable to WSDOT’s misrepresentation of surface area and OGJV’s scope of work.*” CP at 143 (emphasis added). OGJV’s claim emphasized throughout that “surface area” must include voids.

Therefore, OGJV’s certified claim is both factually and legally limited to its contention that voids should have been included in “surface

area of structural steel to be painted.” Any theories based on Bridge components missing from the total, or the sides of steel plates not being included, or any others, were all waived because they were not included in the claim.

OGJV disregarded the actual difference in square footage as an alternate basis for a claim, rejecting it as having “no relevancy” to its claim. CP at 141. OGJV cannot modify its certified claim now to argue that the actual surface area suddenly *does* have relevancy as a new basis for its claim. The certified claim is not simply a “placeholder” that can be modified as subsequent litigation develops; it limits entirely the scope of the contractor’s claim, and waives all claims not reserved. *See Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 147, 890 P.2d 1071 (1995) (claim was waived when contractor did not reserve). *See also Yakima Asphalt Paving Co. v. State, Dep’t of Transp.*, 45 Wn. App. 663, 666-67, 726 P.2d 1021 (1986), *review denied*, 107 Wn.2d 1028 (1987) (contract itself provides sufficient consideration to make waiver provision enforceable).

The purpose of the waiver requirement in the contract is to allow WSDOT to resolve contract disputes early and to avoid litigation. That purpose is thwarted if the contractor is not held to the fundamental requirement that it set out the amount and basis of its claim. OGJV’s

comments about the inaccuracy of WSDOT's measurement, while at the same time dismissing the relevancy of that effort, do not meet the standard of stating the amount and basis of the claim. WSDOT should not have to read an alternative basis for a claim into these comments.

This entire case has been about voids. WSDOT spent almost an entire year negotiating with OGJV as well as preparing for and presenting at a Disputes Review Board hearing that was entirely about whether the "surface area of structural steel to be painted" included voids. CP at 122. Odyssey's owner, Stavros Semanderes, testified that the amount claimed in this litigation was based on the difference between the square footage estimate in the bid documents and OGJV's estimate that included voids. CP at 765:13-16. That amount, \$10,896,359, was based on the difference between the 901,900 square foot estimate in the bid documents and the 1,201,440 square foot area that OGJV estimated in its take-off, which included voids.

OGJV cannot rewrite its certified claim to have a different basis from that which it reserved in its certified claim. Because OGJV failed to preserve a claim based on the actual steel square footage of the Bridge, as opposed to the square footage of the Bridge based on a methodology that included voids, it could not raise that issue before the trial court.

**3. WSDOT's earlier estimate does not provide a basis for a claim, and was not reserved in the certified claim**

OGJV has argued that an earlier estimate performed by WSDOT's bridge office to support a request for an appropriation supports its position that it is entitled to more money. However, that argument fails for two reasons. First, it was not reserved in OGJV's certified claim. This is addressed above at pages 12-19. Second, WSDOT re-calculated the steel surface area and unilaterally issued Change Order 8, which compensated OGJV for the additional steel surface area that WSDOT measured. If OGJV had an issue with the accuracy of the actual measurement of the structural steel to be painted, then it needed to raise that issue with regard to the measurement relied on for Change Order 8.

The WSDOT Project Engineer, Lori Figone, explained this in detail to OGJV in May 2014, at about the time that the work was completed. CP at 108. Ms. Figone explained in an e-mail to OGJV that WSDOT had calculated the actual steel surface area of the Bridge using the as-built drawings, and as a result, had an accurate calculation.

That was the point of the exercise that WSDOT has been doing for the past few months – to calculate the actual surface area of the bridge in order to have an exact surface area for paint application. Since surface area painted is what is in dispute, new drawings were composed by taking the asbuilt drawings and putting them into Microstation in order to accurately measure and sum areas. We now have an accurate calculation of the actual square footage of the steel.

It is WSDOT's position that there is 998,191 SF of steel that was actually painted, as summarized by the drawings and spreadsheet that were sent. We have a strong level of confidence in these numbers.

CP at 108 (emphasis in original). There could have been no misunderstanding by OGJV that the final square footage calculation being relied on by WSDOT in issuing Change Order 8 was the number arrived at by the process described in this quoted e-mail.

There is no evidence that WSDOT ever calculated the square footage of structural steel to be painted in any manner other than measuring the actual steel, excluding voids. Rather, the evidence is to the contrary. WSDOT's Bridge Engineer, DeWayne Wilson, explained in his declaration how he calculated the surface area, and stated that none of his calculations included the voids. CP at 756-58.

