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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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CITY OF PUYALLUP,

Appellant,

vs.

CONWAY CONSTRUCTION COMPANY,

Respondent.

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# APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves termination of a public works contract for cause. The trial court determined that the Appellant, City of Puyallup ("City"), improperly terminated the Respondent, Conway Construction Company ("Conway"), for default. The City appeals the trial court's findings and conclusions regarding termination for default, disallowance of the City's counterclaims for defective work, and its award of attorney fees and costs to Conway.

## II. STATEMENT OF THE CASE

On or about September 21, 2015, the City and Conway entered into a public works contract ("Contract")[1] for significant road improvements to 39th Avenue Southwest in Puyallup, Washington (the "Project").[2]

The Contract between the City and Conway contains two provisions specifically dealing with termination of the Contract for

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[1] Contract. [CP 17-27; Trial Ex. 5]. The Contract includes the "Public Works Contract" form which was attached to Conway's initial complaint, (the "Contract Form") and several voluminous documents incorporated by reference. The referenced documents include the Washington State Department of Transportation ("WSDOT") Standard Specifications for Road, Bridge, and Municipal Construction (2014), [Trial Ex. 1] (the "Std. Specs.") and the Contract Special Provisions (the "Special Provisions") Project Manual, [Trial Ex. 2 pp.177-316].

[2] Finding of Fact (hereinafter referred to as "Finding") No. 3. [CP 2461; Apps. A-B].

default. Paragraph 22 of the Contract provides that violation of a statute or regulation is "good cause" for terminating the Contract:

> 22. Termination. The City shall be entitled to terminate this Contract for good cause. "Good cause" shall include, but shall not be limited to, any one or more of the following events . . .
> d. Contractor's failure to comply with Federal, state or local laws, rules or regulations[3]

The Contract also incorporates the Washington State Department of Transportation ("WSDOT") Standard Specifications for Road, Bridge, and Municipal Construction (2014).[4] Section 1-08.10(1) of the Std. Specs. provides that the Contracting Agency (in this case the City) may terminate the Contract upon the occurrence of any one or more of the following events:

> 1. If the Contractor fails to supply sufficient skilled workers or suitable materials or equipment;
> 2. [Inapplicable]
> 3. [Inapplicable]
> 4. If the Contractor disregards laws, ordinances, rules, codes, regulations, orders or similar requirements of any public entity having jurisdiction;
> 5. If the Contractor disregards the authority of the Contracting Agency;
> 6. If the Contractor performs Work which deviates from the Contract, and neglects or refuses to correct the rejected Work; or

[3] Contract Form. [Trial Ex. 5, p.8 ¶ 22].
[4] Std. Specs. [Trial Ex. 1].

> 7. If the Contractor otherwise violates in any material way any provisions or requirements of the Contract.
>
> Once the Contracting Agency determines that sufficient cause exists to terminate the Contract, written notice shall be given to the Contractor and its Surety indicating that the Contractor is in breach of the Contract and that Contractor is to remedy the breach within 15 calendar days after the notice is sent. . . . If the remedy does not take place to the satisfaction of the Contracting Agency, the Engineer may, by serving written notice to the Contractor and Surety either:
> 1. Transfer the performance of the Work from the Contractor to the Surety; or
> 2. Terminate the Contract . . . .[5]

During the course of performance several issues arose concerning Conway's quality of work. The City issued notices to Conway called Non-Conformance Reports ("NCRs") detailing the City's concerns about the quality of concrete pavement, defects in utilities, and other construction defects.[6] In addition, the City observed unsafe work conditions, including lack of trench shoring, and reported those conditions to the Washington State Department of Labor & Industries.[7]

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[5] Std. Specs., §1-08.10(1). [Trial Ex. 1, pp.1-80]. The Std. Specs are divided into 9 different "Divisions." Division 1 contains the Contract provisions that are a primary focus of this appeal, hence the page numbering for the quoted Section is read Division 1, page 80.

[6] Non Conformance Reports ("NCR's"). [Trial Ex. 69].

[7] [Trial Exs. 55, 56, 57, 61, and 62]. These documents reflect the various communications between the City's Project Manager, Ted Hill, and L&I.

On March 9, 2016, the City issued its Notice of Suspension and Breach of Contract.[8] The City cited nine items that it considered to be breaches of the Contract. The nine items include defective and uncorrected work and safety concerns.[9] In accord with the terms of the Contract, the City informed Conway that it had "fifteen (15) calendar days from the date of [the] letter to remedy the issues listed below."[10] In regard to safety violations the City's letter stated:

> **9. Job site safety**: There have been numerous occasions that the City has observed un-safe site conditions (such as improper shoring) but the City does not have the authority to penalize the contractor for safety violations. It is very clear in the contract under 1-07.1 that the contractor must obey and follow all Federal and State regulations. Safety violations were brought to the attention of the contractor by the Engineer without response. After such attempt, the Engineer did ask the Department of Labor and Industries for assistance in achieving compliance.[11]

In response to the City's safety concerns, Conway responded with what amounts to a general denial:

> CCC values safety. I have interviewed Ken Conway and McKenzie Baker. None of us are aware of 'numerous occasions that the City has observed unsafe site conditions.' Ken does recall one instance when the

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[8] March 9, 2016, Notice of Suspension and Breach of Contract. [Trial Ex. 44].
[9] *Id.*
[10] *Id.*, p.1.
[11] *Id.*

> Engineer noted an unsafe condition. We welcome assistance from the Department of Labor and Industries.[12]

On March 10, 2016, the City responded to Conway saying that "if the Contractor does not correct the deficiency to L&I's satisfaction, the City will suspend operation until the work site is deemed safe again by L&I."[13] Various letters and emails were then exchanged between Conway and the City concerning defective work and safety concerns.[14] On March 21, 2015, the City informed Conway that it still needed to "completely remedy" all nine items in the Suspension Letter.[15] The letter also informed Conway that the City had received further reports of safety violations:

> In regards to item #9, I have received further reports of unsafe practices on the job site, the most recent report of an instance of improper practices in working with asbestos cement concrete water pipe in the vicinity of the day care facility. The lack of standard safe practices by Conway Construction Company continues to be a significant concern of the City, both for Conway Construction Company employees, sub-contractors, and City employees, but also the general public within the project area.[16]

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[12] March 9, 2016 Conway Letter, [Trial Ex. 45, p.3].
[13] March 10, 2016 City Letter, [Trial Ex. 46, p.2].
[14] [Trial Exs. 46 thru 57].
[15] March 21, 2016 City Letter, [Trial Ex. 53, p.1].
[16] March 21, 2016 City Letter, [Trial Ex. 53].

The same day, March 21, 2016, Conway responded by denying it had cut asbestos pipe.[17] Part of the City's investigation into Conway's safety violations included reviewing photos taken by the City's on-site Inspector, Steve Cox.[18] The photographs show a deep trench without shoring and an excavator parked immediately above the worker.[19]

On March 25, 2016, the City issued a Notice of Termination.[20] In regard to safety (or lack thereof) the City stated in its termination letter:

> Conway Construction Company has failed to obey all laws, ordinance, rules, codes, regulations and orders of public entities by numerous safety unsafe construction practices, illicit discharges, and poor traffic control implementation.[21]

In accord with Std. Spec. 1-08.10(1), the City withheld further payments due to Conway under the Contract.[22] On April 13, 2016, the Department of Labor & Industries issued a Citation and Notice of Assessment to Conway.[23] The L&I Citation was for a "serious" safety violation endangering the safety of Conway's workers.[24]

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[17] March 21, 2016 Conway Letter, [Trial Ex. 54, p.2].
[18] *See, e.g.* Inspector Reports, [Trial Ex. 55]. The photograph on p.2 of the Exhibit shows a deep trench well over the head of the worker at the head of the trench. [Trial Ex. 55, p.2].
[19] *Id.*
[20] March 25, 2016 Termination Letter, [Trial Ex. 58].
[21] *Id.* at p. 1.
[22] *Id.*
[23] April 13, 2016 L&I Citation and Notice of Assessment, [Trial Ex. 59].
[24] *Id.*

## A. Conway Files for Declaratory Relief.

On May 10, 2016, Conway filed a "Petition for Declaratory Judgment" in Pierce County Superior Court.[25] The case was assigned to The Honorable Stanley J. Rumbaugh. On May 17, 2016, the City received Conway's Notice of Claim.[26] On August 12, 2016, the City denied Conway's Claim in its entirety.[27]

A few months after filing its initial lawsuit, Conway moved to amend to include claims against the City for breach of contract and unjust enrichment.[28] The trial court approved Conway's Motion.[29] Conway's original petition and its Amended Complaint include the concession by Conway that the Public Works Contract controls any attachments or incorporated documents including the WSDOT Std. Specs.:

> 4.21 The Public Works Contract expressly provides that the language of the Public Works Contract controls over conflicting language in any attachment to the Public Words Contract, including the WSDOT Standard Specifications.[30]

The Contract Form contains the following provision: "This Contract and any attachments contain the entire Contract between the

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[25] Conway Petition, [CP 1-39].
[26] August 12, 2016 City Letter, p.1 [CP 134-137].
[27] *Id.*
[28] Motion to Amend [CP 54-59].
[29] Order on Motion to Amend [CP 149-150].
[30] Conway Amended Complaint, ¶ 4.21 [CP 157].

parties. Should any language in any attachment conflict with any language contained in this Contract, the terms of this Contract shall prevail."[31] Thus, according to the Contract Form, the termination provisions of ¶ 22 "Termination"[32] control those of Std. Spec. 1-08.10(1).

### B. The Court Determined on Summary Judgment That Conway's Safety Violation Was "Grounds for Default" but Also Held the City Still Had to Prove That the Termination Was "Justified."

The City and Conway filed summary judgment motions that were heard by the trial court immediately before trial.[33] The City SJ Motion asked the Court to rule on whether 1) the City was entitled to terminate Conway based upon its safety violations, 2) Conway waived any claims by failing to follow Contract claim notice provisions, and 3) dismissal of all claims for prejudgment interest and consequential damages should be granted.[34]

The Conway SJ Motion asked the court to rule on whether 1) the Court should adopt the order of proof and standards of proof of federal law to determine the propriety of the City's termination for default, 2) Std. Spec. 1-08.10(1) does not require a contractor to complete all rejected

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[31] Contract Form, [Trial Ex. 5, p. 10, ¶ 34].
[32] *Id.* at p.8, ¶ 22.
[33] Conway Motion for Partial Summary Judgment, ("Conway SJ"), [CP 730-755]. City Motion for Partial Summary Judgment ("City SJ") [CP 848-863].
[34] City SJ, Issues for the Court [CP 850].

work within fifteen calendar days of the notice of default, 3) the City gave inadequate notice of default and opportunity to cure, and 4) the City's Consumer Protection Act Claim should be dismissed as a matter of law.[35]

In approving the City SJ Motion in part, the trial court ruled that Conway's violation was "grounds for default."[36] The trial court reserved for trial whether the City's termination was proper or justified:

> (1) The City of Puyallup's ("City") motion with respect to the first issue of whether or not the safety violation cited by the Department of Labor & Industries (the "Safety Violation") constituted a default under the Contract by Conway Construction Company ("Conway") is granted in part and denied in part based on violation of §1-08.10. The Court reserves for trial the issue of whether the City's termination of Conway was proper or justified. Conway shall be given the opportunity to assert its affirmative defenses whether the City's decision to terminate Conway was arbitrary and capricious or otherwise improper. In addition the Court reserves for trial whether other Contract default conditions as alleged by the City were breached.[37]

The trial court reserved for trial the other issues asserted by the City on summary judgment.

On the Conway SJ Motion, the trial court ruled that the City would bear the initial burden to prove by a preponderance of the evidence that Conway was in default and if the City met this initial burden then the

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[35] Conway SJ, Issues [CP 735].

burden would shift to Conway to prove that the decision was arbitrary, capricious, or an abuse of discretion, made in bad faith, or otherwise improper:

> (1) The Court hereby CONCLUDES as a matter of law and ORDERS that the City of Puyallup ("City") shall bear the initial burden to show by a preponderance of the evidence that Conway defaulted under the terms of the contract. If the City meets its burden, then the burden shifts to Conway to prove that the City's decision to terminate was arbitrary, capricious or an abuse of discretion, made in bad faith, or otherwise improper. In the exercise of this Court's authority to control trial management, the Court ORDERS that the City shall present evidence first, followed by Conway, to conform to the relevant order of proof in the declaratory action.[38]

The trial court then determined what the term, "remedy the breach," under Std. Spec. 1-08.10(1) was deemed to mean as a matter of law:

> "The Court hereby CONCLUDES as a matter of law and ORDERS that the phrase "remedy the breach" in Section 1-08.10(1) of the WSDOT Standard Specifications specifically refers to the seven events of default listed in the immediately preceding paragraph of the same Section."[39]

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[36] 5/5/17 Oral Summary Judgment Ruling [CP 2163] "That this act of a safety violation occurred, and it is grounds for default, not for termination for cause."
[37] 6/2/17 Summary Judgment Order [CP 2238, l.17 thru CP 2239, l.3].
[38] 6/8/17 Order re: Conway's Motion for Partial Summary Judgment, p. 2 ll.12-16 [CP 2232].
[39] *Id.*

These rulings were clearly inconsistent. On the one hand, the trial court agreed that Conway had defaulted under the Contract, but required that the City also prove that the termination was justified. On the other hand, the trial court ruled that once the City proved that Conway was in default, then the burden shifted to Conway to show that the City improperly terminated Conway. The trial court's apparent confusion would be manifested in its subsequent Findings and Conclusions.

The SJ Orders also fail to account for the provisions of Paragraph 22 of the Contract Form which provides that any violation of applicable statutes or regulations is "good cause" for termination. Paragraph 22 was specifically brought to the trial court's attention at the argument on the SJ Motions and the trial court commented "I think that as to whether the City actually relied on Section 22 for claiming default is unclear on this record."[40] Thus the trial court maintained that despite the ruling that Conway was in default due to its safety violation, it was the City's further burden to show that the termination was "justified."[41] The trial court did not explain what legal standard would be applied to make that determination.

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[40]SJ Oral Argument May 5, 2017 [RP Vol. V, p.24, ll.1-4].
[41] *Id.* [RP Vol. V, p.27, ll.1-11].

The trial court bifurcated the trial into two parts. Phase I would determine whether Conway was in default and whether the City properly terminated Conway. The determination in Phase I would control what damages and counterclaims would be recoverable in Phase II.

### C. Phase I – Trial Court Concludes Conway Was Improperly Terminated Because Conway Cured All Defaults.

Trial of Phase I started on June 20, 2017, and concluded on July 24, 2017.[42] The trial court entered Findings and Conclusions at the completion of Phase I. The trial court concluded that at the time of termination on March 25, 2016, Conway had cured all of the conditions of default.[43] The trial court based its conclusion upon the legal premise that "[o]nce Conway demonstrated that it was **not neglecting or refusing to correct the cure items**, any alleged breach based on the items listed in Exhibit 44 was resolved."[44] The reference to Exhibit 44 is to the nine items of default contained in the City's March 25, 2016, Notice of Suspension and Breach of Contract.

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[42] Phase I Findings and Conclusions, [CP 2460 thru 2479] p.1. Phase I Findings and Conclusions related to the initial bifurcated trial to determine whether Conway was properly terminated by the City. Phase II Findings and Conclusions, [CP 2550 thru 2582] related to the second phase of the bifurcated trial to determine the amounts of damages and attorney fees.

[43] Conclusion No. 7 [CP 2748].

[44] *Id.* (emphasis added.)

It must be noted that the language of Std. Spec. 1-08.10(1) only mentions the "neglects or refuses to correct" language in relation to subsection (6), which allows termination for failure to correct defective or rejected Work.[45] It is not found in subsection (4) that addresses default for disregard of "statutes and regulations."[46] Moreover, the phrase "neglects or refuses to correct" is not found anywhere in Paragraph 22 of the Contract Form.[47] Thus it appears that the trial court's Conclusion No. 7 quoted above conflated the test for defective work with the test for violating safety regulations.

The trial court ruled that it was the City's burden of proving that termination for default was "justified" rather than what the Contract requires, i.e. that Conway was in default.[48] At no time did the trial court in its original summary judgment rulings or its Findings and Conclusions explain what the term "justified" meant or the legal standard for determining how it would decide whether or not the City was "justified" in terminating Conway. Nevertheless, the trial court placed the burden to prove the undefined justification upon the City: "The City has failed to

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[45] *Id.*
[46] *Id.*
[47] [Trial Ex. 5, p.8].
[48] Conclusion 8, [CP 2478].

demonstrate that its termination of Conway Construction Company by the City of Puyallup was justified."[49]

Thus the trial court effectively abandoned its previous Summary Judgment Rulings by shifting the burden of proof to the City to not only prove that Conway was in default, but also that the termination was somehow "justified."

### D. Phase II – Trial Court Denies the City's Counterclaims for Defective Work Discovered after Termination.

Trial of Phase II started on August 28, 2017, and concluded on September 26, 2017.[50] At the conclusion of trial on Phase II, the trial court entered Findings and Conclusions and awarded Conway compensation for completed work based upon unit prices and costs for force account and fixed price work.[51] The trial court disallowed almost all of Conway's impact claims. The trial court also denied almost all of the pass-through claims advanced by Conway's subcontractor, TSI. Where unit prices were not applicable, the trial court determined the amounts due Conway based upon percentage of lump sum work completed.[52]

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[49] *Id.*
[50] Phase II Findings and Conclusions, p.1 [CP 2675].
[51] *Id.* [CP 2675-2706].
[52] Findings 74 thru 153 [CP 2676 thru 2695].

The trial court determined that Conway was entitled to an additional $864,068.80 for work completed under the Contract. The trial court further determined that Conway was entitled to $58,018.07 for extra work ordered by the City.[53] Other minor claims for delays and stored materials resulted in a principal judgment amount of $986,809.87.[54]

During the Phase II trial, the City presented proof of its set-offs and counterclaims for the cost of replacing Conway's defective work, including significant defective concrete roadway panels that were installed with the wrong slope.[55] The slope defect affected almost all of the roadway that had been installed by Conway before termination. The defect was discovered about four months after Conway had been terminated and the replacement contractor started work.[56]

The City based its claims upon the *Ducolon* case which held that even where a subcontractor has been improperly terminated, the general contractor is entitled to a set-off for the cost of correcting the

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[53] Finding 158 [CP 2696].
[54] February 21, 2018 Judgment, p.1 [CP 2671].
[55] Finding 162 [CP 2697] and Findings 167 thru 171 [CP 2698]. Trial Ex. 172 contains a summary of the City's counterclaims for defective work discovered after March 25, 2016.
[56] Parametrix Report, [Trial Ex. 85].

subcontractor's defective work.[57] The trial court ruled as a matter of law that the City was not entitled to recover anything for defective work that was not discovered before termination.[58] The trial court disregarded the applicable Contract provisions that provide that the City is not required to pay for defective or non-conforming work:

> **The Contracting Agency will not pay for unauthorized or defective Work**. Unauthorized or defective Work includes: Work and materials that do not conform to Contract requirements; Work done beyond the lines and grades set by the Plans or the Engineer; and extra Work and materials furnished without the Engineer's written approval.[59]

The trial court rejected the holding of *Ducolon* in favor of *Shelter Products*, an Oregon case that disallowed any recovery for defective work discovered after termination of a contractor.[60] Applying *Shelter Products*, the trial court refused to consider the City's counterclaims because it determined that by terminating Conway, the City was in breach of the

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[57] *Ducolon Mech., Inc. v. Shinstine/Forness, Inc.* 77 Wn. App. 707, 893 P.2d 1127 (1995); *see also Eastlake Const. Co., Inc. v. Hess,* 102 Wn.2d 30, 686 P.2d 465 (1984).

[58] Conclusions 16-19 [CP 2701-2704].

[59] Std. Spec. 1-05.7, Trial Ex. 1, p.1-28 (emphasis added).

[60] *Id. See, Shelter Products, Inc. v. Steelwood Construction, Inc.*, 257 Or. App. 382, 402, 307 P.3d 449 (2013) (holding that a general contractor that terminated a subcontractor for convenience was barred from recovering the cost of correcting the subcontractor's work when the defects were discovered after the date the subcontractor was terminated and no notice of the alleged defective work or opportunity to cure was provided to the subcontractor.) A copy of the *Shelter Products* case is attached as App. F.

Contract and Conway did not receive any opportunity to cure its defective work.[61]

The Court entered its initial Judgment on February 21, 2018 in the amount of $1,163,810.77.[62]

### E. Attorney Fees – Trial Court Awards Attorney Fees Based Upon the Contract Instead of RCW 39.04.240.

After the trial court entered its initial judgment, it heard arguments on Conway's motion for attorney fees. Conway asserted that it was the "prevailing party" because it "did not wholly lose any motion" and it prevailed in obtaining "88.2% of the damages requested at closing argument."[63]

The City objected because Conway failed to meet the requirements of RCW 39.04.240 which requires offers of settlement to be made in any lawsuit involving a public works contract:

> (1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than

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[61] Conclusions 16-19 [CP 2702-2705].
[62] Judgment, Feb. 21, 2018, [CP 3385-3388].
[63]Conway Construction Company's Petition for Fees and Costs [CP=2717].

> one hundred twenty days after completion of the service and filing of the summons and complaint.
> (2) **The rights provided for under this section may not be waived by the parties to a public works contract** that is entered into on or after June 11, 1992, and **a provision in such a contract that provides for waiver of these rights is void as against public policy**. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration."[64]

The City made a timely Offer of Settlement in accord with RCW 39.04.240.[65] Conway did not make any offer of settlement as required by RCW 39.04.240 and RCW 4.84.280. Rather, Conway claimed that RCW 39.04.240 did not apply to a declaratory relief action and that a competing Contract provision was an alternate means for Conway to be awarded all of its fees.[66] Conway relied upon the recent *King County v. Vinci Construction* case where our Supreme Court considered the following issue:

> Therefore, in order to find that RCW 39.04.240 provides the exclusive means for recovering attorney fees in this action, we must find either that the legislature explicitly intended such exclusivity or that RCW 39.04.240 is so

[64] RCW 39.04.240 (emphasis added).
[65] City Amended Offer [CP 3155-3157].
[66] Conway Reply Re Fee Award [CP 3197-3203].

> inconsistent with *Olympic Steamship* that they both cannot simultaneously apply.[67]

Conway based its claim for attorney fees and costs upon a fee shifting provision in the Contract by which the "prevailing party" is entitled to its "cost of defense" and which can only be assessed as a separate judgment against the plaintiff or as a setoff against the plaintiff's judgment, i.e. a unilateral fee shifting provision.[68]

The trial court determined that the Contract's fee shifting provision read as a whole is ambiguous and constitutes a unilateral attorney fee provision but that it should be enforced against the City:

> 3. The Court finds and concludes that Special Provision §1-09.11 awards reasonable attorney fees and specifically-defined costs to the prevailing party, whether plaintiff or defendant and whether prosecuting or defending contract claims, for the following reasons at a minimum: (a) the first paragraph of the clause applies mutually on its fact to "either of said parties" that may prevail in a lawsuit; (b) the term "Cost of Defense" cannot be read unilaterally and must be applied reciprocally to either prevailing party to define the costs the parties mutually intended for the prevailing party to recover; and (c) **the clause as a whole (when reading the first and second paragraphs in concert) is ambiguous and therefore construed against the City as drafter**.[69]

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[67] *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 628, 398 P.3d 1093, 1098 (2017) (holding that RCW 39.04.240 does not displace *Olympic Steamship*).