This was true of all of the measurements that WSDOT performed in developing a number for a request for an appropriation, in developing an area for the Special Provision, and in developing a more accurate measurement to settle the dispute with OGJV. WSDOT noted that this last effort to measure the steel took several months, and OGJV has acknowledged this. In spite of this, WSDOT's effort to more accurately measure the steel and to fairly compensate OGJV for the difference between that number and the contract number, OGJV dismissed this work as having

“no relevancy” to its claim. CP at 141, 105. The fact is that *none* of these numbers are relevant to OGJV’s certified claim, which is based solely on whether the voids should have been included in these measurements.

**4. WSDOT properly addressed the square footage issue in its reply**

OGJV argues that the Court should not consider whether its claims were preserved in the certified claim because WSDOT raised that issue only in its summary judgment reply brief. That argument is incorrect for two reasons. First, WSDOT’s summary judgment motion argued that “OGJV’s claim is based entirely on the fact that this estimate of steel surface area did not include ‘voids,’ or the openings between the steel segments.” CP at 20-21. Then, after years of asserting that it was entitled to payment for the area of the voids, OGJV, in its response to WSDOT’s summary judgment motion, included arguments for the first time about other potential theories of recovery that were not addressed in the certified claim. WSDOT was obligated to address this matter in reply. These arguments were raised by OGJV, both in its own motion for summary judgment, and by “incorporating by reference” that motion into its response to WSDOT’s summary judgment motion.<sup>3</sup> CP at 244-61, 277-90, 307-24.

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<sup>3</sup> OGJV argues that the trial court inappropriately refused to consider this “incorporated” summary judgment brief as part of its response to WSDOT’s motion. The trial court noted that together, the two briefs exceeded the local rule’s page limit. OGJV did not ask the court for leave to file the additional pages. The trial court’s refusal to

**C. The Contract Is Clear and Unambiguous and Does Not Incorporate Outside Standards**

**1. OGJV cannot raise new arguments on appeal that were not presented to the trial court**

OGJV argues now that the trial court erroneously relied on the incorporation by reference standard, and that the trial court should have allowed for extrinsic evidence to be used to interpret the contract. However, despite having filed two separate briefs in the trial court—a response to WSDOT’s summary judgment motion and its own motion for partial summary judgment—OGJV did not raise the argument that the contract language “surface area of structural steel to be painted” must rely on extrinsic evidence for interpretation. “An appellate court will consider only evidence and issues called to the attention of the trial court when reviewing a trial court’s decision to grant summary judgment.” *Domingo v. Boeing Employees Credit Union*, 124 Wn. App. 71, 86, 98 P.3d 1222 (2004); RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”). The Court should refuse to consider this new argument.

**2. Construction of a contract is a question of law**

Even if the Court were to consider this new issue, OGJV has not

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consider the “incorporated” summary judgment brief at the summary judgment hearing did not relieve WSDOT from the need to respond to the incorporated argument in its reply brief.

demonstrated that the contract language must rely on extrinsic evidence for interpretation. The Special Provision at issue is “[t]he surface area of structural steel to be painted as specified above is approximate and is intended for use as a guide in determining the amount of preparation and paint involved.” CP at 79. OGJV ignores the phrase “of structural steel to be painted” to argue that the term “surface area” is ambiguous.

Courts distinguish between the “interpretation” and the “construction” of a contract. *Burgeson v. Columbia Producers, Inc.*, 60 Wn. App. 363, 66–67, 803 P.2d 838 (1991) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), *review denied*, 116 Wn.2d 1033 (1991)). “Interpretation” of a contract is the process in which the parties’ intent is ascertained through extrinsic evidence, which may involve questions of fact. However, the “construction” of a contract is the process by which the legal consequences of the terms are determined, and is a question of law.

In construing a written contract, (1) the intent of the parties control, (2) the court ascertains the intent from reading the contract as a whole, and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous. *See Mayer v. Pierce Cty. Med. Bur., Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995).

The construction of an unambiguous contract is a question of law

and may be resolved on summary judgment. *See In re the Estates of Wahl*, 99 Wn.2d 828, 831, 664 P.2d 1250 (1983). “If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.” *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P.2d 105 (1992). In construing a contract, undefined terms will be given their “plain, ordinary, and popular meaning....” *Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 66, 882 P.2d 703 (1994), *as amended* (Sept. 29, 1994), *as clarified on denial of reconsideration* (Mar. 22, 1995).

The Special Provision does not use the term “surface area” without qualification; rather, that term is limited by “of structural steel,” and further limited by “to be painted.” “Surface area of the structural steel to be painted” is not a specially defined term in the contract; therefore, its plain, ordinary meaning controls. This contract is to paint a bridge’s superstructure composed of a latticework pattern of lacing bars. The estimate is for (1) the surface area (2) of the structural steel (3) to be painted. Voids are empty space, and cannot be painted. The fact that OGJV disputes the effect of this provision does not change its meaning and the Court should not read an ambiguity into this language when it is clear on its face.

**3. Industry standards are not expressly or impliedly incorporated into the contract**

Assuming for the sake of argument the term “surface area” is ambiguous, the “industry standard” OGJV advocates still is not incorporated in the contract. OGJV argues that the contract does not define that term and so requires reference to SSPC standard definitions. The SSPC standard definitions also do not contain a definition for “surface area.” The interpreter must therefore assume that when a term’s definition does not appear either in the contract or the SSPC standard definitions, the parties intended that the Technology Updates for the SSPC standards be consulted, along with materials referenced in them.

However, the contract contains no language that supports this. Furthermore, Technology Update No. 9, the specific document relied upon by OGJV, explicitly states it is improper to reference it in a contract specification. CP at 202-03. Therefore, the interpreter must assume not only that the parties silently and impliedly intended to use the Technology Update, but that they intended to use it contrary to its own explicit limitation.

However, the interpreter is not done; the interpreter must make one more assumption to use OGJV’s logic. The Technology Update directs the interpreter to the PDCA Manual, which contains various estimation

methods. To validate OGJV's assertion that voids should be included, the interpreter must now assume the parties intended to leave unspecified which of the various estimation methods contained in the PDCA Manual should be used for "surface area," thereby allowing OGJV to choose which method suits its purpose in this litigation. Only then can OGJV choose the method that treats objects that are "closely fabricated" as solid. This process is not consistent with the legal requirement that incorporation of other documents by reference must be clear and unequivocal.

#### **4. The contract does not define "surface area"**

The Standard Specifications in the contract describe bridge painting work as consisting of:

containment, surface preparation, shielding adjacent areas from unwanted surface preparation, testing and disposing of surface preparation debris, furnishing and applying paint, shielding adjacent areas from unwanted paint, and cleaning up after painting is completed. Terminology used herein is in accordance with the definitions used in Volume 2, Systems and Specifications, of the SSPC Steel Structures Painting Manual.

CP at 63.

This specification sets forth the actual cleaning and painting work required by the contract but does not contain the term "surface area." Accordingly, the first logical connection in OGJV's argument is missing. The Standard Specifications require "terminology" used in those specifications to be defined "in accordance" with the SSPC Manual. Since

“surface area” does not appear in either the Standard Specification at issue or in the SSPC Manual, OGJV’s suggested analysis must stop there.

**5. The SSPC Manual does not define “surface area”**

No definition of “surface area” exists in Volume 2 of the SSPC Manual and OGJV does not contend otherwise. Rather, OGJV directs the Court to the Technical Update for Volume 2, which includes a one-paragraph mention of and inclusion in a list of references of the PDCA Estimating Guide. However, OGJV’s use of the Technology Update ignores the following admonition in the SSPC Manual against such use:

**Technology Update:** A consensus SSPC document prepared by a committee that describes and assesses a new material, procedure, concept, method, or other area of technology. Technology Updates are considered “fast track” documents and skip some steps in the standards approval process. **A Technology Update is not suitable for referencing in a specification or procurement document because it does not contain mandatory language,** although information from a Technology Update may be extracted and referenced in a contract. It differs from a technical article in a journal in that it represents a consensus of balanced interest, not a single author's viewpoint.

CP at 189 (emphasis added).

This SSPC Manual definition of “Technology Update” runs counter to the requirement that incorporation by reference be clear and unequivocal. Here, the opposite is true. It “clearly and unequivocally” states that it should *not* be incorporated into a specification or procurement document.

Technology Update No. 9, the particular update relied upon by OGJV, also explicitly states it is for information only. It does not even incorporate the PCDA standards into the SSPC Manual, let alone into the WSDOT contract documents. It begins: “This technology update provides information on approaches and models for estimating the initial and lifetime cost of protective coatings projects.” CP at 197. Then it concludes with the following disclaimer: “This technology update is for information purposes only. It is neither a standard nor a recommended practice.” CP at 202.

A document that by its own terms is “neither a standard nor a recommended practice” cannot possibly be a “standard” amenable to incorporation into a contract.<sup>4</sup> Furthermore, a document that merely sets out information, while expressly precluding its use as a reference in a contract specification, does not incorporate clearly and unequivocally that information into a contract, especially when the contract is silent as to such incorporation.