[68] Project Manual Special Provision 1-09.11, Trial Ex. 2, p.223, App. I (emphasis added.)

[69] Order Awarding Fees And Costs ¶4 [CP 3397] (emphasis added).

The trial court ruled that Conway was the "substantially prevailing party."[70] The trial court further held that RCW 39.04.240 is not an exclusive remedy and "does not preempt the parties' private agreement authorizing the recovery of attorney fees and costs" citing *Vinci* for authority.[71]

The City also objected to the amount of fees and the rates charged. The City filed a declaration of Philip Talmadge, former Justice of the Washington Supreme Court, who concluded that the amount of fees requested by Conway should be discounted by 30%. The trial court disregarded Justice Talmadge's opinion and accepted what was largely hearsay testimony from counsel for Conway regarding the reasonableness of rates and number of hours. The trial court accepted the attorney fee request in its entirety and did not require any segregation of fees between successful and unsuccessful claims. As a result, the trial court awarded a total of $1,107,827.40 in fees and costs. On March 28, 2018 the trial court entered an amended judgment against the City for $2,271,638.27 including prejudgment interest, attorney fees, and costs.[72]

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[70] *Id.* at ¶4 [CP 3398].
[71] *Id.* at ¶5.
[72] Amended Judgment, March 28, 2018, [CP 3391-3394].

The City moved for reconsideration based upon the specific language of RCW 39.04.240 that prohibits any waiver of its terms by contract.[73] The City cited legislative history of RCW 39.04.240 that states "Summary of Bill: **All public works contract disputes** are subject to the offer-of-settlement and prevailing party attorney fees law."[74] The trial court denied the City's Motion for Reconsideration.[75] This appeal followed.

## III. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

### A. Assignments of Error.

1. Error No. 1 – Standard for Termination

The trial court erred as a matter of law in its Conclusion No. 7 that "neglect or refusal to correct within the 15-day cure period" applies to all default provisions within the Contract.

2. Error No. 2 – Cure for Breach

The trial court erred as a matter of law in its Conclusion No. 7 that once Conway demonstrated that it was not neglecting or refusing to correct the cure items, any alleged breach based on the nine items listed in Exhibit 44 were cured.

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[73] City Motion for Reconsideration [CP 3409-3424].
[74] SHB 1671 Senate Bill Report, March 29, 1999 [CP 3421-3422] (emphasis added.); App. H.

3. Error No. 3 – Termination Was Justified

The trial court erred as a matter of law in its Conclusion No. 8 that "[t]he City [] failed to demonstrate that its termination of Conway for default was justified."

4. Error No. 4 – Safety Violations

The trial court erred when it found in Finding No. 16 and related Findings 9 through 22 that the record contains no evidence of ongoing or recurrent unsafe work practices.

5. Error No. 5 – Shoring is Required

The trial court erred as a matter of law when it found in Finding No. 15 that trenches "at or very near four feet" do not require benching or shoring.

6. Error No. 6 – Uncured Safety Violations

The trial court erred as a matter of law when it found in Finding No. 59 that because the Department of Labor and Industries perceived no ongoing safety issues, Conway's previous safety violation was cured.

7. Error No. 7 – Set-off for Defective Work

The trial court erred as a matter of law in its Conclusion Nos. 16-19 and related Findings 169 through 171 when it rejected established

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[75] Order On Reconsideration, April 17, 2018 [CP 3425].

Washington law and the language of the Contract by applying Oregon legal precedent to disallow the City's claim to set-off for defective work.

8. Error No. 8 – Attorney Fees Award

The trial court erred as a matter of law when it concluded in its Order Awarding Attorney Fees and Costs[76] that RCW 39.04.240 was not applicable to determining whether Conway was the prevailing party entitled to an award of attorney fees and costs.

**B. Issues Pertaining to Assignments of Error**

1. Termination for Default.

Where a public works contract specifies certain conditions of default justifying termination and requires that any cure of those conditions be completed to the satisfaction of the owner's engineer, is the engineer entitled to exercise his discretion in rejecting the contractor's tendered cure? Answer: Yes.

2. City Counterclaims for Defective Work.

Where a contractor has installed defective or unauthorized work before being terminated, should the owner be allowed to set-off the cost of correcting the defective work against amounts otherwise due the contractor? Answer: Yes.

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[76] Order Awarding Attorney Fees and Costs, p.3, ¶¶1-5 [CP 3397] (emphasis added).

3. Award of Attorney Fees to Conway.

Where RCW 39.04.240 requires that a plaintiff in a public works dispute must make an offer of settlement to be considered the prevailing party and no such offer has been made, should the trial court deny any award of attorney fees even if the contract contains a fee shifting provision? Answer: Yes.

4. Award of Attorney Fees on Appeal.

Where the City is the prevailing party on appeal, is the City entitled to an award of attorneys' fees and costs in relation to this appeal? Answer: Yes.

## IV. LEGAL ARGUMENT

### A. The Trial Court Applied the Wrong Legal Test in Determining Whether the City Properly Terminated Conway.

The trial court applied the wrong legal test to whether Conway should be terminated due to a serious safety violation. The proper test is whether Conway was in default (which it was) and whether the City was satisfied with Conway's efforts to remedy the breach (which it was not).

The trial court's error in failing to apply the correct test is illustrated by its Conclusion No. 7 where it determined that Conway was

in default but the default was cured because Conway did not refuse or neglect to correct the safety violation:

> Conclusion of Law No. 7: As specified in the Findings of Fact, the City Engineer deliberately told Conway that all defects must be remedied within the 15-day window specified in the suspension and cure letter at Exhibit 44. As detailed in the Court's ruling on partial summary judgment related to Section 1-08.10(1) of the WSDOT Standard Specifications, incorporated into the Contract, it is **neglect or refusal to correct the rejected work within the 15-day cure period that constitutes breach of this Section. Once Conway demonstrated that it was not neglecting or refusing to correct the cure items, any alleged breach based on the items listed in Exhibit 44 was resolved.** The City's position that all cure items must be remedied within a 15-day period violates the Contract's actual terms.[77]

The trial court's conclusion is contrary to the Contract's requirement that whatever remedy is tendered by Conway must be remedied within 15 days to the satisfaction of the City. Thus under the Contract, the City Engineer had discretion to reject Conway's tendered cure. By applying the wrong test, the trial court ignored the requirements of the Contract and shifted Conway's burden of proof to the City.

The trial court also violated its own summary judgment ruling that provided once the City established a default (as defined by the Contract)

had occurred, the burden shifted to Conway to prove that the City's decision was arbitrary and capricious or otherwise improper. [78]

The trial court's Finding No. 16 shows that the trial court completely lost track of the Contract requirements for termination:

> There is no evidence that the Department of Labor and Industries was not satisfied with Conway Construction's safety practices on the site after March 9, 2016, and the record contains no evidence of ongoing or recurrent unsafe work practices.[79]

Lack of evidence of further safety violations after the initial notice of default does not address any of the Contract's requirements for termination. The trial court's Finding No. 43 notes that only work on the nine default items were permitted after the City issued its March 9, 2016 Notice of Suspension.[80] Thus there was no ongoing work that might lead to additional safety violations. The only issue for determining whether the City properly terminated Conway is whether there was a default (which there was) and whether it was somehow cured to the satisfaction of the City (which it was not.)

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[77] Conclusion No. 7 [CP 2478] (emphasis added). Note that Exhibit 44 is the City's Notice of Default that lists all nine of the default conditions for which it was demanding that Conway correct including the various safety violations.

[78] 6/8/17 Order re: Conway's Motion For Partial Summary Judgment, p. 2 ll.12-16 [CP 2232].

[79] Finding No. 16 [CP 2464].

[80] Finding No. 43 [CP 2470].

The trial court did not even mention Paragraph 22 of the Contract in its Ph. I Findings and Conclusions.[81] Paragraph 22 provides that violation of a statute or regulation constitutes "good cause" for termination. Rather, the trial court attempted to minimize the gravity of Conway's safety violation by stating in its Findings that "this is the single serious safety violation."[82]

The federal case law addressing this issue provides that once the City shows that there was a default (defined by contract or otherwise) the City Engineer has broad discretion whether to terminate:

> A contracting officer possesses "broad discretion" when deciding whether to terminate a contract for default. *Consol. Indus., Inc. v. United States,* 195 F.3d 1341, 1343 (Fed.Cir.1999). This discretion, however, is not boundless. A default termination will be overturned if it is "'arbitrary, capricious, or constitutes an abuse of discretion.'"[83]

At no point did the trial court rule that the City was arbitrary or capricious. The federal case law is clear that once a breach of a specific default provision has been established, the liability phase of the case ends:

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[81] *See, e.g.* Findings and Conclusions, Ph. I, [CP 2460-2479]. The trial court failed to analyze or mention Paragraph 22 of the Contract in its Findings and Conclusions.

[82] Finding No. 14, [CP 2464].

[83] *Takota Corp. v. United States*, 90 Fed. Cl. 11, 16 (Fed. Cl. 2009), aff'd, 401 Fed. Appx. 530 (Fed. Cir. 2010) (citations omitted); *see also McDonnell Douglas Corp. v. United States,* 567 F.3d 1340, 1354 (Fed.Cir.2009) (upholding a default termination where "the contracting officer exercised reasoned judgment and d*id* not act arbitrarily")

> [D]etermining whether a termination is appropriate is a two-stage process: **First, the court examines whether defendant has demonstrated that the default was proper under clauses in the contract providing for specific events of default. If defendant makes such a showing, the liability phase of the case ends.**[84]

In its Phase I Findings and Conclusions, the trial court found that Conway committed a serious safety violation and that the trial court takes "safety on the job extremely seriously."[85] The trial court further found that the safety violation in question was deemed by the Department of Labor and Industries as a "serious" safety violation endangering the life of workers on the job.[86] The trial court found that Conway had breached the Contract.

The documents admitted into evidence demonstrate that the City Engineer, Mark Palmer, properly exercised his discretion and judgment in terminating Conway. He confronted Conway with the various safety violations that the City was concerned with and suspended further work until Conway could "remedy the issues."[87] He also informed Conway that

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[84] *5860 Chicago Ridge, LLC v. United States*, 104 Fed. Cl. 740, 757 (Fed. Cl. 2012) (emphasis added).
[85] Finding 14 [CP 2464].
[86] L&I Citation, [Trial Ex. 59]. A photograph of the offending trench is included in Ex. 37, Photo 21. *See also*, Citation and Notice of Assessment [CP 1088].
[87] March 9, 2016 Notice of Suspension and Breach of Contract, [Trial Ex. 44].

the Department of Labor & Industries was investigating the matter.[88] He had City project engineer Ted Hill maintain contact with L&I, and had him provide to L&I information about the various unsafe trench observations that had been made.[89] Conway's only response was that it talked to L&I.[90] Conway's same lackluster response was repeated two days later in the same letter.[91]

The City Engineer wrote Conway on March 21, 2016, and indicated that he was not satisfied with Conway's efforts on safety issues and that the City Engineer had received additional information about improper cutting of asbestos pipe.[92] Conway responded with an observation that such pipe work was done, but that "[s]o far my investigation finds not supporting evidence."[93] The letters from Conway demonstrate the lack of responsibility taken by Conway for safety concerns. Conway's responses exhibit disregard for the City's concerns and lack of any concern for the gravity of the situation.

Finally, on March 25, 2016 the City Engineer exercised his discretion under the contract and determined that the statements and

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[88] March 10, 2016 City Letter to Conway, [Trial Ex. 45].
[89] Ted Hill Emails to L&I with photographs, March 9, 2016, [Trial Ex. 55].
[90] March 16, 2016 Conway Email, [Trial Ex. 50].
[91] March 18, 2016 Conway Letter, [Trial Ex. 52].
[92] March 21, 2016 City Letter to Conway, Trial Ex. 53.

actions of Conway did not meet his expectations and terminated the Contract.[94] This exercise of discretion is specifically allowed under the Contract which provides that any remedy by the Contractor must be "to the satisfaction" of the City.[95]

The existence of a default justifying termination under the Contract was well established before the Phase I trial even started. Despite the fact that Conway's default had been established, the trial court inexplicably conflated the test for determining a default due to a safety violation with that of defective work and held that Conway had cured all of the nine points in Exhibit 44. Neglect or refusal to correct work has nothing to do with a safety violation under the terms of the Contract. The trial court's ruling is clearly a non-sequitur.

Once the City demonstrated that Conway was in default due to the safety violation, the liability phase of the case should have ended.

> Often, then, determining whether a termination is appropriate is a two-stage process: **First, the court examines whether defendant has demonstrated that the default was proper under clauses in the contract providing for specific events of default. If defendant makes such a showing, the liability phase of the case ends**. If it does not or cannot, the focus shifts to whether

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[93] March 21, 2016 Conway Letter to City, Trial Ex. 54.
[94] March 25, 2016 City Termination Letter, Trial Ex.
[95] Std. Specs., §1-08.10(1), [Trial Ex. 1, pp.1-80].

> the contractor's failure to perform constituted a material breach, so as to excuse defendant's abandonment of the contract under either a generic "other provisions" default clause or under the common law.[96]

The City was only required to show that Conway breached a specific condition of default under the Contract in order to justify termination. As held in *5860 Chicago Ridge, LLC v. U.S.*, a recent federal Court of Claims case:

> Accordingly, the burden of proof placed on defendant in a given case depends upon the particular contract clause involved and, specifically, whether thereunder the default arises from: (i) a failure to perform a contract requirement enumerated in the default provision (as was the case in *Kelso* ); or (ii) a failure to perform one of the "other provisions" in the contract. Cibinic & Nash, "Default Termination for Failure to Comply with 'Other Provisions,' " *supra.* In the former instance, defendant need not show that the failure constituted a material breach; in the latter, it must show that the breach was material.[97]

The only remaining question is whether the City should have been satisfied with Conway's performance. The accepted law in Washington regarding "satisfaction" clauses is that if the satisfaction deals with judgment, then what is required is good faith exercise of that discretion.

> Where the question is one of judgment, the promisor's determination that he is not satisfied, when made in good faith, has been held to be a defense to an action on the

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[96] *5860 Chicago Ridge*, 104 Fed. Cl. at 757 (emphasis added.)
[97] *5860 Chicago Ridge, LLC* 104 Fed. Cl. at 756.

> contract.... Although these decisions do not expressly discuss the issues of mutuality of obligation or illusory promises, they necessarily imply that the promisor's duty to exercise his judgment in good faith is an adequate consideration to support the contract.[98]

There is no finding by the trial court that the City Engineer exercised bad faith in terminating Conway. The trial court obviously disagreed with the City Engineer's decision to terminate. But disagreement does not invalidate a discretionary decision made in good faith and bolstered by verified facts.

Conway's breach of a safety regulation is a defined breach and condition of default under the Contract. Moreover, the trial court's Findings, trial exhibits, and testimony of the City's safety expert demonstrate that the City Engineer had ample reasons for terminating Conway.

The testimony of the City's safety expert, Dave Stewart, P.E. shows that the City Engineer was justifiably not satisfied with Conway's half-hearted efforts to remedy its default. Mr. Stewart testified that contemporaneous on-site photographs showed that Conway repeatedly violated safety violations by having workers without shoring in trenches

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[98] *Omni Grp., Inc. v. Seattle-First Nat. Bank*, 32 Wn. App. 22, 26, 645 P.2d 727, 730 (1982)

four feet or more in depth.[99] In addition, many of the photographs showed a reduction of safety factors due to loading various trenches with heavy equipment on the edge of the trench.[100] Mr. Stewart concluded that "the contractor generally was not in compliance with the safety requirements."[101] He further testified that Conway was not meeting industry safety standards.[102] The trial court disagreed with Mr. Stewart's conclusions because in the trial court's opinion "the Department of Labor and Industries perceived no ongoing safety issues."[103] But the trial court's conclusion in this regard misses the mark because the trial court failed to address whether the City should have somehow been satisfied. It remains an established fact that Conway was cited by L&I for a serious safety violation.

The trial court's finding No. 15 represents clear error in this regard when the trial court stated the waterline trenching "was maintained at or very near four feet, **a depth that requires no benching or shoring given**

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[99] David Steward [RP Vol. 15, pp. 128 thru 148 and Trial Ex. 37].
[100] David Steward [RP Vol. 16, pp. 23-24 and Trial Ex. 37].
[101] *Id.* at p.27, ll.4-9.
[102] *Id.* at p.29, ll.23-25.
[103] Finding No. 59 [CP 2473 thru 2474].

**extant soil conditions**."[104] The trial court's finding directly conflicts with the applicable section of the Washington Administrative Code.

> WAC 296-155-657(1) requires that workers in an excavation be protected from the dangers of cave-ins by either sloping the excavation or installing protective systems. WAC 296-155-657(2), (3). No protection is needed if the excavation is **less than four feet** *and* an examination reveals "no indication of a potential cave-in." WAC 296-155-657(1).[105]

The trial court found that the trenches were at or very near four feet. The WAC states that the safe harbor is "less than four feet.[106]" Thus the trial court's finding and conclusion should have been that all of the waterline trenches that were "at or very near four feet" were unsafe for lack of proper shoring. The trial court erred as a matter of law in interpreting the WAC and also erred in determining that there was "no evidence of ongoing or recurrent unsafe work practices."[107] All of this uncontested proof demonstrates that there was evidence of recurring unsafe practices. The City Engineer was rightfully concerned about Conway's pervasive lack of good safety practices.

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[104] Finding No. 15 [CP 2464] (emphasis added.)
[105] *Power City Electric, Inc. v. Dept. of Labor & Industries* No. 35676-1-III, 2018 WL 6002933, at * 2 (Nov. 15, 2018) (emphasis added).
[106] WAC 296-155-657(1)
[107] Finding No. 16 [CP 2464].

The trial court made no finding of bad faith or that the City Engineer made an arbitrary or capricious decision. The Contract specifically provides that the City Engineer must be satisfied with any tendered cure. To allow the trial court to second guess that decision without any finding of bad faith is contrary to the terms of the Contract and undermines the necessity that the City Engineer be allowed to exercise discretion in deciding whether to terminate the contract for default.

In Washington contracts are to be read as a whole and enforced according to their terms:

> In construing a written contract, the basic principles require that (1) the intent of the parties controls; (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. *Felton v. Menan Starch Co.,* 66 Wn.2d 792, 797, 405 P.2d 585 (1965).
>
> Interpretation of an unambiguous contract is a question of law. *Absher Constr. Co. v. Kent School District No. 415,* 77 Wn. App. 137, 141, 890 P.2d 1071 (1995). "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).[108]

The requirements for termination under the Contract Form Paragraph 22 and Std. Spec. 1-08.10(1) must be read as a whole and

[108] *Mayer v. Pierce Cty. Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995)

enforced according to their terms. Conway committed a breach of the Contract by having a serious safety violation and being cited by L&I. In addition, the City was entitled to terminate if it was not "satisfied" with Conway's efforts to cure the default. The trial court agreed that Conway was in default. The only remaining question under the terms of the Contract is whether Conway somehow proved that the City should have been satisfied with its efforts to cure the safety violation, i.e. talking to L&I.

Furthermore, subsequently discovered evidence can be used to justify termination:

> "Plaintiff argued, without support, at trial, in its post-hearing briefs, and request for reconsideration that the government cannot use information discovered "after the fact" to justify a termination for default. The law says otherwise. **Any extant reasons supporting a default termination are sufficient to sustain the default, even if not known or discovered until after the decision to terminate for default is made**. *College Point Boat Corp. v. United States,* 267 U.S. 12, 15–16, 45 S.Ct. 199, 200–01, 69 L.Ed. 490 (1925); *Pots Unlimited, Ltd. v. United States,* 220 Ct.Cl. 405, 600 F.2d 790, 793 (1979) (citations omitted); *Samuel T. Isaac & Assocs., Inc. v. United States,* 7 Cl.Ct. 255, 258 (1985); *422 *Joseph Morton Co. v. United States,* 3 Cl.Ct. 120 (1983), *aff'd,* 757 F.2d 1273 (Fed.Cir.1985). The termination for default was initially based on plaintiff's refusal to comply with the June 17 and July 9, 1987 directives of the contracting officer. The termination was justified, as well, by the later-discovered

> shoddy workmanship, and failure to meet contract specifications.[109]

The clear answer is that the Engineer was not satisfied and justifiably so. Subsequent to the March 25, 2016 termination, L&I cited Conway for the safety violation and assessed fines. Simply because evidence of default is discovered after termination does not make it irrelevant to the decision to terminate. The standard for a proper exercise of discretion to terminate has been held to be "when there is a nexus between his termination decision and the contractor's performance."[110] In this case, the City was not required to allow Conway to continue violating safety regulations. There is no evidence of assurances from Conway that they would change any of their past practices. In addition, Conway was subsequently cited for its deficient trench safety methods.

The trial court cites *Lisbon Contractors, Inc. v. U.S.*[111] for the proposition that the City failed to "justify" its termination.[112] The court in

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[109] *Mega Const. Co., Inc. v. United States*, 29 Fed. Cl. 396, 421–22 (Fed. Cl. 1993); *See also*, *Pots Unlimited, Ltd. v. United States,* 220 Ct.Cl. 405, 600 F.2d 790, 793 (Ct.Cl. 1979) (According to bedrock government contracts law, "a party can justify a termination if there existed at the time an adequate cause, even if then unknown." (citing *College Point Boat Corp. v. United States,* 267 U.S. 12, 15-16, 45 S.Ct. 199, 69 L.Ed. 490 (1925)).

[110] *McDonnell Douglas,* 182 F.3d at 1326..

[111] 828 F.2d 759 (1987).

[112] Conclusion No. 8, [CP 2478].

*Lisbon* simply says that "the government should bear the burden of proof with respect to the issue of whether termination for default was justified."[113] It also held that all the government needed to show was "a reasonable belief on the part of the contracting officer that there was no reasonable likelihood [of performance.]"[114] In *Lisbon* the government's failure to provide any direct testimony of delay was fatal to the government's case.[115] This is a far cry from this case where there is ample evidence of safety violations, in particular the citation by L&I for a serious safety violation endangering the life of a worker.[116]

This Court should reverse the trial court due to its erroneous Conclusions of Law and hold that the City Engineer had a reasonable belief that Conway had not cured its safety violation(s) and therefore made the decision to terminate in accord with the requirements of the Contract.