Technology Update No. 9 goes on to discuss the PDCA Estimating Guide in a single paragraph, in a section entitled “Models and Data Sources.” This section begins:

Over the last several years, various government and private groups have developed models to estimate and analyze the cost for protective coatings projects. This section

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<sup>4</sup> In contrast, certain SSPC standards clearly are incorporated into the Standard Specifications. CP at 63-64. *See* CP at 190-95 for an example of each standard.

summarizes the major features of several of these efforts. Several of these models are derived from common practices and data sources.

CP at 201. A general description of “models” cannot be said to have been clearly and unequivocally incorporated into either the Technology Update or into the WSDOT contract documents as contract terms. Furthermore, nothing in Technology Update No. 9, including its discussion of the PDCA Estimating Guide, includes a definition of “surface area.”

**6. There are multiple PDCA estimating models**

Again, assuming for the sake of argument that the contract is ambiguous, and adding the unwarranted assumption that the Technology Update No. 9 is a standard and is clearly incorporated into the contract, OGJV’s argument must continue downward through additional documents in order to reach the estimating models. Through a reference in Technology Update No. 9 to the PDCA Estimating Guide, OGJV argued to the trial court that one of the standards included in this estimating guide is “incorporated by reference” into the WSDOT Standard Specifications.

OGJV first referred to a document identified as P-9, which is a list of definitions used within the estimating guide. P-9 includes the definition of “surface area” as “[t]he measurement of the area of surface to be finished determined in accordance with the methods, procedures and standards as defined by the PDCA Standard P-10.” CP at 217.

PDCA Standard P-10 then provides several standards that could apply to the measurement of surface areas to be painted, but OGJV's logic dismisses the standard that applies to structural steel in favor of one for closely fabricated items.

Paragraph 5.7 of PDCA Standard P-10 states:

Closely fabricated items, such as chain-link fence, open web joists and grating, should be measured as being solid. If both sides of a closely fabricated item are finished, double the surface area. When a closely fabricated item is attached to framework, measure the framework separately as described in 5.2.

CP at 219 (emphasis added).

Paragraph 5.2 of PDCA Standard P-10 states that “[p]ipes, rods, *structural steel*, lumber and other items to be finished whose circumference or perimeter is less than one foot is measured as one foot, otherwise the actual measurement is used.” CP at 218 (emphasis added).

To use the estimation model for “closely fabricated items,” OGJV likened the superstructure of a very large bridge to a chain-link fence, or to open web joists and grating. The Bridge has no chain-link fence, open-web joists, or grating that were supposed to be painted under this contract. Nevertheless, because this standard allows an estimator to disregard openings and include voids in a surface area estimate, OGJV claimed it is

entitled to assume that WSDOT's estimate of the "surface area of structural steel to be painted" as used in the contract included the voids between the steel segments in addition to the area of structural steel to be painted.

However, OGJV also ignored paragraph 5.7 regarding instructions to measure the framework separately from estimates for closely-fabricated items and the fact that PDCA Standard P-10 specifically contains an estimation model for structural steel, in paragraph 5.2, which allows actual measurement. Paragraph 5.2 of that standard states "[p]ipes, rods, *structural steel*, lumber and other items to be finished whose circumference or perimeter is less than one foot is measured as one foot, otherwise the *actual measurement is used.*" CP at 218 (emphasis added).

Thus, the very standard OGJV relies upon clearly states that the proper method of estimating the area of such structural steel framework is the measurement of actual square footage. This is the method used by WSDOT, which has consistently been explicitly rejected by OGJV throughout this claim.

**7. PDCA estimation models were not incorporated into the contract**

Regardless of whether the PDCA Estimating Guide supports OGJV's position, it does not establish the definition of "surface area" as a contract term for at least two reasons. Under Washington law, the

attenuated chain of references OGJV seeks to link does not meet the standard for incorporation by reference. For a term outside of the contract to be incorporated into a contract by reference, the incorporation by reference must be “clear and unequivocal.” The Washington Supreme Court recently discussed an example of such “clear and unequivocal” language:

Section 11(f) in the subcontracts states that the subcontractor assumes the same obligations and responsibilities toward the general contractor that the general contractor assumes to the owner “as set forth in the Prime Contract, insofar as applicable, generally or specifically, to” the subcontractor’s work. In addition, the subcontracts specifically provide that the “Prime Contract documents shall be considered a part of the Subcontract by reference thereto” and the subcontractors agreed to be bound to Hunt Kiewit “by the terms and provisions” of the prime contract “so far as they apply to the” work under the subcontracts. These provisions clearly and unequivocally incorporate by reference provisions in the prime contract.

*Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502, 520, 296 P.3d 821 (2013) (citation omitted). No comparable “clear and unequivocal” incorporation language is found in WSDOT’s contract with OGJV.

In a decision cited by the Washington Supreme Court in *Public Facilities District*, this Court noted that parties may “incorporate contractual terms by reference” to other documents, but explained that “[i]ncorporation by reference must be clear and unequivocal.”

*W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*,  
102 Wn. App. 488, 494-95, 7 P.3d 861 (2000) (citations omitted). This  
Court stated:

But incorporation by reference is ineffective to accomplish its intended purpose where the provisions to which reference is made do not have a reasonably clear and ascertainable meaning.” Incorporation by reference must be clear and unequivocal. [I]t must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms[.]

*Id.* (citing 11 *Williston on Contracts* § 30:25 at 233–34 (4th ed. 1999) (other citations omitted).

There is no definition of “surface area” in the SSPC Volume 2. In contrast, chapter 6-07 of the Standard Specifications addresses the application of paint. This section of the contract uses “surface area” twice, both in the context of actual surface area of steel, not of empty space. CP at 64 (“[paint] coats shall encapsulate the entire surface area of the structure members specified to be painted.”). CP at 65 (“Spot abrasive blast cleaning of steel surfaces ... will be measured by the square foot of surface area to be cleaned to bare metal....”). There is no definition of surface area at all in Volume 2 of the SSPC Manual, let alone one that is inconsistent with that term’s usage in chapter 6-07 of the Standard Specifications. No facts exist to show that the parties to the contract “had knowledge of and assented to” any PDCA standard for estimating. The trial court correctly

concluded that no industry standard was incorporated by reference into the contract.

**8. The industry standard is not implied in the contract**

Having failed to convincingly argue that the industry standard was incorporated by reference into the contract, OGJV argues on appeal that it must simply be assumed to be the basis under which the contract is interpreted. Again, this argument was not raised in the trial court and it should not be considered here. Moreover, it relies on a rationale that is even more attenuated than the incorporation by reference argument. If the term cannot be found to have been incorporated by reference into the contract, then it is even less likely that a reader of the contract should have simply “known” that the term “surface area of structural steel to be painted” necessarily included voids. The Standard Specifications allow a contractor to apply paint by several methods: “The Contractor shall apply paint materials by air or airless spray, brush, roller, any combination of these methods...” CP at 64. How a given contractor estimates the work will depend on its own means and methods of applying paint. The Disputes Review Board agreed with WSDOT that there is no clear industry standard for calculating the painted surface area of the structural steel. CP at 136.

Moreover, even if there was a clear standard incorporated into the Standard Specifications, it was superseded by the unambiguous Special

Provision that described “surface area of structural steel to be painted.” CP at 79, 52 (Special Provisions take precedence over Standard Specifications).

**D. The Bid Items at Issue Were Priced as Lump Sum and the Contract Provisions Related To Unit Pricing Do Not Apply**

OGJV has argued on appeal that it was entitled to be paid “for the work OGJV actually performed,” and then cites to a Standard Specification that applies to unit priced work. “Under the contract, OGJV is entitled to [p]ayment . . . on the basis of the actual quantities of each item of Work completed in accordance with the Contract requirements.” Br. of Appellant at 26. However, the cited contract provision, section 1-02.3 of the Standard Specifications, applies to work that is bid as a unit priced item. It states in part, “[t]he quantities shown in the Proposal Form and the Contract Forms are estimates and are stated only for Bid comparison purposes.” CP at 49. This is illustrated at CP 774, which provides a “Summary of Quantities” for this contract. The second column is labeled “Total Quantity,” and includes numbers as well as the applicable units in the sixth column. For example, “Spot Abrasive Blast Cleaning” is listed as including 1,000 square feet. This is a unit priced item that would be paid based on the actual amount of work done. However, the two bid items at issue here are Item 3, Cleaning and Painting, and Item 7, Containment of

Abrasives. Both of those are explicitly listed as lump sum items; the “Total Quantity” column states “LUMP SUM” for both. CP at 774. The Standard Specifications also state that these two bid items will be paid as lump sum. CP at 804. One of OGJV’s principals acknowledged that these were lump sum items. CP at 763:2-4. The claimed “actual quantities” provision does not apply here.

**E. WSDOT Employee Statements Do Not Concede Liability**

OGJV asserts that WSDOT employees conceded “it erroneously excluded whole portions of the bridge” and that OGJV should be paid for the “work OGJV actually performed.” Br. of Appellant at 26. This assertion is factually wrong.

First, David Lemke and Daniel Puryear did not testify that WSDOT “erroneously excluded whole portions of the bridge.” Mr. Lemke testified that WSDOT’s estimation did not include calculation of the side edges, but rather only of the front and back of the structural steel to be painted. CP at 509-10. Mr. Puryear testified that the exact surface area of the Bridge superstructure was not measured but was estimated using the CAD program so as to achieve “the highest level of accuracy we could accommodate.” CP at 517.