### B. <u>The Trial Court Should Have Allowed Set-off for the Cost of Correcting Conway's Defective Work Discovered After Conway Was Terminated.</u>

The trial court refused to consider the City's claims for replacing defective work because the defects were discovered after Conway was

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[113] *Lisbon*, 828 F.2d at 765.
[114] *Id.*
[115] *Id.*
[116] L&I Citation [Trial Ex. 59].

terminated.[117] The trial court ruled as a matter of law that the City was not entitled to recover anything for defective work that was not discovered before termination.[118] The trial court adopted the holding of an Oregon case, *Shelter Products, Inc. v. Steelwood*, which disallowed any recovery against a subcontractor for defective work discovered after the subcontractor was terminated for convenience.[119]

The Contract in this case provides that the City will not pay for defective work.[120] The Contract also provides that where a termination for default has been issued and it is later determined that the Contractor was not in default, the termination shall be treated as one for public convenience.[121]

Under a termination for convenience, the Std. Specs. require that Conway may only recover "for the actual work performed" and that "payment will be made in accordance with Section 1-09.5."[122] The trial

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[117] Conclusions 16-19 [CP 2701-2704].
[118] *Id.*
[119] *Id. See, Shelter Products, Inc. v. Steelwood Construction, Inc.*, 257 Or. App. 382, 402 (2013) (holding that a general contractor that terminated a subcontractor for convenience was barred from recovering the cost of correcting the subcontractor's work when the defects were discovered after the date the subcontractor was terminated and no notice of the alleged defective work or opportunity to cure was provided to the subcontractor.) A copy of the *Shelter Products* case is attached as App. F.
[120] Std. Spec. 1-05.7, [Trial Ex. 1, p.1-28[.
[121] Std. Spec. 1-08.10(2), [Trial Ex. 1, p.1-81].
[122] Std. Spec. 1-08.10(4), [Trial Ex. 1, p.1-82].

court agreed that Section 1-09.5 applies to determine amounts due Conway.[123]

However, the trial court did not analyze the effect of Section 1-09.5 upon payment for partially completed work. If it had, it would have realized that the Contract specifically allows a set-off for defective work, even where the termination is one for convenience:

> 4. The total payment for any one item in the case of a deletion or partial termination shall not exceed the Bid price as modified by approved change orders **less the estimated cost (including overhead and profit) to complete the Work** and less any amount paid to the Contractor for the item.[124]

Thus under the terms of the Contract, the City is only obligated to pay for completed work and is not required to pay for defective work. In addition, under Std. Spec. 1-09.5, the City is entitled to set-off the cost to complete defective work against amounts otherwise due for completed Work. The provisions of 1-09.5 directly undercut the trial court's ruling that Conway was somehow entitled to notice and opportunity to cure under a termination for convenience.[125]

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[123] Conclusion No. 18, [CP 2703 thru 2704].
[124] Std. Spec. 1-09.5 [Trial Ex. 1, p.1-88].
[125] Conclusion No. 19 [CP 2704].

Moreover, under generally applicable Washington law, the City was entitled to set off its costs to complete and repair Conway's Work. In *Ducolon,*[126] a subcontractor was held liable for defective work discovered after the subcontractor had been terminated from the project. This was the case even though it was eventually determined that the general contractor had improperly terminated the subcontractor due to inadequate notice.

> Under the Restatement 2d, a defaulting party's award is offset by the loss caused by his or her part performance. Offsetting the award by the defendant's damages is appropriate because restitution under § 374(1) is measured by the *benefit conferred to the defendant.* Thus, there can be no recovery unless the value of the plaintiff's part performance exceeds the amount of the defendant's injury. Simpson, at § 204. As a result, whether the defendant elects to affirm or disaffirm the contract is irrelevant to calculating the value of the benefit conferred to the defendant.[127]

The trial court's rulings in this regard were contrary to the provisions of the Contract and applicable Washington law and should be reversed.

### C. <u>Attorney Fee Award -- Conway Was Not the Prevailing Party Because Conway Did Not Make an Offer of Settlement.</u>

RCW 39.04.240 requires that any dispute involving a public work contract is subject to the provisions of RCW 4.84.250 et seq., which

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[126] *Ducolon Mech..*, 77 Wn. App. at 713-14.

requires the plaintiff to make an offer of settlement in order to be considered the "prevailing party."[128] The same provision prohibits waiver of the requirements of RCW 39.04.240:

> (1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.
>
> (2) **The rights provided for under this section may not be waived by the parties to a public works contract** that is entered into on or after June 11, 1992, and **a provision in such a contract that provides for waiver of these rights is void as against public policy**. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.[129]

In one of the earliest cases applying RCW 39.04.240 the Court of Appeals held that application of the statute to determine the prevailing party in a public works dispute is "mandatory."

> An award of attorneys' fees to the prevailing party is mandatory. RCW 4.84.250. A defendant is the prevailing

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[127] *Id.*
[128] RCW 39.04.240.
[129] RCW 39.04.240 (emphasis added).

> party where the plaintiff either recovers nothing or recovers less than the amount for which the defendant offered to settle. RCW 4.84.270.[130]

### 1. The Trial Court Erred As a Matter of Law by Waiving the Provisions of RCW 39.04.240.

The instant case falls directly within the provisions of the statute prohibiting waiver of its provisions by contract. RCW 39.04.240 overrides any contractual attorney fee provision to the extent the contract does not require offers of settlement in order to determine the prevailing party. That is precisely what the trial court ignored when it ruled that Conway was the "substantially prevailing party."

In *Vinci*, our Supreme Court recently addressed the following issue involving RCW 39.04.240 and a bad faith insurance dispute:

> Is RCW 39.04.240, which applies the attorney fee award provisions of RCW 4.84.250 through RCW 4.84.280 to public works contracts, the exclusive fee remedy available in public works contract disputes where the primary issue is coverage?[131]

In that case, the defendant surety companies argued that RCW 39.04.240 was the exclusive means to be awarded attorney fees on a public works contract dispute. The sureties claimed that because King

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[130] *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 148, 890 P.2d 1071 (1995).

[131] *Vinci*, 188 Wn.2d at 625 (holding that RCW 39.04.240 does not displace *Olympic Steamship*).

County had not made any offer of settlement, under RCW 39.04.240 it could not claim to be the prevailing party. The County claimed that because this was a coverage dispute the equitable fee shifting provisions of *Olympic Steamship*[132] should apply regardless of the terms of RCW 39.04.240. The Supreme Court determined that the nature of a coverage dispute differs fundamentally from disputes controlled by RCW 39.04.240:

> "By way of operation, RCW 4.84.250 does not apply to coverage disputes because such disputes are legal in nature: either there is coverage under the language of the insurance contract or bond or there is not. *See, e.g., Colo. Structures,* 161 Wash.2d at 606, 167 P.3d 1125 ("Since the question is a legal one, which required Structures to litigate to obtain a declaratory judgment ruling regarding the meaning of the contract, it is a coverage dispute."). **On the other hand, the statutory fee remedy clearly envisions a situation where the parties disagree about the *amount* owed rather than the legal question of whether performance has been triggered**."[133]

The Supreme Court's decision in *Vinci* addressed a narrow issue concerning the differences between an insurance coverage dispute subject to *Olympic Steamship* and a breach of contract dispute subject to RCW 39.04.240.

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[132] *Olympic S.S. Co. v. Centennial Ins. Co.,* 117 Wash.2d 37, 811 P.2d 673 (1991).

The Supreme Court ultimately held that in the context of insurance coverage disputes, RCW 39.04.240 is not the exclusive fee remedy available. However, the Supreme Court did not hold that the language of RCW 39.04.240 can be altered or waived by contract.

**2. The Trial Court Erred As a Matter of Law by Awarding Conway Fees Based Upon Contract Fee Shifting Provisions in Disregard Of RCW 39.04.240.**

Conway and the trial court relied upon *Vinci* for the erroneous proposition that RCW 39.04.240 is simply a parallel means of awarding fees. The Supreme Court's ruling in *Vinci* is distinguishable from the instant case because Conway's claim for attorney fees is based upon contract, not equity. Furthermore, at no time did the Supreme Court rule that the specific language of RCW 39.04.240 which makes it mandatory in any public works contract dispute was somehow optional.

Unlike the dispute in *Vinci*, the present case is based upon a Contract that includes a fee shifting provision. The trial court interpreted the Contract in disregard of RCW 39.04.240. The problem with the trial court's decision lies with how the "prevailing party" is determined under the statute vs. the Contract.

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[133] *Vinci*, 188 Wn.2d at 630.

*Vinci* made mention of the fact that King County could have included a contract attorney fee provision:

> Under the facts of this case, King County opted not to include a fee provision in either the construction contract or the performance bond, both of which were drafted by King County. *See* RCW 4.84.330. As the Sureties suggest, this may have been a strategic decision to limit liability for attorney fees in the event that King County found *itself* in breach of the contract.[134]

What the Supreme Court does not address in *Vinci* is what effect a contractual fee provision would have if it conflicted with the provisions of RCW 39.04.240. The Supreme Court concluded that RCW 39.04.240 is not the exclusive fee remedy available in the context of a surety bond:

> This court has previously held that the rule in *Olympic Steamship* applies to performance bonds in the surety context. Although a statutory fee provision exists for public works contracts under RCW 39.04.240, we hold that it is not the exclusive fee remedy available. Furthermore, the trial court properly determined that segregation of the fees was impossible. Accordingly, we affirm the Court of Appeals.[135]

The Supreme Court's holdings in *Vinci* are thus confined to the context of insurance coverage disputes involving the equitable remedies available under *Olympic Steamship*. The *Vinci* decision made no determination or even interpretation concerning the statute's requirement

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[134] *Vinci*, 188 Wn.2d at 631.

that it cannot be waived by the parties and the mandate that any attempt to do so is void as against public policy.

It is anticipated that Conway will attempt to argue that its claims for declaratory relief are more akin to an insurance coverage dispute rather than a construction claim dispute. This is a distinction without a difference.

Under the Contract, the amounts ultimately due Conway turned upon whether the termination is one for default or one for convenience. Under the terms of the Std. Specs., a contractor terminated for default is subject to paying for the additional cost of completing the work required under the Contract.[136] If the contractor is ultimately determined to be not in default, the termination becomes one for convenience.[137] Under a termination for convenience, the contractor is entitled to recover payment for the "actual work performed."[138] Thus Conway was entitled to payment for work performed under either scenario and the question of whether

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[135] *Vinci*, 188 Wn.2d at 634.

[136] Std. Spec. 1-08.10(1), [Trial Ex. 1, p.1-81]. Under Std. Spec. 1-08.10(1) the contractor is not entitled to any additional payments until the Work has been completed. Once the Work is completed, the Contractor is responsible for any additional costs of completion.

[137] *Id.* "If a notice of termination for default has been issued and it is later determined for any reason that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Termination for Public Convenience in Section 1-08.10(2)."

[138] Std. Spec. 1-08.10(4), Trial Ex. 1, p.1-82.

Conway was properly terminated for default simply determined whether Conway was subject to counterclaims and set-offs for the City's cost to complete. The declaratory relief is inextricable from Conway's claim for amounts due.

The trial court determined that Conway was the "substantially prevailing party" even though Conway did not make any offer of settlement as required by RCW 39.04.240. The trial Court's reliance upon *Vinci* to the contrary is an error of law because it violates the provisions of the statute.

As stated by Justice Wiggins in his dissent in *Vinci* (joined by two other Justices):

> Parties may not contract around these requirements. "The rights provided for ... may not be waived by the parties to a public works contract ..., and a provision in such a contract that provides for waiver of these rights is void as against public policy." RCW 39.04.240(2).[139]

The trial court's award of fees and costs to Conway should be reversed in its entirety because under the provisions of RCW 39.04.240 Conway was not the prevailing party and is therefore not entitled to any award of fees and costs.

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[139] *Vinci*, 188 Wn.2d at 640–41.

### 3. The Trial Court Erred As a Matter of Law by Enforcing a Unilateral Attorney Fee Provision Under RCW 4.84.330 Instead of Following the Provisions of RCW 4.84.250 Through RCW 4.84.280.

RCW 39.04.240 applies the provisions of RCW 4.84.250 through RCW 4.84.280 to any action "arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party. . . ."[140] In turn, RCW 4.84.250 states that it overrides the provisions of all other provisions of Chapter 4.84 RCW:

> **Notwithstanding any other provisions of chapter 4.84 RCW** and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, **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**. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.[141]

Thus any application of RCW 4.84.330 which deals with unilateral contract clauses and determining the "prevailing party" as the "substantially prevailing party" is subordinated to RCW 4.84.250 through RCW 4.84.280 and RCW 39.04.240. Under these interrelated statutes,

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[140] RCW 39.04.240(1).
[141] RCW 4.84.250 (emphasis added).

any plaintiff in a public works dispute must make an offer of settlement in order to be considered the "prevailing party."

The attorney fees provision in the Contract is clearly a unilateral fee provision because the Contract awarded "defense costs" but only as a judgment against plaintiff or as a setoff against the plaintiff. This is a "tails I win, heads you lose" provision:

> **1-09.11 Disputes and Claims**
> The Owner and Contractor each agree that in the event either of said parties brings an action in any court arising out of this Contract, the prevailing party in any such lawsuit shall be entitled to an award of its cost of defense. "Cost of Defense" shall include, without limiting the generality of such term, expense of investigation of plaintiff's claims, engineering expense, expense of deposition, exhibits, witness fees, including reasonable expert witness fees, and reasonable attorney's fees. <u>The obligation of payment under this clause shall be incorporated in any judgment rendered in such action either in the form of a judgment against plaintiff for any defendant or in the form of reduction of the judgment otherwise rendered in favor of plaintiff against any defendant</u>, and shall be paid within thirty (30) days after entry of judgment.[142]

The trial Court held in its Order Awarding Fees and Costs:

> 3. The Court finds and concludes that Special Provision § 1-09.11 awards reasonable attorney fees and specifically-defined costs to the prevailing party, whether plaintiff or defendant and whether prosecuting or defending

[142] Project Manual, Special Provision §1-09.11 Disputes and Claims, [Trial Ex. 2, p.223] (emphasis added).

> contract claims, for the following reasons at a minimum: (a) the first paragraph of the clause applies mutually on its face to "either of said parties" that may prevail in a lawsuit; (b) the term "Cost of Defense" cannot be read unilaterally and **must be applied reciprocally to either prevailing party to define the costs the parties mutually intended for the prevailing party to recover**; and (c) the clause as a whole (when reading the first and second paragraphs in concert) is ambiguous and therefore construed against the City as drafter.[143]

The trial court utilized RCW 39.04.330 to read the attorney fee clause reciprocally. The provisions of RCW 39.04.330 require any unilateral attorney fees provision to be enforced bilaterally.[144]

Our Supreme Court has stated that RCW 4.84.330 "must" be read into any contract containing a unilateral attorney fee provision:

> By its plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral. The statute ensures that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision. It does so by expressly awarding fees to the prevailing party in a contract action. It further protects its bilateral intent by defining a prevailing party as one that receives a final judgment. **This language must be read into a contract that awards fees to one party any time an action occurs, regardless of whether that party prevails or whether there is a final judgment**. *Cf. Touchette v. Nw. Mut. Ins. Co.,* 80 Wn.2d 327, 335, 494 P.2d 479 (1972) (holding that uninsured motorist statute expresses overriding public policy, "so that the intendments

[143] Order Awarding Attorney Fees and Costs, p.3, ¶¶1-5 [CP 3397] (emphasis added).
[144] RCW 4.84.330.

of the statute are read into and become a part of the contract of insurance").[145]

But the trial court failed to give effect to RCW 4.84.250 that requires any plaintiff (i.e. Conway) to make an offer of settlement in order to be considered a prevailing party. According to its unequivocal provisions, RCW 4.84.250 controls all other provisions of Chapter 4.84 RCW including RCW 4.84.330. Even if *arguendo* the trial court's determination that RCW 39.04.240 is not an exclusive fee remedy were to be accepted, RCW 4.84.250 still controls RCW 4.84.330 and in turn Special Provision §1-09.11 of the Contract. Thus the trial court's conclusions and findings in awarding Conway fees and costs was based upon a fundamental error of law.

The trial court ignored the statutory requirements of RCW 39.04.240 and RCW 4.84.250 *et seq*, and effectively rewrote the Contract in favor of Conway. The trial Court's award of fees and costs to Conway should be reversed.

**D. <u>Request for Attorneys' Fees and Costs on Appeal.</u>**

The City is entitled to attorneys' fees and costs on appeal.[146] If this Court rules that the City's termination for cause was proper *and* that the

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[145] *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489–90, 200 P.3d 683, 687

special provision regarding "costs of defense" is enforceable, then the City will be deemed the prevailing party under the Contract and entitled to an award of attorneys' fees. Similarly, if this Court rules that the termination for cause was proper *but* the special provision regarding "costs of defense" is not enforceable, then the City should still be entitled to an award of attorneys' fees and costs under RCW 39.04.240 because there is little doubt that the City will beat its prior settlement offer.

Therefore, the City respectfully requests an award of attorneys' fees and costs.

## V. CONCLUSION

The City Properly Terminated Conway. The City Engineer met all of the Contract and legal requirements to terminate Conway for cause. The trial court's findings and conclusions utilized the wrong test in holding that Conway cured all of its default conditions. Rather than evaluate whether the City met the specific requirements of the Contract the trial court found that Conway did not "refuse or neglect" to cure its serious safety violations. This is a non-sequitur Finding and does not support the trial court's Conclusions that the City failed to justify its

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(2009).

termination. The trial court's other Findings concerning the depth of trenches taken together with the unrebutted expert testimony of David Stewart, PE show that the City Engineer had reason to believe that Conway remained in default and failed to provide any cure let alone a reasonable one. This is in keeping with Washington law regarding the reasonable exercise of discretion and applicable Federal case law. The City Engineer's decision to terminate Conway was also subsequently validated by L&I's citation for Conway's serious safety violation. The trial court should be reversed and judgment entered finding the City properly terminated Conway.

The City Is Entitled to Set Off the Cost of Correcting Conway's Defective Work. The trial court erred as a matter of law when it held the City is barred from asserting set-offs and counterclaims for Conway's defective work discovered after Conway was terminated. The City discovered significant defective concrete panels that had to be replaced. As observed by the trial court, these panels were replaced at significant cost to the City. Washington law should prevail in this regard because it is based upon the concept that a contractor is only entitled to be paid for the

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[146] *Reeves v. McClaim,* 56 Wn. App. 301, 311, 783 P.2d 606 (1989) ("A contractual provision for an award of attorney fees at trial supports an award of attorney fees on

amounts due under the Contract. In this case the Contract provides that the City is not obligated to pay for defective work. In addition, when there is incomplete performance, the value to be paid for the part performance is based upon the benefit conferred. Under *Eastlake v. Hess*, and *Ducolon*, that value must take into account the cost of correcting defective work because that cost decreases the value of the part performance to the recipient, in this case the City. The trial court should be reversed and the case remanded to determine the amount recoverable by the City.

Conway Is Not Entitled to an Award of Fees and Costs Under RCW 39.04.240. The applicable statute to this issue is RCW 39.04.240. The statute specifically prohibits waiver of its provisions by contract because such waiver is against public policy. The holding in *Vinci* is inapplicable to this question because there the Supreme Court only considered whether RCW 39.04.240 displaced recovery of fees under *Olympic Steamship*. The question of whether the language of RCW 39.04.240 regarding competing contract provisions was not addressed. The statute is clear – Conway made no offer of settlement and therefore cannot be the prevailing party. The trial court should be reversed as a matter of law.

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appeal."); *See* RAP 14.2; RAP 14.3; RAP 18.1; *see also* RCW 4.84.010, .030, .080.

Respectfully submitted this 21st day of November, 2018.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By _____

William A. Linton, WSBA #19975
Christopher W. Pirnke, WSBA #44378
Attorneys for Appellant City of Puyallup

## DECLARATION OF SERVICE

I, Leslie Addis, under penalty of perjury under the laws of the State of Washington, hereby declare that on November 21, 2018, the following documents were served on the following individuals in the manner indicated below:

1. *Appellant's Opening Brief.*

| | |
|---|---|
| *Attorneys for Petitioner-Plaintiff Conway Construction Company:*<br><br>Colin Folawn, WSBA #34211<br>Joseph J. Straus, WSBA #12063<br>Ryan W. Dumm, WSBA #46738<br>Marti J. McCaleb, WSBA #43303<br>Schwabe, Williamson & Wyatt, P.C.<br>1420 – 5th Avenue, Suite 3400<br>Seattle, WA 98101 | ☐ Personal Service (Legal Messenger)<br>☐ U.S. Mail<br>☐ Certified Mail<br>☐ Overnight Mail<br>☒ E-Service<br>☒ Email *(per e-service agreement)*:<br>jstraus@schwabe.com<br>rdumm@schwabe.com<br>jmilner@schwabe.com<br>rrebusit@schwabe.com<br>cbiro@schwabe.com<br>fretonio@schwabe.com<br>cfolawn@schwabe.com |
| *Co-Counsel for Defendant City of Puyallup:*<br><br>Joseph N. Beck, WSBA #26789<br>City Attorney<br>City of Puyallup<br>333 South Meridian<br>Puyallup, WA 98371 | ☐ Personal Service (Legal Messenger)<br>☐ U.S. Mail<br>☐ Certified Mail<br>☐ Overnight Mail<br>☒ E-Service<br>☒ Email *(per e-service agreement)*:<br>JBeck@ci.puyallup.wa.us<br>czimmerman@ci.puyallup.wa.us |

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|---|---|
| *Attorneys for Plaintiffs Wilson Concrete Construction, Inc. and Transportation Systems, Inc.:*<br><br>J. Craig Rusk, WSBA #15872<br>Ryan M. Gilchrist, WSBA #50629<br>Oles Morrison Rinker & Baker LLP<br>701 Pike Street, Suite 1700<br>Seattle, WA 98101-3930 | ☐ Personal Service (Legal Messenger)<br>☐ U.S. Mail<br>☐ Certified Mail<br>☐ Overnight Mail<br>☒ E-Service<br>☒ Email *(per e-service agreement)*:<br>rusk@oles.com<br>gilchrist@oles.com<br>trimbour@oles.com<br>mora2@oles.com |

DATED this 21st day of November, at Bellevue, Washington

Leslie Addis
Legal Assistant

# APPENDIX A

16-2-07731-1 49993520 FNFCL 09-27-17

The Honorable Stanley J. Rumbaugh, Dept. 18
Trial Date: June 20, 2017

FILED
DEPT. 18
IN OPEN COURT
SEP 26 2017
Pierce County Clerk
By BM
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF PIERCE

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|---|---|
| CONWAY CONSTRUCTION COMPANY, an Oregon corporation,<br><br>Petitioner-Plaintiff,<br><br>vs.<br><br>CITY OF PUYALLUP, a Washington municipal corporation,<br><br>Respondent-Defendant. | No. 16-2-07731-1<br><br>Consolidated with: 16-2-10126-2<br>16-2-10216-1<br><br>**FINDINGS OF FACT AND CONCLUSIONS OF LAW**<br><br>**PHASE I** |

This matter came before the Court for trial by the Court pursuant to Civil Rule 39(b)(1). Phase I of trial commenced on June 20, 2017, and concluded on July 24, 2017.

The Court heard testimony from the following individuals: K. Wendell Adams, a principal of KBA, Inc. Construction Management Specialists; Gary T. Hardiman, an employee of Fruitland Mutual Water Company; Ralph Walker, also an employee of Fruitland Mutual Water Company; Steven O. Cox, a field inspector for KBA, Inc.; Fernando Fierro, a former employee of Conway Construction Company; David Lundeen, a former employee of the Washington State Department of Labor and Industries; Craig Wilson, project manager and dispatch for Wilson Concrete Construction, Inc.; Austin Fisher, a civil engineer and senior consultant at Parametrix; Jack L. Wright, a civil engineer and senior engineer at Parametrix;

David C. Stewart, a civil engineer and owner of Stewart Consulting; Andrew Marks, a civil engineer and managing director of the Puget Sound Concrete Specification Council; Charles "Ted" Hill, a senior project engineer for the City of Puyallup; McKenzie Baker, a project administrator for Conway Construction Company; Mark Palmer, City Engineer for the City of Puyallup; Kenneth Conway, a project superintendent for Conway Construction Company; Kevin Yamamoto, City Manager for the City of Puyallup; and David J. Conway, a civil engineer and owner of Conway Construction Company.

There were 140 exhibits marked with 110 exhibits being admitted into the record in this phase of the trial. Several of the remaining exhibits were published for illustrative or impeachment purposes but not admitted. That is the evidentiary record that informs the Court's decision and from which the Court makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

Finding of Fact No. 1: Respondent-Defendant City of Puyallup ("City") is a Washington State municipal corporation.

Finding of Fact No. 2: Petitioner-Plaintiff Conway Construction Company ("Conway") is a duly licensed Washington business, and has been since 1982. Conway is engaged in general construction activities, above 75 percent of which involve contracts requiring placement of underground utilities.

Finding of Fact No. 3: On or about September 21, 2015, the City and Conway (collectively, the "Parties") entered into a Public Works Contract related to improvements to be constructed on, under, and around 39th Avenue Southwest between 11th Street Southwest and 17th Street Southwest in the City of Puyallup (the "Contract"). The Contract is located at Exhibit 5. The Court will refer to the subject of the Contract as the "Project."

Finding of Fact No. 4: The Contract, at Exhibit 5, incorporated the City's bid documents. These bid documents included, but are not necessarily limited to, the 2014 edition



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of the Washington State Department of Transportation Standard Specifications for Road, Bridge, and Municipal Construction ("WSDOT Standard Specifications"), which are located in the record at Exhibit 1. The Contract also included the City's Project Manual, located at Exhibit 2, which includes amendments to the Standard Specifications, the City's Special Provisions, and the Plans, among other documents.

Finding of Fact No. 5: Beginning on or about November 5, 2015, and through March 3, 2016, the Parties and interested third parties held weekly meetings to discuss Project-related issues. Notes were kept and are in the Court's record at Exhibit 13. Mr. Hill was the City's project engineer on the Project. Mr. Cox was an inspector utilized by the City to be the City's on-site "eyes and ears" as the Project went forward. Mr. Hill and Mr. Cox often, but not always, attended the weekly meetings. Mr. Palmer, the City Engineer, infrequently attended the weekly meetings.

Finding of Fact No. 6: Mr. Cox was employed by KBA, Inc., which is a consulting firm hired to provide construction observation services for the City. That contract (between the City and KBA, Inc.) is in the record at Exhibit 26. Mr. Cox generally reported to Mr. Hill and only infrequently spoke with Mr. Palmer. Mr. Cox's supervisor at KBA was Mr. Adams.

Finding of Fact No. 7: Mr. Cox, based on KBA's scope of services, would process pay authorization requests and would complete and file Inspector's Daily Reports ("IDRs"). The IDRs from December 7, 2015, through March 29, 2016, are in the record at Exhibit 19. Mr. Cox included some photographs in the IDRs, and additional photographs could be posted and reviewed at a SharePoint site, which is an Internet application. Mr. Cox was the first point of contact for the City with Conway.

Finding of Fact No. 8: The WSDOT Standard Specifications at Section 1-05.2 give authority to the Engineer to appoint assistants and inspectors. Section 1-05.2 also provides the inspector with authority to suspend work or reject defective work, but it does not require

the inspector to make those decisions. It was under this Section of the WSDOT Standard Specifications that Mr. Cox was engaged.

Finding of Fact No. 9: Mr. Cox took a series of photographs of the trench work, which have been admitted into the record at Exhibit 37. There was much testimony about the depth and dimensions of these trenches depicted in the photographs. Most of the depth and trench dimensions are estimated or are inconclusive.

Finding of Fact No. 10: Mr. Cox, though he took the photographs and testified as to trench depths at various locations, never measured any of the trench depths. Mr. Cox did not mention any trenching or shoring concerns in any of his IDRs. The minutes of the weekly meetings do not reflect a single occasion where trench shoring, sloping, or construction was mentioned as an issue of non-conformance. Mr. Adams acknowledged that Mr. Cox lacked the expertise to determine issues related to trench safety.

Finding of Fact No. 11: Multiple calls were made, at first on an anonymous basis, by Mr. Hill to the Department of Labor and Industries related to safety violations on the Project site. David Lundeen was the City's contact person with the Department of Labor and Industries related to these safety concerns. Exhibits 55, 56, 57, 61, and 62 are among the exhibits reflecting the exchange of information between Mr. Hill and Mr. Lundeen related to job site safety issues.

Finding of Fact No. 12: The Department of Labor and Industries sent out Mark Cornelius to do a site inspection and observe potential safety infractions. None were noted by Mr. Cornelius.

Finding of Fact No. 13: There was much testimony about a deeper pit estimated at 16 to 18 feet in depth depicted in Exhibit 55, Photograph 2. Mr. David Conway testified that he saw the trench/pit and had obtained an operator from the Operating Engineers' Union skilled in digging such deep trenches. Mr. David Conway testified that the trench box and safety plates extended to the bottom of the hole and that subsequent to the photograph being taken,

which showed no worker in the hole, an angled exit rout was dug and additional shoring on the face of the hole toward the street side was placed. The Department of Labor and Industries' investigation into this potential safety violation was inconclusive, and the Court's evaluation of the evidence reaches that same result.

Finding of Fact No. 14: The Department of Labor and Industries issued a citation for an improperly benched trench. The citation and appeal are at Exhibit 63. The photograph of the trench in violation is at Exhibit 37, Photograph 21. Mr. Ken Conway acknowledged incomplete benching of this trench, and the Court does take safety on the job extremely seriously. However, this is the single serious safety violation warranting a finding in this case. The work on this trench—the offending trench—occurred on or about March 7, 2016. The finding of this instance as the single safety violation is based on a preponderance of the evidence standard.

Finding of Fact No. 15: Review of the waterline dimensions in Exhibit 35 desiganted WA1 – WA8 (inclusive) reflect the trench depth from the finished grade to the bottom of the trench and show it to be approximately four feet through the entire run of the line. This is exclusive of the placement of bedding at the bottom of the trench. This evidence leads the Court to conclude that the waterline trenching, about which there was much testimony, was maintained at or very near four feet, a depth that requires no benching or shoring given extant soil conditions.

Finding of Fact No. 16: In Exhibit 46, the City advised David Conway by letter that all safety violations needed to be corrected to the Department of Labor and Industries' satisfaction, or work would be stopped. There is no evidence that the Department of Labor and Industries was not satisfied with Conway Construction's safety practices on the site after March 9, 2016, and the record contains no evidence of ongoing or recurrent unsafe work practices. In Exhibit 119, the City admitted there were no safety violations on the Project site after March 9, 2016.

Finding of Fact No. 17: The Project plans designed by Parametrix pursuant to a contract with the City are in the record at Exhibit 35. These plans bear the stamp of registered professional engineers employed by Parametrix. It is in these plans that the various depths of cuts and improvement locations are called out.

Finding of Fact No. 18: KPG, another construction manager, provided the City with a form called a Nonconformance Report ("NCR"). This was not a form specified for use in the Contract, but it was utilized to discharge the City's obligation to report concerns about the contractor's performance of the work to Conway. This form was proposed to discharge the reporting requirement specified by Exhibit 26, Section D(2), and did so adequately.

Finding of Fact No. 19: Mr. Adams discussed termination of Conway from the Project at least one month before the suspension/termination process began. The termination discussions based on Exhibits 27 and 39 occurred on or before February 8, 2016. Mr. Adams characterized termination for default as a drastic remedy and so advised the City officials. The termination decision in early February was one of two times that Mr. Adams actually spoke with Mr. Palmer. The rest of his contacts were with Mr. Hill.

Finding of Fact No. 20: Mr. Adams believed that prior to termination the best practice would have been to tender the Contract to the contractor's surety and then to meet and discuss the circumstances with the contractor—that is, Conway—and the surety. Mr. Adams advised that this process should be completed before meeting with a new contractor, but his advice was not followed by the City in this regard.

Finding of Fact No. 21: Part of the work Conway was hired to do involved placement of water pipe for Fruitland Mutual Water Company ("Fruitland"). Mr. Ted Hardiman, who was general manager of Fruitland at the time the Project was under construction, was on site and verified that asbestos-cement pipe ("A/C pipe") was being cut as a part of the trench work. Mr. Hardiman provided snap cutters for re-sectioning the A/C pipe. However, the rest of his

testimony about the process was inconclusive based on a lack of his personal observations of anyone actually cutting the A/C pipe.

Finding of Fact No. 22: Exhibit 31 is an email from Mr. Hill to Mr. Hardiman referencing "Conway trench hazard." This email was sent after the March 9, 2016 suspension letter in the record at Exhibit 44. The suspension letter was issued by Mr. Palmer to Conway. It is also after the date that, as will be detailed hereinafter, the Court finds the City Engineer had decided to terminate Conway for default as expressed in the March 25, 2016 notice of default letter, which is in the record at Exhibit 58.

Finding of Fact No. 23: Exhibit 31, when considered in light of the entire record, seems to be an after-the-fact attempt to provide support for termination that is unsupported in the contemporaneous documentation created as the Project went forward.

Finding of Fact No. 24: Mr. Cox testified that Exhibit 35 was the construction plans with which he was attempting to ensure compliance at the site. He would meet with David Conway frequently throughout the day to discuss and evaluate the work progress. He would prepare his IDRs each day and deliver them weekly to Mr. Hill, along with the pay notes.

Finding of Fact No. 25: Pay notes were derived from field observations related to the progress of the work and were calculated from the schedule of prices specified in Exhibit 36. Per the schedule of prices, traffic, curb, and gutter were Items A58 and A59 and were reimbursed at $16.00 per linear foot. Permeable ballast was Item A27 and was reimbursed at $37.00 per ton and tracked with certified truck tickets. Gravel borrow, Item A22, was paid at $17.00 per ton and was likewise tracked using certified truck tickets.

Finding of Fact No. 26: Exhibit 38 contains a photograph taken by Mr. Cox documenting a sagging tension wire between the signal pole and temporary pole. The pole eventually leaned out of vertical alignment at some time before March 9, 2016.

Finding of Fact No. 27: The evidence demonstrates that the use of pervious concrete on this Project was unique and the first such application on a major arterial in the United States.



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Generally, the pervious concrete was poured to a depth of nine inches. The permeable ballast, below the pervious concrete, was specified to be four inches in the roadway, increasing to 12 inches at intersections. The subsurface is also required to be sufficiently loose to allow water infiltration. Over-compaction, *i.e.*, over-compression of the subgrade, was prohibited. A photograph in Exhibit 38 shows a ballast depth being measured at a grade stake, which is angled in the photograph but appears to be between six and seven inches deep at the particular grade stake from which the measurement was taken. In Exhibit 38, that photograph is marked as 00008.

Finding of Fact No. 28: Permeable ballast was also used beneath the roadway to fill several 6-inch by 24-inch check dams. The subgrade preparation plan, which is in the record as Exhibit 9, required loose or incompetent materials in the subgrade to be excavated to firm bearing and filled with gravel borrow. Subsequently the fill material specification was changed to specify permeable ballast, which is at Exhibit 18.

Finding of Fact No. 29: There were two large areas of incompetent material that needed over-excavation. There was one area on either side of the Costco street frontage. A large vault was installed and required permeable ballast import to a significant depth. Several smaller locations required over-excavation was well. Existing subsurface that was lower than finished subsurface grade was filled using common borrow, as were some sections under the sidewalk, as reflected in Exhibit 42.

Finding of Fact No. 30: The payment for ballast import was alleged to be excessive by the City, which utilized a neat-line calculation reflected in Exhibit 96. This alleged excess resulted in Conway's Pay Request No. 3 to be refused and was a major driver of conflict between the Parties.

Finding of Fact No. 31: Review of the IDRs at Exhibit 19 reflect that Wilson Concrete Construction, Inc. ("Wilson") completed its pour of Wall C on January 26, 2016. The forms had been set for the pour on January 12, 2016, and observed by Mr. Cox, who raised no

concern to the contractor or subcontractor—that is, Wilson—related to either their process or performance.

Finding of Fact No. 32: There was a lack of detail in the plans related to integration of the luminaire foundation and the footing for Wall C. Conway sent a Request for Information ("RFI") to obtain the City's specifications for this luminaire foundation design.

Finding of Fact No. 33: There was discussion of the luminaire foundation engineering in Wall C reflected in the IDRs on February 12, 2016. Exhibit 76 more fully discusses the engineering concerns related to the luminaire foundation and how the now new Wall C terminated at an existing joint about five feet west of where it was designed to end.

Finding of Fact No. 34: No discussion of Wall C appears to have taken place at weekly meetings until March 3, 2016, documented in Exhibit 13. At the March 3, 2016, weekly meeting, Wall C was referenced as the subject of an NCR, that being NCR No. 8, which was issued on or about March 3, 2016. This is contained in the record at Exhibit 30.

Finding of Fact No. 35: Mr. Hill believed he was aware of the nonconformance of Wall C in December of 2015, but he did not recall a conversation with Conway personnel about it.

Finding of Fact No. 36: David Conway acknowledged that he made a decision to terminate Wall C 4 feet 10 inches short of its extension as detailed in the plans. David Conway admitted this was a field adjustment he decided upon without requesting or receiving input from the City Engineer. He believed utilizing an existing wall joint, rather than proceeding to where the design called for termination of Wall C, where there was no joint, was a better methodology.

Finding of Fact No. 37: As will be discussed, the City chose to direct Conway to remove the newly created Wall C and rebuild it per the plan specifications.

Finding of Fact No. 38: On January 22, 2016, following completion of field verification of pervious concrete panel pours in Rows D, located in the north lanes of 39th Avenue, the City alleged some of the panels were out of tolerance related to slope. *See* Exhibit 69, NCR

No. 1. There was also cracking of some panels at locations not contemplated by the joint plan, along with spalling along the edge of Row D and some high and low spots. *See* Exhibit 69, NCR Nos. 06 and 07. Wilson was made aware of these issues, and you can refer to Exhibits 67 and 68 in the record. A nonconformance order 1a, dated February 9, 2016, and in the record as Exhibit 69 also reflects issues related to out of tolerance panels in Rows D and E.

Finding of Fact No. 39: As the Parties were attempting to resolve what to do to correct the panels out of tolerance, on February 8, 2016, the traffic was shifted to the north lanes so work could proceed on the south lanes. The City was aware of and approved, directly or tacitly, this traffic shift. The City's approval occurred some time the first week of February 2016. Mr. Palmer was not aware that Mr. Hill was working to arrange the traffic shift on February 2, 2016. In addition to witness testimony, Exhibit 130 informs the Court related to this finding. On or about February 18, 2016, Wilson—per Jeremy Wilson—wrote to the City with suggested remedies to the NCRs related to out of tolerance panels, which is at Exhibit 65.

Finding of Fact No. 40: On or about February 23, 2016, a meeting was held related to the City's concerns about the panels and the NCRs generated by those concerns. McKenzie Baker, Jeremy Wilson, David Conway, Ted Hill, and Mark Palmer attended this meeting. Wilson Concrete offered a number of suggestions related to remedy the panels. These remedies included cutting panels, grinding them, or, if necessary, replacing the panels at Wilson's cost. City officials were noncommittal.

Finding of Fact No. 41: On March 10, 2016, Wilson sent a proposal to Remedy NCR No. 1A to the City in the record as Exhibit 71. This letter contained many of the elements of the offer made at the February 23, 2016 meeting, an offer which was not responded to by the City. This was the offer to repair or replace the panels at Wilson's cost, which Wilson reiterated on April 13, 2016, after Conway had been terminated. That offer is reflected in Exhibit 73.

Finding of Fact No. 42: By February 18, 2016, Mr. Palmer was still contemplating terminating Conway from the Project. Termination was not discussed at a meeting of City officials on that day, the agenda for which appears at Exhibit 112. Nor had Mr. Palmer informed the City Manager, Mr. Yamamoto, who was his supervisor, of this potential termination. Mr. Yamamoto was not informed of Mr. Palmer's proposed termination of Conway until approximately March 1, 2016. Mr. Palmer never raised the issue with Conway until he sent the suspension and cure notice at Exhibit 44.

Finding of Fact No. 43: Largely based on the foregoing facts, the City sent a letter of suspension to Conway in the record at Exhibit 44. The letter listed nine items the City wanted remedied. Conway's work on the Project was suspended, ostensibly to allow a utility window for Century Link to relocate its utilities. Only work on the nine items was permitted, and the personnel and equipment present at the site reflected that limited scope of work. Mr. Palmer executed the suspension letter, which also claimed that Conway breached the Contract and was in default.

Finding of Fact No. 44: Exhibit 44 specified that all nine items listed in the notice had to be remedied within 15 calendar days. In a prior ruling entered on June 8, 2017, this Court's review of the Contract language in Section 1-08.10(1), subpart (6), required that Conway demonstrate, within 15 days of the Notice of Default, that it was not neglecting or refusing to correct rejected work. That is a plain and non-technical understanding of what the Contact language states.

Finding of Fact No. 45: Within hours of receiving the suspension letter, Exhibit 44, Conway responded to the City's list of cure items point-by-point in detail. *See* Exhibit 45. David Conway requested a meeting with the City Engineer, Mr. Palmer, to discuss the City's concerns and how the cure on those items might move forward. Mr. Palmer refused to meet with Mr. Conway, instead responding by letter in the record at Exhibit 46.

Finding of Fact No. 46: Exhibit 46 acknowledges completion within one day of the suspension letter of Remedy Item No. 2, related to the traffic pole placement. The balance of Exhibit 46 is essentially repetitive of Exhibit 44, and the refusal to discuss further details raised by Mr. Conway in his response letter—that being Exhibit 45—implicated the concerns of bad faith on the City's part at this time.

Finding of Fact No. 47: The record is unclear as to whether Conway ever made an offer to the City that encompassed Wilson's proposal to remove and replace the out of tolerance and/or damaged panels at no extra expense to the City. It is established in the record that the City was made aware, or in the exercise of reasonable diligence should have been aware, that Wilson was prepared to remove and replace panels that were identified as unsatisfactory and that removal and replacement would be at Wilson's own expense. This offer was extended by Wilson prior to termination of Conway, which occurred on March 25, 2016.

Finding of Fact No. 48: After Conway was terminated from the Project and Olson Brothers Excavating, Inc. ("Olson") took over, Wilson was re-engaged by subcontract with Olson to perform the concrete work necessary to complete the Project. The net effect was that Wilson did the concrete work on the entire Project under subcontract with either Conway or the follow-on contractor Olson.

Finding of Fact No. 49: In March of 2016, the City objected to Conway's plan to remove and replace panels in Rows D and E after Wilson completed the pours on the south lanes and traffic could be re-routed to those south lanes. However, in March of 2017, that is how the correction of the north lane panels was accomplished. Exhibit 85 details the method by which the Row E panels were to be removed in a manner that maintained the crown centerline as designed, sufficiently corrected the adverse cross slope issues, and reduced waste by sparing many of the Row D panels. This is an example of constructive problem solving which could have been arrived at much earlier had the City accepted one of Conway's or Wilson's multiple requests to engage in discussions related to the out of tolerance panels.

Finding of Fact No. 50: Mr. Palmer suggested that requests for meetings by David Conway were merely attempts to stall or somehow gain contractual advantage. The record does not support this assessment. Mr. Palmer's opinion in this regard lacks credibility. Mr. Palmer, despite acknowledging that he knew termination for default was a serious and potentially litigation-producing decision, left on vacation after the suspension letter was sent and was essentially incommunicado from March 11, 2016, through March 20, 2016.

Finding of Fact No. 51: In the end, there were two material differences between what was suggested by Conway and Wilson for correction of the out of tolerance and damaged panels and what ultimately occurred. The first difference is that the cure came nearly a year after it could have been achieved. The second is that when Wilson performed the correction under the subcontract with Olson, Wilson got paid for that work at significant taxpayer expense when it had offered to do it in March of 2016 for free. After the March 9, 2016 suspension letter was transmitted to Mr. Conway, Mr. Hill described his input related to the Project as inconsequential. Mr. Hill's conduct related to the Project after March 9, 2016, matches his self-description as he went into what he described as "radio silence" with Conway. Mr. Hill never visited the site between March 9, 2016, and March 25, 2016.

Finding of Fact No. 52: Mr. Palmer, despite acknowledging that he knew the termination for default was a serious measure and having left on vacation thereafter, did not visit the site prior to the Notice of Default being sent either.

Finding of Fact No. 53: With Mr. Hill in so-called radio silence, Conway was left to communicate with an absent and generally substantively unresponsive Mr. Palmer related to cure issues.

Finding of Fact No. 54: On March 25, 2016, the City terminated Conway's contract for default. *See* Exhibit 58.

Finding of Fact No. 55: By Mr. Palmer's acknowledgement, of the nine cure items listed in Exhibit 44, six had been fully cured within 12 days of the March 9, 2016 suspension and cure letter being delivered to Conway.

Finding of Fact No. 56: Mr. Palmer acknowledged that progress had been made on the correction of Wall C as specified in Remedy Item No. 1 in Exhibit 44. Specifically, the record documents that the newly constructed Wall C was removed and the remainder of the pre-existing wall was taken down to the point specified in the design plan. Staking issues were impeded by Parametrix's unwillingness, at least at first, to accomplish re-staking, through Parametrix ultimately did so. The rebar had been delivered for the Wall C re-construction as well.

Finding of Fact No. 57: Progress was impeded by a lack of clarity on the integration of the wall foundation with the luminaire foundation in that area. Additionally, spring water was present at Wall C and required constant pumping. While Conway did not obtain a discharge permit when Wall C was being constructed in January of 2016, and the City lodged no objection at that time, Conway was required to get a stormwater discharge permit from the City to allow the pumping when Wall C was being recast. This caused some delay in March of 2016.

Finding of Fact No. 58: Taken as a whole, the Court finds that Conway did not ignore or neglect the Wall C repair item specified in Exhibit 44. Conway made substantial progress toward cure at the time the termination letter was issued on March 25, 2016, related to Wall C.

Finding of Fact No. 59: While the City complains of ongoing safety concerns existing on the site, at the time of termination the unsafe trench detailed in these findings was being addressed during the suspension period between Conway and the Department of Labor and Industries. In Remedy Item No. 9 of Exhibit 44, the City essentially deferred the safety issue to the Department of Labor and Industries, stating, "If the contractor does not correct the

deficiency to L&I's satisfaction, the City will suspend operation until the work site is deemed safe again by L&I." After at least two inspections of the Project site and meetings with Conway's principals, the Department of Labor and Industries perceived no ongoing safety issues. In Exhibit 119, the City admitted there were no further safety issues on site after March 9, 2016. This item consequently is found to have been cured by the end of the suspension period.

Finding of Fact No. 60: Regarding safety concerns the City had related to the progress of the work, the Court finds several evidentiary points derived from the record to be relevant. Other than the acknowledged failure to properly bench both sides of a trench exceeding four feet in depth as previously detailed, there is no contemporaneous concern about safety raised by the City. No IDR contains any mention of safety concerns being noted by Mr. Cox, the City's dedicated inspector. The weekly progress meeting minutes were similarly barren to any reference to safety concerns. The issues meeting agenda at Exhibit 12 lacks mention of a single safety concern, whether it be trench safety, rebar cap concerns, A/C pipe cutting, pedestrian and traffic safety hazards. There is no mention at all in any of these exhibits of any of those alleged safety concerns.

Finding of Fact No. 61: The circumstances related to the correction of out of tolerance or damaged panels has been discussed previously. Item No. 6 in Exhibit 44 is the sole item not fully or substantially cured by March 25, 2016. As noted, traffic had been shifted with the agreement of the City to the south lanes where the offending panels were situated. Strategies like constructing a temporary lane, shifting traffic back to the south lane, re-routing traffic, or similar methods were simply not practical. The Court finds, therefore, that Conway's proposal to wait for correction of the north lane panels that were flawed until traffic could be shifted to the south lanes was not refusal or neglect to correct the work.

Finding of Fact No. 62: Mr. Palmer is the City's engineer who had the exclusive authority to modify the contract or terminate the contractor. *See, e.g.*, Exhibit 1, Section 1-05(4).

Finding of Fact No. 63: Mr. Palmer delegated responsibility for project management and completion to Mr. Hill. At the time of this project assignment, during the period Conway was on site, Mr. Hill had approximately 12 projects to monitor, which he characterized as "a lot." The Court finds such a work burden to be, indeed, a lot.