Second, Glenn Schneider did not state that WSDOT owed OGJV for work it actually performed. Mr. Schneider testified that the contract

provides for an equitable adjustment upon proper showing and explained how this was done. CP at 359-63. Indeed, this equitable adjustment process was used by WSDOT to increase OGJV's payment by 10.7 percent after the CAD estimate by WSDOT was performed. There is no dispute that the items at issue were to be paid as a lump sum.

Third, as argued above, OGJV explicitly rejected the equitable adjustment performed by WSDOT, not because of estimation errors such as not counting the edges of three dimensional objects, but because it did not include the voids. Therefore, Messrs, Lemke, Puryear, and Schneider's testimonies are completely irrelevant to the issue before this Court because they did not testify as to the propriety of including voids in WSDOT's estimation.

Finally, even assuming these employees' testimonies are relevant, they lack both the apparent and actual authority to bind WSDOT in the manner claimed by OGJV. Statements made by individual WSDOT employees, speaking in their individual capacities, are insufficient as a matter of law to concede legal liability on behalf of WSDOT in this case where OGJV has sought more than \$10 million in damages.

In a case involving WSDOT's predecessor agency, the Court found that department employees do not have speaking authority absent actual or apparent authority. In *Donald B. Murphy Contractors, Inc. v. State*,

40 Wn. App. 98, 108, 696 P.2d 1270, 1276 (1985), the contractor sought to establish liability against the Washington State Department of Highways based on statements made by individual department employees. The trial court determined that the employees were not speaking agents and that their statements were therefore not the admissions of a party-opponent under ER 801(d)(2). *Id.* at 108. The contractor asserted the statements were party-opponent admissions because the employees had actual or apparent authority to make the statements. *Id.* at 108. On appeal, the Court found that the contractor had failed to establish that the employees had either actual or apparent authority to bind the State. *Id.* at 109. In so finding, the Court noted the rule that apparent authority can be established only by the conduct of the principal, not the conduct of the agent. *Id.* at 110. Although the case arose in the context of ER 801(d)(2), the Court's reasoning in *Murphy* applies with equal force to the present case: statements made by individual WSDOT employees are insufficient to bind the State to the extent that the statements exceed the employees' actual or apparent authority.

OGJV has provided no evidence that the quoted employees had either the apparent or actual authority to bind WSDOT in the amount—more than \$10 million—that OGJV seeks in this litigation. Indeed, WSDOT employees expressly lack authority to bind it in the amount claimed by OGJV, and they testified to that point.

OGJV asserts that Glenn Schneider, WSDOT's Southwest Region Construction Engineer, conceded liability for WSDOT. However, Mr. Schneider stated in his deposition that he lacked authority to settle claims that exceeded \$200,000. CP at 769:11-15. Mr. Schneider also stated that he did not believe that OGJV was entitled to more compensation. CP at 767:1-3. Therefore, it is disingenuous for OGJV to argue to this Court it considered Mr. Schneider to have actual or apparent authority to admit liability, and more so, for it to suggest Mr. Schneider was of the opinion that OGJV was owed more money.

**F. Expert Fees Are Recoverable as Part of an Attorney Fees Award**

OGJV's argument against the trial court's awarding expert fees rests largely upon its interpretation that RCW 4.84.010 does not authorize such fees to be considered costs of litigation. But this section does not purport to limit costs and instead merely enumerates cost elements permitted "in addition to costs otherwise authorized by law." RCW 4.84.010. RCW 4.84.010 does not circumscribe a prevailing party's recovery within the context of attorney fees.

This is in contrast to the language of RCW 4.84.250 through RCW 4.84.280, which apply only to certain enumerated classes of litigation and which apply to this litigation only by virtue of the express language found in RCW 39.04.240. Accordingly, RCW 4.84.010 and its enumerated

cost recovery provisions apply to this litigation just as they apply to any other form of litigation within the state of Washington not otherwise excluded.

OGJV's reliance on *Wagner v. Foote*, 128 Wn.2d 408, 908 P.2d 884 (1996), is misplaced because it did not interpret RCW 4.84.010. Rather, it applied the provisions of RCW 4.84.030 stating, "[n]either RCW 4.84.030, .080 or RCW 2.40.10 authorize the award of expert witness fees as costs. Additionally, no grounds in equity support an award of expert witness fees in this case." *Id.* at 418. However, as shown immediately below, application of *Wagner* to claims for expert expenses recoverable within attorney fees was specifically rejected by the Washington Supreme Court. *See Panorama Vill. Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 144, 26 P.2d 910 (2001).