Finding of Fact No. 64: Despite the unique engineering and allegations of compliance problems on the site, Mr. Palmer never spoke with David Conway directly about Mr. Palmer's concerns. Mr. Palmer's attendance at the pre-construction meetings saw him arrive late and maintain most of his focus on his cell phone, taking no meaningful part in the pre-construction meeting. Mr. Palmer only visited the site during working hours on one or two occasions prior to termination of Conway.

Finding of Fact No. 65: Exhibit 45 is Conway's same-day response to the issues stated in the suspension letter. In that correspondence, Mr. Conway requested a meeting to discuss issues related to the suspension letter. Despite the significance of the City's action, Exhibit 46 documents Mr. Palmer's refusal to meet, instead asserting that his letter, Exhibit 44, was clear.

Finding of Fact No. 66: As the remediation effort by Conway moved forward, Conway sent a letter on March 16, 2016, which is in the record at Exhibit 50, to Mr. Hill. This correspondence laid out progress on the cure items that had occurred up to that date. Mr. Conway raised several questions in that March 16, 2016 letter and asked whether the City wanted additional work on some of the items that had been cured or partially cured. That inquiry went unresponded to by Mr. Hill or by anyone else at the City.

Finding of Fact No. 67: On March 18, 2016, Mr. Conway sent another progress letter to Mr. Palmer, again specifying cure items completed or on which progress was being made. Mr. Conway inquired of the City as to whether anything more needed to be done on the cure

items he believed to be completed. Mr. Conway further inquired as to whether the contractor's plans for sequencing the completion of the work were satisfactory for the City. This is Exhibit 52. In Exhibit 52, given that the potential termination date was soon approaching, Mr. Conway requested a meeting with the City, Conway's surety, representatives of Wilson Concrete and Transportation Systems, and the Parties' attorneys.

Finding of Fact No. 68: On March 21, 2016, Mr. Palmer, in a clear misstatement of the Contract requirements, stated that Conway had until March 24, 2016, to completely remedy all nine of the cure items, and he refused the meeting that Conway had requested. This is Exhibit 53.

Finding of Fact No. 69: On March 21, 2016, Mr. Conway responded to Exhibit 53 with another update on progress toward cure. The next correspondence from the City was Exhibit 58, the letter terminating Conway for default.

Finding of Fact No. 70: Throughout the pendency of this Project, including the cure period between March 9, 2016, and March 25, 2016, Mr. Palmer made no effort to personally inform himself with firsthand knowledge about Project progress or concerns raised by various individuals or entities connected with the Project. Virtually all of Mr. Palmer's information came secondhand through Mr. Hill, who himself was stretched to provide adequate time as the project manager on the work site. In short, Mr. Palmer was disengaged from the facts that should have informed his critical decision to terminate Conway. This falls short of due diligence on Mr. Palmer's part and, again, undermines his credibility as it relates to his overall assessment of the situation the Parties found themselves in.

Finding of Fact No. 71: Taking the record as a whole, the Court finds that the City, acting through Mr. Palmer, was never genuinely desirous of, or cooperative with, Conway's efforts to comply with the cure requirements and continue with the Project. Certainly, the City did nothing to facilitate such an outcome. Mr. Palmer testified that he had lost confidence in Conway's ability to perform the Contract to his satisfaction, which may well be true. Loss of

confidence, however, is not grounds for default termination. The Court finds that even before the March 9, 2016 cure letter was sent that Mr. Palmer, in conjunction with Mr. Hill, had decided they wanted Conway removed from the Project.

## CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

Conclusion of Law No. 1: The Court has jurisdiction over the subject matter of this case.

Conclusion of Law No. 2: The Court has *in personam* jurisdiction over the Parties in this case.

Conclusion of Law No. 3: The Contract and its supplements are valid and enforceable between the Parties.

Conclusion of Law No. 4: This is a public works contract issued by the City. Consequently, the doctrine of *contra proferentem* controls the method by which ambiguities in the contract documents are to be interpreted. *See Byrne v. Bellingham Consolidated Sch. Distr. No. 301*, 7 Wn.2d 20, 108 P.2d 791 (1941). In this case, the doctrine means that any contractual ambiguities or inconsistencies internal to the Contract, including its supplemental provisions, will be construed against the City.

Conclusion of Law No. 5: As in any contract, the parties are obligated work cooperatively and in good faith so that each may receive the full benefit of contract performance. *See Badgett v. Sec. State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991).

Conclusion of Law No. 6: In circumstances where one party has discretionary authority pursuant to contract terms, the obligation of good faith cooperation overlays that discretionary authority. *See Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 279 P.3d 487 (2012). As specified in the Findings of Fact, the City Engineer either misunderstood the Contract terms or deliberately misrepresented them to Conway.

Conclusion of Law No. 7: As specified in the Findings of Fact, the City Engineer deliberately told Conway that all defects must be remedied within the 15-day window specified in the suspension and cure letter at Exhibit 44. As detailed in the Court's ruling on partial summary judgment related to Section 1-08.10(1) of the WSDOT Standard Specifications, incorporated into the Contract, it is neglect or refusal to correct the rejected work within the 15-day cure period that constitutes breach of this Section. Once Conway demonstrated that it was not neglecting or refusing to correct the cure items, any alleged breach based on the items listed in Exhibit 44 was resolved. The City's position that all cure items must be remedied within a 15-day period violates the Contract's actual terms.

Conclusion of Law No. 8: Federal case law related to public works contracts imposes upon the governmental authority, here the City, the burden of proving that termination for default was justified. *See, e.g., Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). The City has failed to demonstrate that its termination of Conway for default was justified. Consequently, the termination of Conway Construction Company by the City of Puyallup will be deemed a termination for convenience.

Conclusion of Law No. 9: The City pled, as a counterclaim, that Conway violated the Unfair and Deceptive Business Practices Act, RCW 19.86 *et seq.* This is the so-called Consumer Protection Act. No evidence directed at this counterclaim was produced at trial, at least no direct evidence, despite extended testimony related to Remedy Item No. 3, the alleged over-excavation and placement of excess permeable ballast. A review of the record fails to reveal any evidence that Conway engaged in an unfair or deceptive act or practice. There is no evidence that Conway unfairly or deceptively billed the City by unnecessarily over-excavating the subgrade to install permeable ballast, or by improperly removing material from the jobsite. Consequently, the test for violation of the Consumer Protection Act, as detailed in *Hangman Ridge Training Stables v. Safeco Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986),

has not been met. This counterclaim is dismissed. This Conclusion does not preclude the City from making an offer of proof in Phase II.

These are the Court's Findings of Fact and Conclusions of Law for Phase I of this trial, first delivered in open Court on August 21, 2017, and now signed, as supplemented or otherwise amended, in open Court upon presentation on September 26, 2017:

The Honorable Stanley J. Rumbaugh
Superior Court of the State of Washington
In and For the County of Pierce, Department 18

FILED
DEPT. 18
IN OPEN COURT
SEP 26 2017
Pierce County Clerk
By BM
DEPUTY

Presented By:

SCHWABE, WILLIAMSON & WYATT, P.C.

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Approved as to Form:

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# APPENDIX B

16-2-07731-1 50819495 FNFCL 02-22-18

FILED
DEPT 18
IN OPEN COURT
FEB 21 2018
PIERCE COUNTY, Clerk
By ____ DEPUTY

**IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE**

| | |
|---|---|
| CONWAY CONSTRUCTION COMPANY,<br>Plaintiff(s),<br>vs.<br>CITY OF PUYALLUP,<br>Defendant(s). | No. 16-2-07731-1<br>**REVISED FINDINGS OF FACT AND CONCLUSIONS OF LAW**<br>**PHASE II** |

## PREAMBLE

This dispute began when City of Puyallup (City) breached its contract obligations and terminated Conway Construction Company (Conway) for default, when no default had occurred. The Court had found the City to be the party in breach, and the parties' various claims for payments and damages will be determined accordingly.

Trial of the damages claims in this case began August 28th, 2017, and concluded on September 26th, 2017. The following witnesses testified during the damages phase of the trial, some of whom also testified in the earlier liability phase of the trial: Charles "Ted" Hill, McKenzie Baker, Mark Palmer, Bryson Huie, David Conway, Steven O. Cox, David C. Stewart, and Jeffrey Lounsberry.

Relevant testimony and exhibits from the liability phase of the trial also inform the Court's opinion in the damages phase of the trial along with the testimony of the witnesses listed herein and additional 60 exhibits that were admitted into the record and 13 exhibits used for illustrative purposes, or to refresh witness' recollection.

In conjunction with the Findings of Fact and Conclusions of Law entered on September 26th, 2017, the Court makes the following, additional

**FINDINGS OF FACT**

Finding of Fact No. 72: By stipulation of the parties entered on the record on September 12th, 2017, the record establishes that the City has paid the sum of $1,403,401.80 to Conway for various obligations under the contract prior to initiation of this action.

Finding of Fact No. 73: The Court reserves the issue of costs and attorneys' fees, including any claim of awardable costs related to claim preparation or submittal, for post-judgment briefing and argument.

Finding of Fact No. 74: Conway has made a claim related to maintenance of the pervious cement concrete pavement. Conway claims compensation under Claim No. 2, Exhibit 167, for road cleaning after traffic shifted onto the newly paved section. The standard contract specifications, found at Exhibit 1 Section 1-07.23(i), provide "Conway must maintain existing roads, streets... within the project limits, keeping them open and in good, clean and safe condition at all times." By its terms, this section does not except from its scope the obligation to keep the newly constructed, permeable concrete roadway clean. Hence, even after street traffic was moved to the northbound lanes on February 8th, 2016, (see Finding of Fact 39-Phase I) Conway's obligation to keep both lanes of the roadway clean continued until March 25th, 2016. At that point the City ordered Conway to be terminated for default and Conway's obligation to keep the roadway clean was extinguished.

Finding of Fact No. 75: Neither the contract itself (Exhibit 5), nor any attached specifications (Exhibits 1 and 2), reference use of any regenerative air sweeper, as opposed to normal street sweeping equipment related to this requirement.

Finding of Fact No. 76: Conway did not initially use a regenerative air sweeper or vacuum sweeper to discharge its street cleaning duties. The first mention located in the record related to the City's desire for use of a regenerative air sweeper is in Exhibit 44, Mr. Palmer's

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March 9th, 2015(sic), letter to Conway. Of course, this letter is authored and transmitted approximately five and one half months after the September 1st, 2015, execution of the contract (Exhibit 5). The relationship of the parties by then had deteriorated and the City had already decided to terminate Conway by default.

Finding of Fact No. 77: At Mr. Palmer's direction, Conway performed the maintenance of the pervious concrete roadway with a vacuum sweeper until termination.

Finding of Fact No. 78: The work Conway performed to sweep the pervious concrete roadway with a regenerative air sweeper was a minor change as defined by Section 1-04.4 of the contract. The value of Conway's work to sweep the pervious concrete is $2,282.19, including reasonable mark up for profit and overhead. Conway is entitled to this amount.

Finding of Fact No. 79: Following contract termination for convenience (Exhibit 1) Section 1-08.10(4) requires that the contractor be paid in accordance with Section 1-09.5 for actual work performed.

Finding of Fact No. 80: As to lump sum work, Exhibit 2, Section 1-09.9 specifies it should be paid based on mutual agreement, based on actual quantities of work performed. Here there was agreement between the parties as to many of the lump sum completion percentages. The Court will determine those completion percentages not agreed upon for lump sum work.

Finding of Fact No. 81: Exhibit 1, Section 1-09.5 provides that payment for completed items will be at the unit contractor prices. "Payment for terminated work will be made... for the actual number of units of work completed unless the engineer determines unit prices are inappropriate for the work actually performed." In this case, Mr. Palmer did assert that unit prices were inappropriate for some work actually performed. This determination is found by the Court to be without substantive basis, and arbitrary. Mr. Palmer expressed his subjective concern that the project was costing too much and Conway was earning too much profit. This concern was raised after Conway had performed substantial work. Even if the record supported Mr. Palmer's opinion, which it does not, the unit prices agreed upon were based on Mr.

Palmer's erroneous projections of what the cost would be. Conway was entitled to, and did bill, unit prices at the rate agreed upon for the work completed before termination. Conway will be paid on that basis as further detailed herein.

Finding of Fact No. 82: Exhibit 170 is a letter dated May 4th, 2017, related to modification of the unit prices. This exhibit relies on an "audit" conducted by the City's forensic economist, Mr. Lounsberry. The whole of the record does not support the conclusion of Mr. Lounsberry that unit prices should be modified. The Court rejects Mr. Lounsberry's and the City's conclusion related to unit pricing modification.

Finding of Fact No. 83: Conway timely protested the City's decisions and submitted all notices and claims to preserve its claim rights under the contract Ex 1, Section 1-09.11, except the TSI conduit claims. The contract notices are included in Exhibit 181. The date of claim perfection is May 17, 2016.

Finding of Fact No. 84: When resoliciting the project after Conway's termination, the City included detailed specification related to the maintenance of pervious concrete, including specific reference to the sweeping equipment and frequency of use. The addendum making this change to the project manual is admitted as Exhibit 221.

Finding of Fact No. 85: The follow on contract with Olson Brothers Construction ("Olson") included the same maintenance requirement as was present in Conway's contract. Testimony establishes the City, despite the contract language, did not require Olson to maintain the pervious roadway using a regenerative air sweeper or vacuum sweeper, and Olson did not do so. This fact reflects disparate treatment of Conway by the City in contract term enforcement. This disparate treatment leads the Court to conclude that Mr. Palmer's letter of March 9th, 2015 (sic) (Exhibit 44) to Conway was motivated by a desire to enhance the City's perceived claim against Conway, and reflects some level of bad faith on Mr. Palmer's part.



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Finding of Fact No. 86: In Claim No. 6 (Exhibit 167) Conway was required to move a waterline adjacent to the Lieu property. The waterline had been installed per plan specifications and ultimately had to be moved due to insufficient clearance with the Lieu sewer hookup.

Finding of Fact No. 87: The Lieu sewer hookup was called out incorrectly in the plans because of the City's oversight regarding what was promised to the Lieus. Specifically, the City agreed to connect multiple laterals located on the Lieu property to the main, but failed to account for that placement agreement in the plans.

Finding of Fact No. 88: Conway consulted with Fruitland Water Company and Fruitland proposed a design to address this conflict between the Lieu sewer and the waterline. The City directed Conway to proceed with the waterline adjustment but denied Conway's claim for additional costs as documented in Exhibit 184.

Finding of Fact No. 89: The City contends that even though the waterline was located as called out in the plan designed by Conway's installation, Conway somehow should have known a conflict was going to develop and accounted for the sewer line location. This contention is not supported by the evidence in light of the requirement that Conway build all improvements to plan specifications. In Exhibit 160, the City acknowledged liability for some, unspecified amount of these waterline adjustment costs.

Finding of Fact No. 90: The waterline adjustment constitutes a change as defined in Section 1-04.4 of the contract (Exhibit 1).

Finding of Fact No. 91: Conway was terminated before the placement of the newly designed waterline was complete. The value of the work performed up to the date of termination totals $3,815.04, and is documented in Exhibit 184 (Bates No. 0628 through 0633). Conway will be awarded this sum.

Finding of Fact No. 92: Exhibit 182 (Bates No. 0354) reflects the fact that on December 14th, 2015, Conway informed the City that the franchise utilities working on the site, primarily CenturyLink, and to some degree Puget Sound Energy (PSE), had contaminated some of the

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permeable ballast that had been placed. The ballast had been placed, at least in part, to prevent heavy trucks and equipment from creating excessive subgrade compaction. Exhibit 1, Section 2-06.3(3).

Finding of Fact No. 93: CenturyLink was a persistent source of delay and frustration during the period of time Conway worked on the project. It was largely CenturyLink's utility excavation that was responsible for the contamination, though to a lesser degree Puget Sound Energy contributed as well. Conway had no contractual or other right to control the franchise utility's work. It was the City's obligation to coordinate the franchise utilities' work.

Finding of Fact No. 94: In a December 14th, 2015, e-mail exchange between Mr. Baker and Mr. Hill, Mr. Baker advised that CenturyLink and PSE had relocated some existing underground utilities, had contaminated the subgrade and had failed to adequately remediate the area contaminated. Mr. Baker requested Conway be allowed to restore the work and track it, to be paid on a force account. (Exhibit 182. Bates No. 0362).

Finding of Fact No. 95: Mr. Hill responded to Mr. Baker saying he directed the utilities to return and fix the issue. If the utilities did not do so, Mr. Hill advised Mr. Baker, "We will need to track your efforts."

Finding of Fact No. 96: Conway was notified on March 9th, 2016, that it had 14 days to cure nine separate defects. (See Exhibit 44). This included remediation of additional permeable ballast contaminated by Conway. All contaminated permeable ballast was effectively remediated by Conway before March 25th, 2016, including that which was contaminated by the franchise utilities. The City was not charged by Conway for the cleanup of permeable ballast Conway contaminated, but the City also refused to pay Conway for the force account it had tracked, based on Mr. Hill's e-mail, related to the utilities' contamination.

Finding of Fact No. 97: Conway is awarded $3,415.42 for costs incurred in cleaning up permeable ballast contaminated by the franchise utilities.

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Finding of Fact No. 98: The payment for permeable ballast was specified in the contract to be based upon tonnage tracked by certified truck ticket. Exhibit 2, Section 4-04.4 - Special Provisions. The certified truck tickets are in the record at Exhibit 162 and Exhibit 147. This tracks Bid Item A-27 on Ex. 145 and Ex. 144. The A-27 number and other pay item numbers to be analyzed are derived and carried through from Exhibit 2, the Project Manual Schedule of Prices. No dispute or contest ever arose as to accuracy of the certified truck tickets.

Finding of Fact No. 99: Mr. Hill and Mr. Palmer urge the Court to endorse a "neat line" calculation which would result in a deduction of tonnage from the certified truck ticket calculation for permeable ballast. The City requests the Court to adopt its position that Conway overexcavated the roadway depth and thereby intentionally defrauded the City on the permeable ballast costs. The City contends the overexcavation resulted in import of more permeable ballast than the construction plans and contract required.

The Court has already rejected the City's claim related to bad faith or fraud in the permeable ballast. No substantial evidence is in the record to support such a claim. Additionally, Mr. Cox never raised any concern about the depth or extent of Conway's excavations.

Finding of Fact No. 100: Two problems exist related to the City's position on the permeable ballast reimbursement. The first problem is that the contract required Conway to excavate down to firm bearing in all areas where soft spots were encountered (See Exhibit 18, Subgrade Preparation Plan). On both the east and west corners fronting the Costco property there were large soft spots that required extra excavation. Numerous smaller soft spots existed at various points, and to various depths in the project. A large storm chamber also had to be backfilled with permeable ballast. Since the quantities necessary to backfill the excavated soft spots and storm chamber were not quantified, any "neat line" calculation cannot account for such quantities and consequently is speculative.

Finding of Fact No. 101: Importantly, the contract does not reference or even mention any kind of "neat line" calculation process. The parties did not agree to such a methodology,

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instead opting for the certified truck ticket procedure which the Court will enforce. The quantity payable under Line Item A-27 (Exhibits 97 through 101) will be 5,198.57 tons of permeable ballast at $37 per ton.

Finding of Fact No. 102: The City contends that the contract, at Exhibit 1, Section 1-094 and Section 1-09.5, allows for a "neat line" calculation based on the City's belief that an equitable adjustment is appropriate. The Court finds that a legal remedy, through enforcement of the contract provisions related to unit pricing for permeable ballast, was agreed to and available. The unit price can be accurately calculated and consequently no equitable remedy is necessary or appropriate. The City Engineer apparently miscalculated the extent to which permeable ballast would be necessary on the project, and perhaps the City's Inspector was inattentive to the excavation process. There is no evidence in the inspector's daily reports that Mr. Cox noticed any degree of overexcavation in the roadway. Neither miscalculation by Mr. Palmer nor inattention by Mr. Cox entitles the City to equitable relief. It is also noteworthy that, in the follow on contract with Olson, the City was billed $40 per ton for permeable ballast (see Ex 148).

Finding of Fact No. 103: The City raises the issue of whether Conway double billed for permeable ballast under Items A-27 and also Item A-24 on the pay estimates. The Court does not believe double billing occurred, however the record reflects confusion or error in the billing for ballast in Item A-24. It is clear, from the pay estimates, that about 513 tons of either gravel borrow or permeable ballast was utilized under A-24; and not billed for under A-27. It is unclear what quantities of each should be allowed in this circumstance where the Court recognizes that some of the A-24 fill would be permeable ballast per the plan specifications, and some gravel borrow. Based on the overall record and exercising equitable powers, the Court will find that 350 tons of the A-24 quantities will be paid at the contract rate of $21 per ton for gravel borrow, and 163 tons at the contract rate for permeable ballast at $37 per ton. All together this fill cost for A-24 equals $13,381.00. The Court is not able to ascertain from

the record whether this cost was paid to Conway and the parties are directed to meet and confer on this point.

Finding of Fact No. 104: The Court has already found Wall C was initially built out of specification, and this was known to be true by Mr. Conway at the time of the initial Wall C construction.

Finding of Fact No. 105: Mr. Conway did not ask for, nor receive City permission to construct Wall C in a manner other than that as specified in the plan. Mr. Conway cites to his best judgment in the field as being the justification for this change. After constructing Wall C in a non-conforming manner, Conway proposed a variety of alternatives to bring Wall C within what Conway believed to be the intent of the Wall C construction specification (See Exhibit 109).

Finding of Fact No. 106: At the City's direction, Wall C, as constructed initially, was removed. Substantial work had commenced on the Wall C rebuild, as demanded by the City in the suspension and cure letter, at the time of the City's dismissal of Conway (See Exhibit 44). Conway was paid for the work performed associated with the rebuilding of Wall C in the manner conforming to the specifications in the plan. The payment was for so much of the rebuilding and material acquisition as had been completed by the time of the March 25th, 2016, termination.

Finding of Fact No. 107: Conway now maintains the Court should find the City's order to demolish that part of Wall C built in the manner that did not comport to plan was an order that constituted waste. Alternatively, Conway argues it substantially complied with the plans in the original Wall C construction. Conway requests compensation for so much of the first, nonconforming Wall C as was constructed.

Finding of Fact No. 108: The Court perceives no reason why Conway could not have addressed its concerns and recommendations regarding the initial Wall C construction with City representatives before it unilaterally went forward to build a nonconforming structure.

The contract provisions were clear. While it may be a close call on the waste question, the Court finds the City has proven that Conway's performance in constructing the original Wall C was not to plan, and was not the result of some mistaken reading of the plan, or action by a third party. Further, the City is entitled to the design for Wall C it contracted to have built. To allow the waste doctrine to justify a unilateral after-the-fact contract change, when the initial failure not to build to plan was deliberate, raises concerns about the use of the waste doctrine for inappropriate manipulation.

Finding of Fact No. 109: Conway's request for payment of the $29,692.80 for construction of the original, subsequently removed Wall C is denied.

Finding of Fact No. 110: Conway subcontracted with Transportation Systems Incorporated (hereafter "TSI") for installation of illumination and signal improvements at the project. This subcontract (Exhibit 149) incorporated, insofar as relevant, all of the specifications, plans, conditions in the prime contract entered into between the City and Conway.

Finding of Fact No. 111: At issue in the TSI claim is the location, depth, and backfill material used in burying conduit to power the illumination system. The conduit was located in part under the sidewalk adjacent to the curb off 39th Avenue Southwest. Beneath the sidewalk (prior, of course, to the sidewalk having been poured) the conduit was buried to a depth of 18 inches. Where driveway aprons cross the conduit, the depth went to 24 inches. Backfill used in the areas of the driveway aprons was Crushed Surface Base Course (CSBC), and elsewhere it was native soil.

Finding of Fact No. 112: Mr. Huie, a TSI principal, testified that prior to placement of the conduit a white line was painted to call out the intended path of installation of the conduit. The Parametrix project design drawings, Exhibit 35, and in particular Exhibit 35, Section IL1–IL6, call out the specifications for the illumination system. These sections are devoid of any location specifications for the placement of the power conduit.



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Finding of Fact No. 113: Mr. Huie did not recall who from the City observed this white line designation, however placement of the conduit occurred in the location of the white line designation and was alleged by Mr. Huie to be open and obvious to the City and Conway representatives on the site. This testimony was neither corroborated nor disputed on the record.

Finding of Fact No. 114: Following installation it was noticed that the conduit was in conflict with the tree pits. Rather than adjust the tree pit locations the City ordered the conduit to be moved. The City further justified this order by alleging the conduit was in the roadway and therefore had to be buried to a continuous depth of 24 inches. The City also asserts that it did not approve the use of native material to backfill the trenches and therefore TSI was obliged to utilize CSBC. The specifications at Section 8-20.3(2)(A) allow for the use of native backfill when approved by the City Engineer.

Finding of Fact No. 115: Exhibit 2, Special Provision Section 8-20.3(2)A specifies that trench depths shall be sufficient to provide 18 inches of cover over the topmost conduit when outside the roadway area, and 24 inches of cover over the top most conduit when it is below the roadway, driveway or shoulder. This section controls here.

Finding of Fact No. 116: The Court finds that the roadway does not include the sidewalk area. In Exhibit 177, TSI goes to some length to note that sidewalks, when included within the contract definition of roadway, utilizes a "S." Since a lower case "s" was used in the Section 8-20.3(2)(A) of the special specifications, the specifications are using sidewalk in its common lexical definition. While an interesting semantic discussion, the Court finds that it is a fact that a sidewalks are exposed to much lower pressure, versus a roadway or a driveway apron. The Court notes that it violates the law to drive a motor vehicle on the sidewalk. The reduced pressure exposure supports the decision to bury the trench 18 inches when beneath the sidewalk. The foregoing justifies a finding that the sidewalk was, or should have been, contemplated to be outside the roadway at the time the contract was entered into.

Finding of Fact No. 117: In another of many examples of inconsistent, and probably arbitrary, treatment of the contractors under the Conway contract versus the Olson contract, the trenching performed under the Olson follow on contract was backfilled with suitable native material. This demonstrates that, insofar as the backfill issue is concerned, the contract requirements are ambiguous. Therefore, the contract in that regard is to be construed against the City as the drafter.

Finding of Fact No. 118: The City has claimed, as a defense to TSI's claim, passed through by Conway, that the claim was not perfected as required by Exhibit 1, Section 1-09.11. On December 20, 2015, the City Engineer rejected the conduit. The record reflects that on December 30th, 2015, TSI, pursuant to Contract Standard Specification Section 1-04.5, submitted backup information supporting its claim for equitable adjustment of the contract. This claim followed the City's project engineer's directive to relocate the conduit. This supplemental information was within the 14 day window specified in Section 1-04.5(2).

Finding of Fact No. 119: On January 13th, 2016, the City denied Conway's protest and request for equitable adjustment which had been filed on behalf of TSI (See Exhibit 173).

Finding of Fact No. 120: On January 26th, 2016, Conway disputed the City's denial, as did TSI on January 25th, 2016. The City followed with a letter on January 28th, 2016, to Mr. David Conway advising that the Conway's dispute of the City's January 13th, 2016, determination was made more than seven days after Conway received the City's January 13th, 2016, denial. Exhibit 1, Section 1-09.11 specifies that written notification of the contractor's dispute of the request for adjustment made pursuant to Section 1-04.5 "shall be provided with seven calendar days after receipt of the Engineer's written determination..." Even allowing the expansion of time for service by three days as specified in Court Rule 6(e), the contractor's written disputes needed to be provided to the City by January 23rd, 2016. TSI and Conway's dispute was not timely, and the compensation for reworking the conduit placement will be denied on this basis.



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Finding of Fact No. 121: Conway asserts that Exhibit 1, Section 1-09.11(3) allows the contractor to file claims against the City within 180 days of acceptance of the project. Since acceptance had not yet occurred even on the day trial commenced, Conway asserts that TSI's conduit claim submitted July 21st, 2016 was timely and should preserve the claim for present adjudication. The Court rejects this reasoning based on the language of Section 1-09.11(3), which restricts application of the 180 day post acceptance claim period to claims against the State of Washington. No such claim is before the Court, as the State of Washington is not a party herein. Many of the other operative sections of Exhibit 1 refer to the "contracting agency" (here the City). This section expanding the claim period to 180 days is unique to claims involving the State. The Court's analysis, in this regard, is informed by Section 1-09.11(3) language requiring that "any such claims or causes of action shall be brought only in the Superior Court of Thurston County." Such is not the venue of the current action, leading further support to the Court's interpretation that Section 1-09.11(3) applies only to actions involving the State of Washington.

Finding of Fact No. 122: The City's letter of suspension on March 9th, 2015 (sic) (Exhibit 44) directed Conway to stop work on all but cure items, and further stated that the 90 day utility window would be commenced to allow the franchise utilities to begin their work.

Finding of Fact No. 123: The record is unclear as to what, if any, utility work was performed between March 9th, 2016, and March 25th, 2016. That is not relevant to the Court's decision here. Conway also complains that the period between March 9th, 2016 and March 25th, 2016, were charged as working days. That fact is indirectly relevant to the Court's decision. (See e.g. Finding of Fact 129).

Finding of Fact No. 124: Conway claims several categories of increased costs due to the City's interruption and suspension of all non-cure related work during the March 9th-25th, 2016 time frame. These categories include standby and direct equipment costs, direct subcontractor and vendor costs, and direct labor costs.

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Finding of Fact No. 125: As to direct equipment costs, the testimony established there was an array of equipment on site when all non-cure work was suspended on March 9th, 2016. Exhibit 19, the inspectors' daily reports (IDRs) verify, with specificity, what contractor's equipment was on site each workday.

Finding of Fact No. 126: Exhibit 1, Section 1-09.6 details the manner in which compensation for force account work is to be calculated. Section 1-09.6(3) addresses valuation of equipment and specifies that equipment owned by the contractor be valued utilizing the AGC/WSDOT rental agreement in force at the time of the force account. The AGC/WSDOT template agreement is Exhibit 228.

Finding of Fact No. 127: The method by which rented equipment is to be valued in the force account situation is through use of a valid invoice. In this case, David Conway owned a company named Brighton Vista, which in turn owned much of the equipment used on the site by Conway, both before and following March 9th, 2016. Mr. Conway testified that Brighton Vista leased equipment to Conway for the project at or below market rates.

Finding of Fact No. 128: On March 9th, 2016, Conway had not yet been terminated, but only delayed in its prosecution of the non-cure work. The City characterizes this March 9th, 2016, through March 25th, 2016, time period as a specified "utility window." The City proposes that Conway therefore could not characterize this "utility window" as standby time, since it was a period of time when the franchise utilities had exclusive right to access the project site. Consequently, the City reasons, there is no reason to have the equipment available on a standby basis, and no basis for an equipment rental charge.

Finding of Fact No. 129: The City characterized the franchise utilities right to access during the utility window as exclusive. The contract at issue does not provide support for a finding of exclusivity. Further, Exhibit 44 advises Conway that the 15 day calendar suspension period would be counted as working days under the contract. This directive in Exhibit 44 supports the conclusion that the clock of working days continued to run on Conway. After

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Conway satisfactorily addressed the cure items, Conway reasonably believed the equipment would be necessary to proceed with the work without losing more working days to remobilize equipment. Given the relatively short period of suspension, it was not commercially reasonable to relocate the equipment elsewhere only to return it at the end of the suspension period.

Finding of Fact No. 130: In a series of emails dated October 20th, 2016, (Exhibits 203 & 204), Mr. Hill and Mr. Baker tacitly, if not specifically, accepted the proposal that the "blue book" identified in testimony as the AGC/WSDOT rental rate specifications would be utilized when calculating the values for standby equipment. The Court will adopt those rates when calculating the values for standby equipment.

Finding of Fact No. 131: The unrebutted testimony of Mr. Stewart was that the likely margin of profit for Conway in this contract was 6 percent. The Court will accept this 6% profit margin for use in its damages calculation.

Finding of Fact No. 132: Per the AGC/WSDOT "blue book" document establishing equipment charges to be assessed when equipment is on standby, one half of the unoperated rate is to be used as a measurement.

Finding of Fact No. 133: Exhibit 229 was used for illustrative purposes, setting forth amounts claimed for standby equipment, subcontractor and vendor costs, and adjustments claimed for labor amounts. As to standby equipment costs, the equipment for which costs are claimed are listed in a schedule attached to emails admitted as Exhibit 204 (See also Exhibit 186). The schedule of equipment on standby was, in turn, derived from the IDRs covering the time period from March 9th, 2016, through March 25th, 2016. These IDRs are included in Exhibit 19.

Finding of Fact No. 134: Exhibit 229 accurately sets forth amounts owing for standby equipment costs. Interpreted pursuant to the AGC/WSDOT Guidelines, the appropriate markup per Exhibit 1, Section 1-09.6(2) is 15% (21% less 6% disallowed as profit). Conway will be awarded $14,398 for this standby equipment claim.

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Finding of Fact No. 135: Conway claims increased direct subcontractor costs and vendor costs during the period of suspension. These are itemized in Exhibit 186. The Court finds that, while use was likely not at their most productive level, the detailed costs would be necessarily incurred while the work related to Exhibit 44 was being prosecuted. Consequently, no compensation is awarded for the claims specified as work done by subcontractors or vendors on Exhibit 186.

Finding of Fact No. 136: At the outset of the project Conway submitted a labor rate sheet that notes $75 per hour for straight time to compensate Conway's superintendent (See Exhibit 205). The City did not object to this rate when it was proposed at the outset of the project. Rates for Conway's project manager and project administrator were not included in the initial rate sheet at Exhibit 205. Exercising equitable powers, in light of the entirety of the record, the Court finds the rates of $100 per hour straight time for the project manager and $50 per hour straight time for the project administrator to be proportional to the agreed rate for the superintendent's time, and these constitute a commercially reasonable wage for management services.

Finding of Fact No. 137: Labor costs which are not scheduled have been claimed by Conway for senior personnel during the 13 days of work suspension. Pursuant to the preceding Finding of Fact, the Court will award wages as follows:

i. Ken Conway, project superintendent, 84 hours at $75 per hour equals $6,300.

ii. David Conway, project manager, 94 hours at $100 per hour equals $9,400.

iii. MacKenzie Baker, project administrator, 94 hours at $50 per hour equals $4,700.

Finding of Fact No. 138: Per Exhibit 1, Section 1-09.6(1), the labor markup on force accounts to be applied is 23% (29%, less 6% disallowed as profit). Total labor costs during the suspension period as detailed in the preceding Finding of Fact total $20,400 times 123% equals $25,092.

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Finding of Fact No. 139: Conway's Claim No. 12 relates to restocking fees and rental equipment left on site. The parties are in general agreement, and the evidence supports Conway's entitlement to $224.11 in restocking costs. Further, there is agreement between the parties, and Exhibits 189, 190, 191, and 192 establish a total of $9,996.24 in equipment rental costs left on site after March 25th, 2016. That equipment was generally necessary for traffic control and public safety, and is unrelated to the construction equipment addressed earlier.

Finding of Fact No. 140: The parties do not agree that the City should be responsible for what amounts to a pass through equipment rental claim from TSI for $5,000. This represents one month of temporary signal systems rental, and $3,000 for material storage for a period of three months post termination.

Finding of Fact No. 141: The one month of temporary signal system which was at issue was critical to public safety. The City paid TSI directly $5,000 per month for this same system after Conway was terminated. The testimony of Mr. Huie established that, in light of the timing of the City taking over this subcontract from Conway, only 15 days of rental for two temporary signals is payable to Conway on the pass through claim. The cost is prorated, and Conway will be award $2,500 on this safety equipment pass through claim. This claim is also supported by Exhibit 165, Tab 12.

Finding of Fact No. 142: Various items of traffic control/safety equipment were left with TSI to store subsequent to contract termination. The testimony established a range of costs for storage depending on the degree of security necessary for the stored material. That range was between $250 to $2,000 per month. Mr. Huie testified that three months of storage would cost, in the aggregate, at least $1,000 a month for a total of $3,000 over three months. This sum will be awarded to Conway. The record is unclear whether Conway paid that cost, in which case the City should reimburse Conway, or whether TSI is still owed, in which case the City should pay TSI directly for those post-termination storage services rendered by TSI.

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Finding of Fact No. 143: An array of outstanding costs claimed by Conway against the City were presented that related to original bid items for which percentages of completion were claimed. Conway's breakdown of these unit price and lump sum items is contained in Exhibit 152. Analysis of amounts paid versus amounts claimed on outstanding costs is included in Exhibit 144. A larger, more readily readable analysis of amounts paid versus claims is found at illustrative Exhibit 145. Exhibit 142 contains further analysis of the original pay items alleged to be outstanding.

Finding of Fact No. 144: There is agreement as to completion percentages on some of the specific lump sum items, and on some of the partially completed unit price items. At the time of termination, some aspects of the contracted work were largely completed, and some largely uncompleted, and each line item will be separately evaluated. Looking at the macro view of the entire project, the Court will find 50% overall project completion at the time of termination.

Finding of Fact No. 145: On the listed base contract bid items, in addition to what has already been paid by the City to Conway, the City, pursuant to Mr. Hill's testimony and in the City's proposed Findings of Fact agrees that an additional $777,608.68 is owing on Conway's amount claimed of $886,423.92. The amount is derived, in large part, from completion percentages detailed in the IDRs, Exhibit 19, and to some degree on-site inspection by the City and Conway personnel. The disputed difference is $108,815.24. This is Conway's Claim No. 7 and 8, (Exhibit 142) and City's response (Exhibit 143).

Finding of Fact No. 146: Of the disputed amount for original bid items of $108,815.24, the Court has already addressed the permeable ballast dispute. See Finding of Fact 98 through 103 inclusive. The Court, in attempting to reconcile Exhibits 142, 143, 144, and 145, along with the trial testimony, has endeavored to arrive at precisely what amounts of the disputed original bid items are attributable to permeable ballast issues.

Finding of Fact No. 147: In its proposed findings, the City calculates the permeable ballast as comprising $73,459.04 of the $108,815.25 in dispute. This seems reasonably grounded in the record. Using the City's assessment, and having found that all permeable ballast is payable as reflected in the certified truck tickets, the remaining amount in dispute on original bid items is reduced to $35,356.20.

Finding of Fact No. 148: Addressing the remaining outstanding differences in amounts owing on the original bid items, referring to line item references, the Court findings are as follows:

i. A2 Type B Progress Schedule 50% project completion results in $325 to the City's favor.

ii. A4 Traffic Control 50% project completion results in $3,750 claimed in Conway's favor.

iii. A23 Roadway Excavation. Per Exhibit 142, Tab "Exhibit A," the Court finds Conway had not reached past phase 2B of the roadway excavation. Conway invites the Court to establish roadway excavation percentages looking only at the percentage of asphalt cap that was removed, which Conway calculates at 96.55 percent. However, the roadway excavation had only progressed through approximately Phase 2B at the time of the termination. Exhibit 6 specifies the work related to roadway excavation to be completed in multiple phases. When Exhibit 6 is correlated with Exhibits 142, Tab "A," 88.5% completion is demonstrated. Consequently, the Court will adopt the City's reduction on item A23 as set out in the City's Proposed Findings of Fact, in the sum of $17,355.12.

Finding of Fact No. 149: Conway has requested payment for 25% completion on Wall A. A careful search of the record reveals only that Exhibit 19 IDRs dated January 21st, 2016, and February 25th, 2016, even mention Wall A. No description exists of work done on Wall A, nor has the Court located testimony developed related to Wall A completion. This claim by

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Conway fails of proof. The City's reduction of Conway's request for compensation for original bid items in the sum of $2,575 will be allowed.

Finding of Fact No. 150: Item A43, Catch Basin Type 1. Of the 22 Catch Basin Type 1s called out in the plans, seven were either deleted or not installed by Conway leaving the City responsible for 15. The City's count was 14 installed. This was resolved by agreement with the City receiving credit as specified in Finding of Fact #165.

Finding of Fact No. 151: Item A46, Manhole Adjustment. Only one manhole was adjusted per Exhibit 142, Tab "O." This tab references Exhibit 35, page RD4. Conway is owed for one manhole adjustment, and Conway's claim related to this item will be reduced in favor of the City by $1,120.

Finding of Fact No. 152: The final item in Claims 7 and 8 related to extra worked involves Line Item E7 on Exhibits 144 and 145. This line item is for installation of the sewer clean out, priced at a unit cost of $280 per clean out. The City claims four such clean outs were completed, and Conway claims eleven. In Exhibit 142, Tab U, Conway has included Exhibit 53, Sections RD1 through 10, marked up to show the location of eleven sewer clean outs. The City has asserted that of the eleven clean outs claimed, seven were not complete because the cover on the clean outs had not been installed at the time of termination. David Conway's testimony on this point was that the "Y" assembly was placed in the newly installed sewer line in the appropriate configuration, but did not address the cover installation. In Exhibit 143 it is asserted that placement of covers is just as much work as the installation of the "Y." So, exercising equitable power, the Court will allow one half payment on Items E7 (one half $280 equals $140) for seven sewer clean outs. $280 for four completed sewer clean outs will be allowed. This adjusts Conway's claim downward, in favor of the City, by $980.

Finding of Fact No. 153: Of the disputed amounts on original bid items, the City receives a reduction of $22,355.12, and the total amount owing to Conway is $864,068.80.

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Finding of Fact No. 154: Claim 9 is a listing of Conway's claim for additional work ordered by the City. This revised extra work/force work account claim totals $58,018.17. The claim itemization is found in Exhibit 154: The City's response is at Exhibit 155. In its proposed findings, the City agrees that $51,392.35 is owing on this claim. The Court will next address the disputed items.

Finding of Fact No. 155: Item 1C, Valve Lid Block Outs. The unit price is $114.24. Conway claims 20 units as having been completed. In response, the City contends that it is entitled to $436.96 of reduction on this claim because of valve lid failure. The record lacks substantial support for the assertion that the City sustained loss in the sum of $436.96 for valve lid block out defects, or that any such defect claim resulted from errors by Conway. This claim setoff by the City will be denied.

Finding of Fact No. 156: Claim 9, Item 2 Joint Layout Change. The joints between the permeable concrete panels in some locations in the roadway was such that car tires could be "grabbed" by the joint. That condition constitutes a jeopardy to public safety. Conway asserts there was a joint plan they followed located in that portion of the project plans related to traffic control. Exhibit 35 (Section TC1 through TC16). At Exhibit 35, Section TC1 through TC16, in multiple locations the plans provide "for pavement jointing information, see Pavement Jointing Plans PJ 1 through PJ5." The Court record does not contain the pavement jointing plans referenced. Conway asserts it was not required by contract to submit a joint layout plan, in contrast to the City's claim that it was. Conway's interpretation is correct. Exhibit 1, Section 5-05.3(8), specifies that joints shall be placed as indicated in the standard plans. As noted, Exhibit 35 is bereft of any joint plan and it was the City's obligation to include the detail for pavement jointing in the standard plans. Hence, the City's disapproval of the original joint placement and order to Conway for pavement joint reconfiguration constitutes a change order. The City's request for relief from the $2,620.86 cost is denied.

Finding of Fact No. 157: The City also wants Conway's claim for relocation/reconfiguration of the Lieu sewer to be reduced by $2,157.02. The issues related to the Lieu sewer have been addressed earlier, and the City's requested reduction is denied for the reasons previously detailed.

Finding of Fact No. 158: Conway shall be awarded $58,018.07 on its claim for extra work.

Finding of Fact No. 159: Conway's claims for maintenance of pervious cement concrete pavement (Claim 2), contaminated permeable ballast (Claim 3), work stoppage including public safety equipment and equipment standby (Claim 4), Lieu sewer change/waterline adjustment (Claim 6); permeable ballast payment (Claim 7); original pay items (Claim 8); added work (Claim 9); are all liquidated claims to the extent the claims were factually supported. This is true even though disputed as to exact amount. The facts, once found, result in damages that are considered based on a fixed standard – that being the contract in issue. Interest will be awarded as the amounts owing are liquidated sums as of the date Conway perfected its claims, May 17th, 2016. The only exception is detailed in Finding of Fact No. 160.

Finding of Fact No. 160: Conway has acknowledged that senior personnel labor costs were not fully specified in rates proposed at the outset of the contract. Only the project superintendent pay rate of $75 per hour was included in the initial rate sheet, Exhibit 205. In Findings of Fact 137 and 138, the Court exercised its discretion and found what the Court believes is an equitable pay rate for the project manager and project administrator unliquidated. Applying the appropriate markup to sums awarded in Finding of Fact 138, the sum of $17,343 will be deemed unliquidated and not subject to pre-judgment interest claims.

Finding of Fact No. 161: Various issues were raised by the parties regarding good faith and discovery compliance. Given the complexity of this action, the considerable amount of



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written information relevant to the dispute and the manner in which the discovery requests evolved, the Court does not find that either party is in bad faith related to discovery.

Finding of Fact No. 162: The City has made a variety of claims against Conway for faulty work, and excess costs following the rebid awarded to Olson Brothers Construction for the work remaining following termination of Conway. The City's claim also contains items where it is alleged Conway's work was defective. A summary of the increased costs/cost differential between Conway and Olson's bid is at Exhibit 172.

Finding of Fact No. 163: Prior to termination, the City claimed Conway was responsible for 34 nonconforming pervious concrete panels, which were either damaged or out of tolerance. The Court finds Conway responsible for the cost of replacement of these panels, and the quantities referenced on Line Item A32R in Exhibits 144 and 145 already reflect reduction for this offset in the City's favor.

Finding of Fact No. 164: Exhibit 69 is a nonconforming order related to root barrier damage owing prior to termination supports the City's claim in this regard. Exhibits 144 and 145 reflect reduction in Line Item A57R to account for the damage to the root barrier.

Finding of Fact No. 165: The City is entitled to credit for two items that Conway agrees were nonconforming. These are a $1,400 credit for undertemperature concrete placement (Item A31 on Exhibit 144) and $3,284.91 for incomplete catch basins (Item A43 in Exhibit 44).

Finding of Fact No. 166: The parties agree that Conway has already been paid $1,403,401.80 for base contract work. The record does not contain line item payment information for each item that Conway concedes the City should be allowed credit for. Based on testimony, the Court understands these credits to have been reflected by appropriate reductions in the previous payment. If the prior payment was reduced, a second reduction would constitute prohibited double reduction. If that reduction was not taken in the previous payments, the parties are invited to bring the issue to the Court's attention in the event this particular question cannot be resolved by agreement.

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Finding of Fact No. 167: Subsequent to termination the City refused to voluntarily allow Conway or its surety on site for investigative purposes, or for any purpose other than equipment removal.

Finding of Fact No. 168: Conway was never given an opportunity to investigate or potentially cure any of the alleged defects in workmanship claimed by the City. Conway was never afforded the opportunity to complete bid items that were only partially finished at time of termination.