The question of whether expert witness fees are recoverable is a matter of statutory construction. RCW 4.84.250, applicable here because of its reference in RCW 39.04.240, provides that for the prevailing party, "[n]otwithstanding any other provisions of chapter 4.84 RCW ... there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees." In multiple other classes of litigation, the Washington courts have held that prevailing parties are entitled to recover expert witness fees as a part of

attorney fees, even where there is no textual basis in statute for such recovery. For example, RCW 49.60.030(2) allows a successful discrimination litigant to recover “the cost of suit including reasonable attorneys’ fees,” and in such cases, expert witness fees are well established as part of the recovery. *See, e.g., Johnson v. State, Dep’t of Transp.*, 177 Wn. App. 684, 313 P.3d 1197 (2013). And, in the context of insurance coverage disputes, the Washington Supreme Court holds that expert witness fees are recoverable within an award of attorney fees. *See Panorama*, 144 Wn.2d at 144 (acknowledging the rejection in *Wagner* of expert fees as costs under RCW 4.84.030, but allowing expert fees as a necessary expense within an award of attorney fees). In so holding, the Court in *Panorama* acknowledged the equitable rationale for allowing expert witness fees within an award of attorney fees.

Furthermore, the Legislature confirmed the courts’ broad authority to award costs: “In all actions and proceedings other than those mentioned in this chapter [and RCW 4.48.100], where no provision is made for the recovery of costs, they may be allowed or not, and if allowed may be apportioned between the parties, in the discretion of the court.” RCW 4.84.190.

OGJV has pointed to no cases interpreting the award of expert witness fees under RCW 39.04.240 and RCW 4.84.250, and the existence

of cases such as *Johnson* indicate that expert witness fees are recoverable outside the context of RCW 4.84.010. Because the expert witness fees in this case were necessarily incurred in order to assist WSDOT in responding to the lawsuit brought by OGJV, those fees were properly awarded by the trial court.

**G. The Trial Court Properly Found That the Hourly Rate and Total Number of Hours for WSDOT’s Attorneys and Paralegals Are Reasonable**

An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion. Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons. *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013), citing *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

Here the trial court made specific findings of reasonableness in its oral rulings of December 9, 2016, after reviewing the extensive briefing of the parties. “I spent quite a bit of time going through all of the documentation that was provided to the Court.” RP at 20:2-4, Dec. 9, 2016.

Certain of the fee requests are reasonable and appropriately documented, and there are some that I don’t think are appropriately documented. The ones that are not sufficiently or appropriately documented, it is still clear to the Court that the work was done and that a significant amount of work was done. My intention, at least as far as today, would be to

discount the request. I can tell you the ones that I am looking at in particular.

RP at 21:6-15, Dec. 9, 2016. The trial court then listed the paralegals and attorneys whose time entries were likely to be discounted. Indeed, the trial court's ultimate award of attorney fees was discounted by 50 percent due to its particularized inspection of the billing records at issue. CP at 1006-09.

In order to address the trial court's concerns about itemization raised by OGJV, WSDOT submitted declarations from Deborah Cade (CP at 908-10), Robert Hatfield (CP at 919-32), Sunset Brinton (CP at 904-07), Danielle Oliver (CP at 889-900), and Tiffany Orozco (CP 933-38). These declarations provided a greater level of detail concerning the work performed by WSDOT's attorneys and paralegals on this case, established the unique legal questions posed by this litigation, the level of litigation preparation needed to respond to those questions, and the extraordinary workload brought about by the discovery component of this litigation.

The trial court in fact made particularized findings and conclusions that were more than conclusory, and they show this Court that it "actively and independently confronted the question of what was a reasonable fee." *Berryman*, 177 Wn. App. at 658.

**1. The level of billing detail provided in declarations from WSDOT's attorneys and paralegals provides a sufficient basis for an award of fees**

OGJV then argues the billing records were “reconstructed,” and not contemporaneous, and therefore an improper basis for the trial court to award attorney fees. This argument fails for two reasons. First, the hourly billing records are not “reconstructed” records because the time entries were in fact created contemporaneously with the work performed. In order to provide detail to the trial court, the records were supplemented through comparison of the existing billing records to actual documents and work notations contained in WSDOT’s attorney file. Therefore, they are factually different from the attorney billing records at issue in the cases cited by OGJV.