Finding of Fact No. 169: There is a dispute between the City and Conway as to the cause of a variety of items claimed by the City as damages alleged to have resulted from contractual nonconformity by Conway. These areas of dispute include, but may not necessarily be limited to: additional defective permeable concrete panels, additional contaminated ballast, unusable and contaminated spoils, sewer pipe alignment, roadway damage from striping removal, introduction of foreign material onto the roadway surface, driveway apron and concrete ramp placement, incomplete sewer service installation, and site restoration.

Finding of Fact No. 170: Considerable testimony and documentation of alleged remediation and completion costs incurred by the City following Conway's termination was supplied by the City. For example, Olson pay applications for some of this work are found at Exhibits 202, 206, and 215.

Finding of Fact No. 171: The Court will forbear analysis designed to quantify the City's counterclaims. As a result of the Court's Conclusions of Law Nos. 16 through 19 inclusive, such analysis is superfluous to the decision.

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## CONCLUSIONS OF LAW

Conclusion of Law No. 10: The Court incorporates by reference Conclusions of Law 1 through 9 from the Court's initial Findings of Fact and Conclusions of Law, as if fully set forth herein.

Conclusion of Law No. 11: Pursuant to Exhibit 1, the parties' contractual agreement at Section 1-09.4, recovery is prohibited for profit and consequential damages related to equitable adjustments of the contract price. Exhibit 1, Section 1-09.4(3) provides, "No claim for anticipated profits on deleted, terminated or incompleted work will be allowed." Exhibit 1, Section 1-09.4, states, "No claim for consequential damages of any kind will be allowed." Exhibit 1, Section 1-09.5(6) reiterates this same language as to deleted or terminated work. Conway will not be allowed lost profits, nor direct or indirect consequential damages on this claim. Such exclusionary clauses in commercial contracts are wholly enforceable. See *American Nursery Products vs. Indian Wells Orchard*, 115 Wn.2d 217 (1990).

Conclusion of Law No. 12: As claimant, Conway has the burden of proving its damages resulting from contract breach with reasonable certainty. See 224 *Westlake LLC vs. Engstrum Properties, LLC*, 169 Wn.App. 700 (2012). As adjusted pursuant to the Findings of Fact, the amount the Court finds proven to be owing to Conway for base contract work totals $864,068.80.

Conclusion of Law No. 13: The contract (Exhibit 1) contemplates that work may be required to be performed beyond the scope of the original contract terms. Section 1-04.4 provides the basis for the engineer's authority to modify quantities, alterations, and other adjustments to the contract as necessary to adequately complete the project. This section also provides the process by which contract changes are ordered, valued and paid. Exhibit 1, Section 1-04.5, outlines the process by which the contractor can protest the engineer's decisions. Except as to the TSI conduit issue, Conway was in compliance with the change order/protest procedures, and thereby perfected its right to litigate its claims in this court.

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Conclusion of Law No. 14: Conway claims that the City wrongfully denied TSI's pass-through claim related to the conduit placement. Each party brought to the Court's attention a variety of issues related to the illumination conduit placement. These issues include the method of claim submission, trench depth, backfill material, conduit location, and pre-installation notice of that location. The Court did, to some extent, analyze these allegations in its Findings of Fact. The Court's determination regarding the rejection of this TSI/Conway claim finds its basis in a lack of timeliness of notice and perfection of claim to the City as specified by Exhibit 1, Section 1-09.11. The Washington Supreme Court interpreted this contract section in *Mike M. Johnson, Inc., vs. City of Spokane*, 150 Wn.2d 375 (2003). In *Johnson* (supra) a series of letters were exchanged by the parties notifying each other of respective positions on a variety of claims. This occurred over a course of several months, and in the end the Court found that, Throughout this lengthy period of correspondence, MMJ failed to comply with the contractual protest procedures required under Section 1-04.5 and, additionally, failed to follow the formal claim procedures under Section 1-09.11 which were a contractual condition precedent to MMJ's right to seek judicial relief. *Id.* p.384.

The *Johnson* Court declined to apply an actual notice exception and affirmed the City's denial of the claim as untimely and out of procedural compliance. The *Johnson* decision is binding on this Court related to the TSI/Conway conduit claim, and that claim is denied.

Conclusion of Law No. 15: Conway claims that the *Johnson* case (supra) is not controlling here and urges the Court to adopt the rule applied in *Weber Construction, Inc., vs. The County of Spokane*, 124 Wn.App. 29 (2004). *Weber* was an appeal from a decision where the Trial Court entered judgment as a matter of law pursuant to CR 50, holding the contract did not comply with procedural claim requirements and consequently Weber could not pursue its claim for extra work payment. *Weber* addressed the situation where unforeseen subsoil conditions (unexpected large boulders) created the need for a change order. In the case at bar, no unforeseen conditions factor into the analysis. The *Weber* remand for fact finding was

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ordered by the Appellate Court based on the issue of Spokane County's alleged waiver of the claims process. The waiver assertion was based on the assertion that the county was in sole possession of information related to disposition/disposal of the newly found boulders. Weber argued it could not be in compliance with the contract claims process without the sought after information it alleged the County withheld. Consequently, Weber argued, by withholding information requisite to perfecting the claim, the county waived its right to assert procedural irregularity related to that claim. The *Weber* Court remanded the case to the Trial Court for determination of the factual question regarding a waiver. Absent waiver, "Actual notice was not an exception to contractual compliance." *Id.* p.32

Here, Conway has the burden of proving the City's waiver of claim procedure. *See U.S. Oil and Refining Company vs. Lee and Estes Tank Lines, Inc.*, 104 Wn.App. 823, 830, 831 (2001)

> Waiver is the intentional and voluntary relinquishment of a known right which may be inferred from circumstances indicating an intent to waive. Waiver may be express or by implication. To constitute implied waiver, there must exist UNEQUIVOCAL acts or conduct evidencing an intent to waive. Waiver will not inferred from doubtful or ambiguous factors. The party asserting waiver bears the burden of proving an intention to relinquish the right. (Emphasis mine)

This Court has completed its fact finding and Conway's proof related to waiver fails. *Weber* is inapposite to the case at bar and will not be applied.

<u>Conclusion of Law No. 16:</u> The City has made multiple claims related to defective work through which it claims offset to amounts owing to Conway. Critical to this analysis is the Court's earlier finding that the City was in breach of contract when it wrongfully terminated Conway for default. The Court ruled the termination was for convenience, therefore the City, not Conway, was in breach of contract. The City cites the *Ducolon Mechanical, Inc., vs.*

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*Shinstine/Forness, Inc.*, 77 Wn.App. 707 (1995) for the proposition that, even though the City was found to have wrongfully terminated the Conway contract, it may still pursue its claim for costs of defective work remediation and increased completion costs that were incurred after Conway was ordered off the job site on March 25th, 2016.

The critical distinction between *Ducolon* and the case at bar is that in *Ducolon*, both parties to the contract had materially breached the agreement, essentially placing those parties *in pari delicto*. Here, Conway was not found in breach. Conway was given no opportunity to cure alleged detective work, or complete partially finished work. In fact, neither Conway nor its surety were permitted to even timely investigate the potential cause or causes of the City's defective work claims. Such an investigation would have helped clarify whether Conway's performance was actually defective, or whether the conduct of others (including the City) was the source of the alleged defect.

While no Washington authority has been found to addressing the specific circumstances before this Court (i.e. only one party in breach), the Oregon State Court of Appeals has recently ruled on the issue in *Shelter Products, Inc., v. Steelwood Construction, Inc.*, 257 Or.App. 382, 402 (2013). In *Shelter Products*, a material supplier (Shelter Products) brought a claim against the general contractor (Catamount Constructors, Inc.), and a subcontractor (Steelwood Construction, Inc.) for material supplied to Steelwood to be utilized in work involving Steelwood's subcontract with Catamount. After Steelwood took delivery of materials and commenced work pursuant to the subcontract, Catamount terminated Steelwood for convenience. Shelter Products sued Steelwood and Catamount on its materialman's lien, and Steelwood crossclaimed against Catamount for the amount of Steelwood's Construction lien. Catamount crossclaimed back against Steelwood for offset based on claims of alleged defective work.

While the procedural posture of the case at bar is less convoluted than in *Shelter Products*, the *Shelter Products* Court's reasoning is persuasive and on point. That Court ruled:

So to go back now without giving Steelwood an opportunity to inspect, to cure, to do anything and just say that the contract somehow allows under termination of convenience for the contractor to then go in and discuss all of these things that it now charges against the subcontractor, is not provided by the terms of the contract, it's not provided by any case law that I can find. And I don't think it is appropriate.

The *Shelter Products* rule is applicable here, and except as otherwise specifically stated, the City's claim for post-termination damages and costs are denied in their entirety.

Conclusion of Law No. 17: The foregoing conclusion is consistent with longstanding and uniform case law which expresses the goal in contract claims. In addressing the relief due to the non-breaching party in a construction contract claim, the Court ruled in *Eastlake Construction Company, Inc., vs. Hess,* 102 Wn.2d, 30, 39 (1984) "that the general measure of damages for breach is that the injured party is entitled (1) to recovery of all damages that accrue naturally from the breach (2) to be put in as good of a pecuniary position as he would have had had the contract had been performed." All cases found by this Court speak to the relief owed to the non-breaching party. None provide such relief to a sole party in breach.

Conclusion of Law No. 18: Contrasting the remedies available under the subject contract for termination for default versus for convenience, we have further illustration of the point addressed in *Shelter Products* (supra). Exhibit 1, Section 1-08.10(1), addresses the contractor's responsibilities in the event of default, in relevant part providing, "Any extra costs or damages to the contracting agency shall be deducted from any money due or coming due from the contractor under the contract."

The default section continues: "The contractor shall bear any extra expenses incurred by the contracting agency in completing the work, including all increased costs for completing the work, and all damages sustained or which may be sustained by the contracting agency by reason of such... neglect... of the work by the contractor."



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By contrast, Exhibit 1, Section 1-08.10(4) addresses payment following termination for convenience, stating, "Whenever the contract is terminated in accordance with Section 1-08.10(2), for public convenience, payment will be made in accordance with Section 1-09.5 for the actual work performed."

The specification of these sharply contrasting contractual remedies for default as opposed to public convenience further supports this Court's denial to the City of damages for post-termination costs.

Conclusion of Law No. 19: Exhibit 44 is the Notice of Suspension and Right to Cure letter sent by the City to Conway pursuant to Exhibit 1, Section 1-08.10(1). This notice and cure provision allowed Conway 15 days to cure the alleged breach related to the work specified in the notice. In the instant case the alleged breach is based on Exhibit 1, Section 1-08.10(1)(6) asserting a circumstance where the "contractor... neglects or refuses to correct rejected work." In *DC Farms, LLC, vs. Conagra Foods Lamb Weston, Inc.*, 179 Wn.App. 205, 226 (2014) the Court ruled

> A party who bargained for a notice and cure provision to protect against forfeiture and litigation is entitled to have that bargained for protection honored. And if the party who seeks to have the contract terminated truly believes that the default cannot be cured, then giving notice - with the result that any steps actually taken and proposal actually made will be in evidence - will produce a more reliable and thereby fairer basis for deciding whether the breach is curable.

Most of the post-termination claims advanced by the City involve issues where Conway was never given the right to cure or even timely investigate. This failure of notice and right to cure is a separate and also fatal defense to the City's post-termination claims.

Conclusion of Law No. 20: "Generally, prejudgment interest is favored because the law assumes that one who retains money owed to another should be charged interest on it."



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*Lakes v. von der Mehden* 117 Wn.App 212, 217 (2003) citing *Kiewit-Grice v. State* 77 Wn.App. 867 (1995)

Here, Conway has been unpaid the monies owed at the time of termination for approximately 21 months. The Court recognizes Conway requests prejudgment interest on items completed at the time of termination, back to the date of termination, that being March 25th, 2016. The contract does, however, contain a claims procedure that the parties agreed to utilize in the event of dispute. Conway's allowed claims will consequently all be deemed liquidated as of May 17th, 2016. The Trial Court is invested with discretion as to the amounts subject to, and the availability of prejudgment interest. See *Hadley v. Maxwell*, 120 Wn.App 137 (2004). The City argues that because all of Conway's claimed damages were not quantified with precision at the time the claim was perfected (May 17th, 2016), no prejudgment interest should be granted (citing to Charles Tilford McCormick - Handbook on the Law of Damages - Section 54 (1935).

The current rule, cited in Prier vs. Refrigeration Engineering Company, 74 Wn.2d 75 (1968), a case also relied on by the City, holds that even though an exact damage amount is not known, or is disputed, it can be found to be liquidated if it can be determined by a fixed standard and is not reliant upon opinion or discretion. Here the contract that the parties entered into forms "the fixed basis" for computation of damages, even though the amounts were disputed and some successfully challenged by the City. See *Scoccolo Construction, Inc., ex. Rel Curb One, Inc., v. City of Renton*, 158 Wn.2d 506 (2006).

Conway, except as specified in Finding of Fact 160, shall be awarded interest at the rate of 12% on the amounts awarded in the decision, measured from May 17th, 2016, as day "zero."

<u>Conclusion of Law No. 21:</u> Conway may petition the Court for attorney fees and costs as provided in CR 54.

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FILED
DEPT 18
IN OPEN COURT
FEB 21 2018
PIERCE COUNTY, Clerk
By ____
DEPUTY

DATED this 21 day of ~~January,~~ February 2018.

JUDGE Stanley J. Rumbaugh

# APPENDIX C

16-2-07731-1 51034354 ORRE 03-30-18

FILED
DEPT 18
IN OPEN COURT
MAR 28 2018
PIERCE COUNTY, Clerk
By ____ DEPUTY

3/30/2018 5025 0029

The Honorable Stanley J. Rumbaugh, Dept. 18
SPECIAL SET: Date of Hearing: March 23, 2018
Time of Hearing: 11:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF PIERCE

| | |
|---|---|
| CONWAY CONSTRUCTION COMPANY, an Oregon corporation,<br><br>Petitioner-Plaintiff,<br><br>vs.<br><br>CITY OF PUYALLUP, a Washington municipal corporation,<br><br>Respondent-Defendant. | No. 16-2-07731-1<br><br>Consolidated with: 16-2-10126-2<br>16-2-10216-1<br><br>ORDER AWARDING FEES AND COSTS TO PLAINTIFF CONWAY CONSTRUCTION COMPANY |

THIS MATTER came before the Court on Plaintiff Conway Construction Company's Petition for Fees and Costs. The Court has reviewed the following submissions and evidence:

1. Plaintiff Conway Construction Company's Petition for Fees and Costs;

2. Declaration of Joseph Straus in Support of Conway Construction Company's Petition for Fees and Costs, with exhibits attached thereto;

3. Un-redacted Copy of Exhibit A to the Declaration of Joseph Straus in Support of Conway Construction Company's Petition for Fees and Costs;

4. Declaration of David Conway in Support of Conway Construction Company's Petition for Fees and Costs, with exhibits attached thereto;

5. Declaration of Kenneth Conway in Support of Conway Construction Company's Petition for Fees and Costs;

6. Declaration of McKenzie Baker in Support of Conway Construction Company's Petition for Fees and Costs;

7. Declaration of Chad Ahrens in Support of Conway Construction Company's Petition for Fees and Costs;

8. Declaration of Scott McGilvray in Support of Conway Construction Company's Petition for Fees and Costs;

9. Declaration of Sean P. Dowell in Support of Conway Construction Company's Motion for Award of Attorneys' Fees and Costs, with exhibits attached thereto;

10. Declaration of Ryan M. Gilchrist in Support of Plaintiff Conway Construction Company's Motion for Attorneys' Fees, with exhibits attached thereto;

11. Defendant City of Puyallup's Response to Conway Construction Company's Petition for Fees and Costs, with exhibits attached thereto;

12. Declaration of William A. Linton in Support of City's Response to Conway Construction Company's Petition for Fees and Costs;

13. Declaration of Philip A. Talmadge on Attorney Fees;

14. Plaintiff's Reply in Support of Petition for Fees and Costs;

15. Declaration of Joseph Straus in Rebuttal to Declaration of Philip A. Talmadge, with exhibits attached thereto;

16. Declaration of Cathleen Biro in Rebuttal to Declaration of Philip A. Talmadge;

17. Declaration of Ryan Dumm in Support of Conway Construction Company's Petition for Fees and Costs, with exhibits attached thereto; and

18. Plaintiff's Motion to Strike Portions of the Declaration of Philip A. Talmadge.

The Court heard oral argument from counsel on March 21, 2018, at which time the Court considered the evidence and argument, weighed the factors set forth in *Berryman v.*

*Metcalf*, 177 Wn. App. 644, 656–64, 312 P.3d 745 (2013), and made findings and conclusions on the record in open court. In addition, the Court makes the following written findings and conclusions:

1. Washington subscribes to the "American Rule" for the payment of attorney fees, under which "the imposition of attorney fees must be based upon some agreement (contract), a statute, or some recognized ground in equity." *E.g.*, *Hamm v. State Farm Mut. Auto Ins. Co.*, 151 Wn.2d 303, 325, 88 P.3d 395 (2004).

2. Special Provision § 1-09.11 of the parties' contract awards reasonable attorney fees and costs to the prevailing party in a lawsuit arising out of the contract:

> The Owner and Contractor each agree that in the event either of said parties brings an action in any court arising out of this Contract, the prevailing party in any such lawsuit shall be entitled to an award of its cost of defense.
>
> "Cost of Defense" shall include, without limiting the generality of such term, expense of investigation of plaintiff's claims, engineering expense, expense of deposition, exhibits, witness fees, including reasonable expert witness fees, and reasonable attorneys' fees. The obligation of payment under this clause shall be incorporated in any judgment rendered in such action either in the form of a judgment against plaintiff for any defendant or in the form of reduction of the judgment otherwise rendered in favor of plaintiff against any defendant, and shall be paid within thirty (30) days after entry of judgment.

*See* Ct.'s Ex. No. 2 (admitted).

3. The Court finds and concludes that Special Provision § 1-09.11 awards reasonable attorney fees and specifically-defined costs to the prevailing party, whether plaintiff or defendant and whether prosecuting or defending contract claims, for the following reasons at a minimum: (a) the first paragraph of the clause applies mutually on its face to "either of said parties" that may prevail in a lawsuit; (b) the term "Cost of Defense" cannot be read unilaterally and must be applied reciprocally to either prevailing party to define the costs the parties mutually intended for the prevailing party to recover; and (c) the clause as a whole (when reading the first and second paragraphs in concert) is ambiguous and therefore construed against the City as drafter.

4. Plaintiff Conway Construction Company is the substantially prevailing party in the declaratory judgment action, in the action for damages, and with respect to Defendant's counterclaims. The Court has entered judgment for Plaintiff.

5. RCW 39.04.240 is not an exclusive fee remedy in public works contracts and does not preempt the parties' private agreement authorizing the recovery of attorney fees and costs. *See King Cnty. v. Vinci Constr. Grands Projets/Parson RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 627–30, 398 P.3d 1093 (2017).

6. The requested billing rates for Plaintiff's counsel and paralegals are reasonable and commensurate with experience level. Plaintiff utilized three primary timekeepers on this matter: Joseph J. Straus, Shareholder; Ryan W. Dumm, Associate; and Cathleen Biro, Senior Paralegal. The Court finds the rates of $450 per hour in 2016 and 2017 and $465 per hour in 2018 for Mr. Straus; $250 per hour in 2016 and 2017 and $285 per hour in 2018 for Mr. Dumm; and $225 per hour for Ms. Biro to be reasonable.

7. The Court has specifically weighed the Declaration of Philip A. Talmadge suggesting Ms. Biro's rate for senior paralegal assistance is excessive and recommending a lower rate of $125 to $150 per hour. Mr. Talmadge provides no data in support of his opinion. Mr. Straus's rebuttal declaration, which provides market information about similarly-situated senior paralegals in peer law firms, leads this Court to find that on balance the rate of $225 per hour for Ms. Biro's time is reasonable and consistent with the market for paralegal services in this type of case. The Court notes that three of the paralegals who worked on this matter for Plaintiff left for competing firms, where they are now having their time billed at higher rates than $225 per hour.

8. The Court rejects Mr. Talmadge's opinion that a senior trial attorney's rate of $450 per hour is not reasonable in Pierce County. The Court notes that Defendant's outside counsel also billed time to this matter at rates in excess of $450 per hour for attorney Dan Lossing's time.

9. Plaintiff employed other timekeepers in this matter as needed, and the Court finds that the range of personnel served to reduce, rather than increase, the overall cost of the litigation. The Court finds the rates charged for the time of Averil Rothrock, Shareholder; Marti McCaleb, Associate; Derrick DeVera, Associate; Cecelia Jeong, Associate; Kristin Hildebrant, Paralegal; Annalisa Provence, Paralegal; Tonja Smith, Paralegal; CaroLea Casas, Law Clerk; Keyi Wang, Law Clerk; and Zachary Nelson, Law Clerk to be reasonable and commensurate with experience level.

10. The Court finds that the hours Plaintiff's counsel billed for this matter are reasonable. This was a document-intensive and complex case. The Court heard testimony from at least seventeen witnesses in Phase I and at least another eight witnesses in Phase II over twenty-eight trial days. The Court heard over a dozen motions, none of which the Court finds to be frivolous or unnecessary. The parties pre-marked 397 potential exhibits, and the Court marked 236 exhibits during the trial. Of the fourteen deponents, each and every deponent testified at trial. The parties were organized and well-prepared, which ultimately saved the Court and counsel time and eased the still significant burden of processing a large volume of complex information.

11. The Court does not find that Plaintiff's legal team spent excessive or disproportionate time on this matter. For example, time entries for both sides indicate that Mr. Linton worked 1,111.20 hours on the case through the end of September 2017 (the conclusion of trial), while Mr. Dumm worked 1,111.0 hours on the case through the same time period. That is astonishing similarity. The Court also notes that City Attorney Joe Beck attended every day of the trial for the City and appeared in the matter. His time (or the time of other City personnel) is not reflected or considered in Mr. Talmadge's opinion that Plaintiff's hours are disproportionate to Defendant's hours.

12. The Court finds that Plaintiff's counsel exercised appropriate billing judgment, for example by not charging for travel time, not charging for clerical tasks, and reducing or

not charging duplicative time or time required for new paralegals to come up to speed on the case. Counsel did not charge at least 130 hours of recorded time.

13. The Court has reviewed a substantial number and fair sampling of the time entries and finds them to be sufficiently detailed, enabling the Court to determine what task was performed and for what purpose. The time entries are not "block-billed." The Court rejects Mr. Talmadge's opinion in this respect.

14. This case involved several unsettled areas of law and required extensive briefing, sometimes at this Court's request.

15. The time Plaintiff's counsel billed to the matter was productive time. Plaintiff successfully prevailed in the declaratory judgment action and recovered a significant portion of the monetary damages it requested in closing argument. Plaintiff also substantially prevailed in defeating Defendant's counterclaims.

16. The Court finds that the total fee requested is proportional to the issues at stake in the litigation. The Court finds that the default termination, had it not been overturned, would have had a significant, adverse impact on Plaintiff's business as a public works contractor. The Court finds the testimony of David Conway and Scott McGilvray to be credible in this regard. The relationship between the fee requested and the nature of the dispute is appropriate.

17. The Court has weighed detailed evidence and argument and does not find any reasonable basis to reduce the rates of the timekeepers or the hours actually billed by Plaintiff's counsel and paralegals. Time billed at $0.00 (written off) will not be recovered.