Secondly, courts recognize that government agencies do not have billing systems like private law firms and that the contemporaneous records submitted by WSDOT in this case are therefore not unusual or suspicious. There are not many statutory provisions that allow government agencies to recover their attorney fees. The most common statutory bases for recovery of fees either explicitly exclude the government (such as the Federal Civil Rights Act, 42 U.S.C. § 1988), or apply only to parties adverse to the government (such as the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A)). One federal statute that has been interpreted to allow the

federal government to recover attorney fees is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601. Courts applying this statute have recognized that government agency attorneys often do not have the same billing record-keeping requirements that private law firms are likely to use. In those cases, courts are still required to look at whether the number of hours and hourly rates are reasonable. However, they have relied on records such as daily billing records, timesheets, and declarations from attorneys stating descriptions of the work performed. *See, e.g., United States v. Gurley*, 43 F.3d 1188, 1199 (8th Cir. 1994); *United States v. E.I. duPont de Nemours & Co.*, 341 F. Supp. 2d 215, 245 (W.D.N.Y. 2004); *United States v. Northernair Plating Co.*, 685 F. Supp. 1410, 1417-18 (W.D. Mich. 1988).<sup>5</sup>

Washington cases awarding attorney fees to public agencies under RCW 39.04.240 have not addressed the degree of detail that must be provided to support a claim of reasonable attorney fees. In *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 773 174 P.3d 54 (2007), the

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<sup>5</sup> The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) allows recovery of costs of federal government enforcement activities, which courts have interpreted to include attorney fees. *See, e.g., United States v. Chapman*, 146 F.3d 1166, 1174-75 (9th Cir. 1998). Despite the fact that the statute in question in these cases does not include the term “reasonable attorney fees,” the Ninth Circuit interpreted it to allow only reasonable fees. *Id.* at 1176.

court awarded reasonable attorney fees to the City, but did not discuss what constituted reasonable attorney fees. *See also Skyline Contractors, Inc. v. Spokane Housing Auth.*, 172 Wn. App. 193, 207-08, 289 P.3d 690 (2012).

In a recent opinion, the Court of Appeals considered an application for attorney fees by the State under the Consumer Protection Act. In upholding the award of fees, the Court stated:

The trial court also concluded that the time detailed in the State's declarations was reasonable and appropriate. The State submitted a 28-page spreadsheet listing the individual time entries for which it sought fees. As CRS [the appellant] notes, several entries are vague and general. But the majority of the entries contain information identifying the nature of the work itemized. The trial court did not abuse its discretion in accepting the itemizations.

*State v. The Mandatory Poster Agency, Inc.*, No. 74978-1-I, slip op. at 19, 2017 WL 2839781 (Wash. July 3, 2017). There is no indication in that opinion that the amount requested by the Attorney General's Office was discounted, even for what the Court noted were "vague and general" entries. If that court did not abuse its discretion in accepting more general descriptions of work in awarding an attorney fee request with no discount, then the trial court in this matter could not have abused its discretion in discounting the award by 50 percent based on its conclusion that the time entries lacked enough detail.

Here, three attorneys provided primary representation to WSDOT in this matter: Robert Hatfield, Deborah Cade, and Sunset Brinton. Each attorney recorded the hours worked on the case contemporaneously with that work being done. In addition, each of these attorneys submitted declarations that described the work performed in addition to the number of hours worked on this case: Robert Hatfield on a weekly basis, and Sunset Brinton and Deborah Cade on a monthly basis.<sup>6</sup> These declarations are sufficient, under the standard articulated by the federal courts in *duPont*, *Northernair*, and *Gurley*, to permit the trial court to evaluate the reasonableness of WSDOT's request for attorney fees and make an award accordingly.

The work performed by the Attorney General's Office paralegals on this case was complex, highly specialized, legal in nature, and critical to WSDOT's defense of this lawsuit. The criteria set forth in *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995) for the recovery of fees incurred by paralegals are met here. The services of the Attorney General's Office paralegals—document identification and review; drafting and responding to pleadings; drafting and responding to discovery; communicating with opposing counsel regarding discovery—are

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<sup>6</sup> Most of Ms. Cade's time was devoted to preparation of WSDOT's summary judgment motion, including the research and record review needed for that work; an hour-by-hour detail would have been repetitive at best.

legal in nature. The performance of these services was supervised by an attorney. The Attorney General's Office paralegals are qualified by training and experience to perform substantive legal work. CP at 821-30.

The analysis the trial court applied to WSDOT's request for fees meets the requirement that the trial court appropriately exercise discretion. The trial court's award of attorney and expert fees should be affirmed.

#### V. CONCLUSION

Respondent WSDOT requests that the trial court orders dismissing OGJV's claim and awarding attorney and expert witness fees to WSDOT be affirmed.

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RESPECTFULLY SUBMITTED this 14th day of July, 2017.

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