18. Lodestar Calculation. The Court finds the following hours and rates to be reasonable for the reasons stated above and awards Plaintiff **$1,015,211.50** for Schwabe, Williamson & Wyatt, P.C.'s attorney fees without multiplier, which was neither requested nor appropriate, as follows:

| TIMEKEEPER | HOURS | RATE | TOTAL |
|---|---|---|---|
| **Joseph Straus, Shareholder** | 21.90 hours at | $465.00 | $10,183.50 |

| | | | |
|---|---|---|---|
| | 904.80 hours at | $450.00 | $407,160.00 |
| | 9.30 hours at | $329.03 | $3,060.00 |
| | 2.10 hours at | $300.00 | $630.00 |
| | 1.30 hours at | $276.92 | $360.00 |
| | 11.7 hours at | $225.00 | $2,632.50 |
| **Averil Rothrock, Shareholder** | 6.1 hours at | $475.00 | $2,897.50 |
| | 2.6 hours at | $465.00 | $1,209.00 |
| | 10.50 hours at | $450.00 | $4,725.00 |
| **Ryan Dumm, Associate** | 51.60 hours at | $285.00 | $14,706.00 |
| | 1,074.20 hours at | $250.00 | $268,550.00 |
| | 2.50 hours at | $125.00 | $312.50 |
| **Marti McCaleb, Associate** | 12.20 hours at | $275.00 | $3,355.00 |
| | 100.20 hours at | $250.00 | $25,050.00 |
| | 41.10 hours at | $200.00 | $8,220.00 |
| **Derrick DeVera, Associate** | 12.10 hours at | $235.00 | $2,843.50 |
| | 59.60 hours at | $230.00 | $13,708.00 |
| | 8.10 hours at | $225.00 | $1,822.50 |
| **Cecelia Jeong, Associate** | 11.20 hours at | $225.00 | $2,520.00 |
| **Cathy Biro, Paralegal** | 700.50 hours at | $225.00 | $157,612.50 |
| | 4.70 hours at | $220.21 | $1,035.00 |
| | 43.70 hours at | $213.75 | $9,340.87 |
| **Kristin Hildebrant, Paralegal** | 50.80 hours at | $225.00 | $11,430.00 |
| | 0.50 hours at | $218.80 | $109.40 |
| | 66.10 hours at | $218.78 | $14,461.23 |
| | 3.40 hours at | $112.50 | $382.50 |
| **Susan Van Meter, Paralegal** | 104.80 hours at | $225.00 | $23,580.00 |
| **Annalisa Provence, Paralegal** | 49.20 hours at | $225.00 | $11,070.00 |
| **Tonja Smith, Paralegal** | 35.60 hours at | $225.00 | $8,010.00 |
| **Julie Chapman, Paralegal** | 0.90 hours at | $225.00 | $202.50 |
| **CaroLea Casas, Law Clerk** | 10.60 hours at | $200.00 | $2,120.00 |
| **Keyi Wang, Law Clerk** | 5.50 hours at | $225.00 | $1,237.50 |
| **Zachery T. Nelson, Law Clerk** | 3.00 hours at | $225.00 | $675.00 |
| | | **Total** | **$1,015,211.50** |

19. In addition, the Court awards Plaintiff **$420.00** in attorney fees for attorney



3/30/2018 5028 0035

Robert Coleman of the Law Office of Robert Coleman.

20. Special Provision § 1-09.11 of the contract authorizes the prevailing party to recover litigation costs, including but not limited to the "expense of deposition, exhibits, [and] witness fees, including reasonable expert witness fees."

21. The Court finds that Plaintiff is entitled to recover the expenses of deposition, including court reporter fees and the expense of transcripts, regardless of whether or not such transcript was used at trial, because of the broad language of Special Provision § 1-09.11. The Court awards **$13,763.17** in deposition costs to Plaintiff. The Court denies Plaintiff's request for employee personnel time associated with appearing for depositions.

22. The Court denies Plaintiff's request for costs for hearing transcripts. While these transcripts have proved helpful over the course of the case, the Court finds that this is not a necessary litigation expense and is not recoverable under the contract.

23. The Court finds that Plaintiff is entitled to recover the outside expenses of preparing trial exhibits per the contract and awards Plaintiff **$10,040.37** for these costs. The Court denies all other copying and printing expenses, finding them to be a portion of regular overhead.

24. The Court finds that Plaintiff is entitled to recover expert witness fees per the contract and awards Plaintiff **$1,460.00** for the expert witness fee paid to defense expert Andrew Marks.

25. The Court awards Plaintiff **$241.00** in filing fees pursuant to RCW 4.84.010(1).

26. The Court awards Plaintiff **$523.50** in service of process fees pursuant to RCW 4.84.010(2).

27. Plaintiff also requested costs for the time David Conway, Kenneth Conway, and McKenzie Baker spent to prepare Plaintiff's written "claims," which Plaintiff submitted to the City for administrative review in accordance with the contract and WSDOT Standard Specifications, on the basis that the phrase "investigation of Plaintiff's claims" in Special



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Provision § 1-09.11 must be read reciprocally to include "preparation" of claims. The Court declines to adopt such a reading and rejects Plaintiff's request for personnel costs incurred to prepare the claims for administrative review.

28. The Court also denies Plaintiff's request for employee time costs to provide witness testimony at trial, other than for statutory witness fees. Plaintiff has not requested any statutory witness fees, and the Court therefore awards none.

29. The Court denies Plaintiff's request for electronic legal research expenses. The Court finds this cost is more appropriately subsumed in overhead.

30. The Court denies Plaintiff's request for lodging, meals, parking, and mileage during trial or to and from court for hearings and other matters.

31. The Court denies any other costs reflected in Exhibit A to Mr. Straus's declaration (the Schwabe, Williamson & Wyatt fee and cost invoice).

32. In addition to the fees and costs Plaintiff incurred to prevail at trial, two of Plaintiff's subcontractors, Wilson Concrete Construction Inc. ("Wilson") and Transportation Systems, Inc. ("TSI"), incurred fees and costs to assist in overturning the default termination, defending counterclaims, and/or prosecuting pass-through claims.

33. Work performed by a subcontractor's attorneys may be recoverable to the extent the work is performed to assist the general contractor to prevail at trial. *See Frank Coluccio Constr. Co. v. King Cnty.*, 136 Wn. App. 751, 780, 150 P.3d 1147 (2007). The Court finds that Wilson substantially assisted in contesting the default termination and in defending against the City's counterclaims related to allegations of defective or non-conforming concrete panels. Both of these efforts were successful. The Court finds Wilson's fees and costs to be reasonable and awards Plaintiff **$66,167.87** for the fees and costs Wilson incurred to assist Plaintiff to prevail at trial.

34. With respect to TSI, although TSI did assist Plaintiff to defend one Remedy Item listed in the default notice and to offer proof of the amount of electrical work performed



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prior to termination, TSI's primary effort was in prosecuting pass-through claims, the most significant of which was for extra work performed to relocate electrical conduit. The Court denied that pass-through claim and, on balance, the Court finds that TSI is not a substantially prevailing party under the contract and is not entitled to its fees and costs.

Based on the findings and conclusions above, the Court hereby ORDERS that Plaintiff Conway Construction Company's Petition for Fees and Costs is GRANTED IN PART and DENIED IN PART. The Court awards Plaintiff the total sum of **$1,107,827.40** in reasonable attorney fees and litigation costs as authorized by private agreement or by applicable statute or case law. Plaintiff may submit an amended judgment form to conform the judgment to this order.

Dated this 28th day of March, 2018.

The Honorable Stanley J. Rumbaugh
Pierce County Superior Court Judge

FILED
DEPT 18
IN OPEN COURT

MAR 28 2018

PIERCE COUNTY, Clerk
By _____
DEPUTY

Presented by:

SCHWABE, WILLIAMSON & WYATT, P.C.

By: s/ Ryan W. Dumm
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*Attorneys for Conway Construction Company*

Notice of Presentation Waived, Approved as to form:

INSLEE, BEST, DOEZIE & RYDER, P.S.

By: s/ William A. Linton (per email authorization 3/26/2018)
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# APPENDIX D

**RCW 4.84.250**

**Attorneys' fees as costs in damage actions of ten thousand dollars or less—Allowed to prevailing party.**

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, 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. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

**RCW 4.84.260**

**Attorneys' fees as costs in damage actions of ten thousand dollars or less—When plaintiff deemed prevailing party.**

The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280.

**RCW 4.84.270**

**Attorneys' fees as costs in damage actions of ten thousand dollars or less—When defendant deemed prevailing party.**

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

**RCW 4.84.280**

**Attorneys' fees as costs in damage actions of ten thousand dollars or less—Offers of settlement in determining.**

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250.

**RCW 4.84.330**

**Actions on contract or lease which provides that attorneys' fees and costs incurred to enforce provisions be awarded to one of parties—Prevailing party entitled to attorneys' fees—Waiver prohibited.**

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

**RCW 39.04.240**

**Public works contracts—Awarding of attorneys' fees.**

(1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

(2) The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.

# APPENDIX E

# PUBLIC WORKS CONTRACT

**1. Parties.** This Public Works Contract is made by and between the City of Puyallup, a Washington State municipal corporation (City) and Conway Construction Company (Contractor).

For and in consideration of the promises hereinafter made and exchanged, the City and Contractor agree as follows:

**2. Contract.** The word "Contract" as used throughout this document shall include the following:

**a.** This Contract;

**b.** Contractor's submitted and City accepted bid packet, which is on file with the City and incorporated herein by this reference. (The provisions of this Contract shall prevail over any conflicting provisions in the bid packet.); and

**c.** The project manual & bid documents for the **[39th Avenue SW; 11th Street SW to 17th Street SW]**, which are on file with the City, and are incorporated herein by this reference.

**3. Term.** This Contract shall be effective when both parties have executed this Contract and shall terminate upon the City's final acceptance of the Contract Work, or a valid exercise of termination rights under the provisions of this Contract.

**4. Contract Work.** The provision of goods and services identified in the Contract constitute the contract work (Contract Work). Contractor shall perform the Contract Work pursuant to the terms of the Contract. Contractor shall furnish all labor, materials, equipment, tools, transportation, services, appliances, and appurtenances for the Contract Work in strict conformity with this Contract, within the time-period prescribed by the City.

**5. Manner of Work & Qualifications.** Contractor shall provide, perform and complete the Contract Work in its entirety in a proper and workmanlike manner, and in conformance with the standard of care required of Contractor by law, and in accordance with, and as described in the incorporated plans and specifications, which are by this reference incorporated herein and made part hereof, and shall perform any changes in the Contract Work in accord with the Contract.

Contractor warrants that its employees or those persons or entities that perform the Contract Work have sufficient education, training, skill, knowledge, ability, and experience to competently perform the Contract Work. Contractor further warrants that its employees or those persons or entities that perform the Contract Work have satisfied all statutory and regulatory

requirements that are necessary to perform the Contract Work.

**6. Time of Completion.** Contractor shall commence to perform the Contract Work after execution of this Contract and when directed by the City. The City's authority to direct commencement shall include the authority to delay commencement of the Contract Work. Contractor shall complete the Contract Work by: 240 days.

**7. Compensation.** The City shall pay Contractor an amount up to, but **not to exceed Three million eight hundred sixty one thousand seventy seven dollars and forty seven cents ($ 3,861,077.47)** plus any applicable Washington State sales tax. Contractor shall submit regular statements to the City describing the portion of the Contract Work that has been provided with any necessary corresponding or supporting records. The City, upon receipt of a completed invoice or billing statement, shall promptly process said claims for payment. Contractor shall be responsible for the payment of any taxes imposed by any lawful jurisdiction as a result of the performance and payment of this Contract.

a. **Retainage.** The City shall hold back a retainage in the amount of five percent (5%) of any and all payments made to Contractor for a period of sixty (60) days after the date of final acceptance, or until receipt of all necessary releases from the State Department of Revenue and the State Department of Labor and Industries and until settlement of any liens filed under RCW 60.28, whichever is later. If Contractor plans to submit a bond in lieu of the retainage specified above, the bond must be in a form acceptable to the City and submitted upon entering into this Contract, and shall be issued from a bonding company that satisfies the City.
b. **Defective or Unauthorized Work.** The City shall be entitled to withhold payment from Contractor for any defective or unauthorized work. If Contractor is unable, for any reason, to satisfactorily complete any portion of the Contract Work, the City may complete the work by contract or otherwise, and Contractor shall be liable to the City for costs incurred by the City. The City is entitled to deduct the cost to complete the Contract Work from any amounts that may be due and payable to Contractor. Notwithstanding the terms of this section, the City's payment to Contractor shall not be a waiver of any claims the City may have against Contractor for defective or unauthorized work.
c. **Final Payment—Contractor's Waiver of Claims.** CONTRACTOR'S ACCEPTANCE OF FINAL PAYMENT (EXCLUDING WITHHELD RETAINAGE) SHALL CONSTITUTE A WAIVER OF CONTRACTOR'S CLAIMS, EXCEPT THOSE PREVIOUSLY AND PROPERLY MADE AND IDENTIFIED BY CONTRACTOR AS UNSETTLED AT THE TIME REQUEST FOR FINAL PAYMENT IS MADE.

**8. Changes.** The City may issue a written change order for any change in the Contract Work during the performance of this Contract. Alternatively, if Contractor believes that a change order is necessary, Contractor must submit a written change order request to the City. If Contractor fails to request a change order before performing changes in the Contract Work, Contractor waives its right to make any claim or submit a subsequent change order request for that changed portion of the Contract Work. Contractor shall perform the change order work

upon receiving either a written change order from the City or an oral order from the City that precedes a written change order.

If the City issues or authorizes the change order and determines that the change increases or decreases Contractor's costs or time for performance, the City will make an equitable adjustment to the terms of this Contract, which may include, but shall not be limited to, a change in compensation or extension of time. The City will attempt, in good faith, to reach agreement with Contractor on all equitable adjustments. However, if the parties are unable to agree, the City is entitled to establish an equitable adjustment that it deems appropriate. Contractor shall complete the change order work, but may elect to protest the adjustment and assert a claim as provided in this Contract.

Contractor accepts all requirements of a change order by: (1) endorsing it, (2) issuing a separate acceptance, or (3) by failing to protest in accordance with the requirements of this Contract. Acceptance of payment for change order work under a change order that is accepted by Contractor as provided in this section shall constitute full payment and final settlement of all claims for compensation or costs and expenses that are related to the change.

**9. Change Order Protests and Claims.** If Contractor disagrees with any requirement of a change order or oral order from the City, Contractor may file a protest and assert a claim as provided in this section. Contractor shall give written notice to the City of any protest and claim within fourteen (14) calendar days of the occurrence of the events giving rise to the protest and claim, or within fourteen (14) calendar days of the date Contractor knew or should have known of the facts or events giving rise to the protest and claim, whichever occurs first. Any protest and claim shall be conclusively deemed to have been waived by Contractor unless timely notice is provided pursuant to this section.

**FAILURE TO PROVIDE A COMPLETE, WRITTEN NOTIFICATION OF CLAIM WITHIN THE TIME ALLOWED SHALL CONSTITUTE A WAIVER OF ANY CLAIMS ARISING FROM OR RELATED TO THE FACTS OR EVENTS SURROUNDING THAT CLAIM OR CAUSED BY THAT DELAY.**

If Contractor chooses to file a protest and assert a claim, Contractor's written protest and claim shall include the following:

**a.** Notice of Protest and Claim. A signed written notice of protest and claim that provides the following information:
- The date of the notice;
- An accurate description of the nature the claim and the circumstances that gave rise to the claim, including, if applicable, an analysis of the progress schedule showing the schedule impact or disruption;
- The provisions in the Contract or change order that are the basis for, or apply to the claim; and
- The proposed remedy, including, if any, the amount of the claim, and the basis for its calculation;

**b.** Records. Complete copies of all records that support the claim.

**10. Laws and Rules.** Contractor shall comply with all applicable state, federal, or local

laws, regulations, rules, or any other sources of authority, including, but not limited to, court orders, administrative rulings and the following:

**a.** Wage, Hour, Safety, and Health Laws. Contractor shall comply with the rules and regulations of the Fair Labor Standards Act, 294 U.S.C. 201 *et seq.*, the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.*, the Washington Industrial Safety and Health Act, RCW 49.17, and any other state or federal laws applicable to wage, hours, safety, or health standards.

**b.** Prevailing Wages. Contractor shall file a "Statement of Intent to Pay Prevailing Wages", which shall include Contractor's registration certificate number and the prevailing rate of wage for each classification of workers entitled to prevailing wages under RCW 39.12.020, and the estimated number of workers in each classification. Contractor shall pay prevailing wages and comply with RCW 39.12 as well as any other applicable prevailing wage rate provisions. Contractor shall obtain the most current prevailing wage rate revision issued by the Department of Labor and Industries. Contractor shall require all subcontractors to comply with RCW 39.12 and this section of the Contract.

**11. Independent Contractor.** Contractor shall be an independent contractor for all federal, state and other purposes.

**12. Days and Time of Work.** Contractor shall perform the Contract Work only during Monday through Friday and 7:00 a.m. to 7:00 p.m. unless otherwise authorized by the City.

**13. Audit of Contractor Records.** Contractor shall maintain records which sufficiently and accurately reflect all the provision of goods and services and costs and expenses related to the performance of the Contract Work, and use such accounting procedures and practices as may be deemed necessary by the City to assure proper accounting of all funds paid pursuant to this Contract. Contractor shall make these records available to the City, at all reasonable times, for inspection, review or audit by the City, its authorized representative, the State Auditor, or other governmental officials authorized by law to monitor this Contract.

**14. Work Product.** All originals and copies of work product related to the Contract Work, in whatever form, including, but not limited to, plans, sketches, layouts, designs, design specifications, records, files, computer disks, magnetic media or material, shall belong to the City. At the termination or expiration of this Contract, all originals and copies of any such work product in the possession of Contractor shall be delivered to the City. Contractor is entitled to retain copies of any work product for its own records.

**15. Confidentiality.** Contractor may use confidential information and other sensitive information gained by reason of its provision of services to the City, or by access to its property, when expressly authorized by the City, and only for City purposes. Contractor shall not disclose, transfer, or sell any such information to any party, except as provided by law, or in the case of personal information, without the prior written consent of the person to whom the personal information pertains. Contractor shall maintain the confidentiality of all personal information and other information gained by reason of its provision of services to the City, or by access to its

property.

**16. Insurance.** Contractor shall procure and maintain for the duration of the Contract or activity associated with the Contract, whichever is longer, insurance against claims for injuries to persons or damage to property which may arise from or occur in connection with the performance of the work hereunder by Contractor, their agents, representatives, employees or subcontractors. Contractor's maintenance of insurance, its scope of coverage and limits as required herein shall not be construed to limit the liability of Contractor to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity.

a. Minimum Scope of Insurance. Contractor shall obtain insurance of the types described below:

   i. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be written on Insurance Services Office (ISO) form CA 00 01 or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage.

   ii. Commercial General Liability insurance shall be written on ISO occurrence form CG 00 01 and shall cover liability arising from premises, operations, stop gap liability, independent contractors, products-completed operations, personal injury and advertising injury, and liability assumed under an insured contract. The Commercial General Liability insurance shall be endorsed to provide the Aggregate Per Project Endorsement ISO form CG 25 03 11 85 or an equivalent endorsement. There shall be no endorsement or modification of the Commercial General Liability insurance for liability arising from explosion, collapse or underground property damage. The City shall be named as an insured under Contractor's Commercial General Liability insurance policy with respect to the work performed for the City using ISO Additional Insured endorsement CG 20 10 10 01 and Additional Insured-Completed Operations endorsement CG 20 37 10 01 or substitute endorsements providing equivalent coverage.

   iii. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

   iv. Builders Risk -NOT APPLICABLE insurance covering interests of the City, Contractor, Subcontractors, and Sub-subcontractors in the work. Builders Risk insurance shall be on a all-risk policy form and shall insure against the perils of fire and extended coverage and physical loss or damage including flood, earthquake, theft, vandalism, malicious mischief, collapse, temporary buildings and debris removal. This Builders Risk insurance covering the work will have a deductible of $5,000 for each occurrence, which will be the responsibility of Contractor. Higher deductibles for flood and earthquake perils may be accepted by the City upon written request by Contractor and written acceptance by the City. Any increased deductibles accepted by the City will remain the responsibility of Contractor. The Builders Risk insurance shall be maintained until final acceptance of the work by the City.

b. Minimum Amounts of Insurance. Contractor shall maintain the following insurance limits:
   i. Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of $1,000,000 per accident.
   ii. Commercial General Liability insurance shall be written with limits no less than $1,000,000 each occurrence, $2,000,000 general aggregate and a $2,000,000 products- completed operations aggregate limit.
   iii. Builders Risk insurance shall be written in the amount of the completed value of the project with no coinsurance provisions.
c. Other Insurance Provision. Contractor's Automobile Liability, Commercial General Liability and Builders Risk insurance policies are to contain, or be endorsed to contain that they shall be primary insurance as respect to the City. Any Insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of Contractor's insurance and shall not contribute with it.
d. Contractor's Insurance for Other Losses. Contractor shall assume full responsibility for all loss or damage from any cause whatsoever to any tools, Contractor's employee owned tools, machinery, equipment, or motor vehicles owned or rented by Contractor, or Contractor's agents, suppliers or contractors as well as to any temporary structures, scaffolding and protective fences.
e. Waiver of Subrogation. Contractor and the City waive all rights against each other, any of their Subcontractors, sub-subcontractors, agents and employees, each of the other, for damages caused by fire or other perils to the extent covered by Builders Risk insurance or other property insurance obtained pursuant to the Insurance Requirements Section of this Contract or other property insurance applicable to the work. The policies shall provide such waivers by endorsement or otherwise.
f. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best rating of not less than A: VII.
g. Verification of Coverage. Contractor shall furnish the City with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the Automobile Liability and Commercial General Liability insurance of Contractor before commencement of the work. Before any exposure to loss may occur, Contractor shall file with the City a copy of the Builders Risk insurance policy that includes all applicable conditions, exclusions, definitions, terms and endorsements related to this project.
h. Subcontractors. Contractor shall have sole responsibility for determining the insurance coverage and limits required, if any, to be obtained by subcontractors, which determination shall be made in accordance with reasonable and prudent business practices.
i. Notice of Cancellation. Contractor shall provide the City and all Additional Insureds for this work with written notice of any policy cancellation, within two business days of their receipt of such notice.
j. Failure to Maintain Insurance. Failure on the part of Contractor to maintain the insurance as required shall constitute a material breach of contract, upon which the City may, after giving five business days notice to Contractor to correct the breach, immediately terminate the contract or, at its discretion, procure or renew such

insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the City on demand, or at the sole discretion of the City, offset against funds due Contractor from the City.

k. Contractor to insure that insurance coverage is adequate for the scope of work as defined in the RFP (Request for Proposal) and design drawings.

**17. Performance & Payment Bond.** At such time as Contractor enters into this Contract, Contractor shall provide a performance and labor & materials payment bond in an amount that equals the Contract compensation as security for the faithful performance and payment of all Contractor's obligations under this Contract. The amount of the bond shall be increased for each change order in an amount that equals the amount of the change order. The bond shall be in a form that is acceptable to the City's attorney. The surety shall be licensed to conduct business in the State of Washington and shall be named in the current list of "Surety Companies Acceptable in Federal Bonds" as published in the Federal Register by the Audit Staff Bureau of Accounts, U.S. Treasury Department.

In the event that the compensation called for in this Contract is less than $25,000.00, which sum shall be determined after the addition of applicable Washington state sales tax, Contractor may, in lieu of the above mentioned bond, elect to have the City retain 50% of the contract amount for a period of either thirty (30) days after final acceptance, or until receipt of all necessary releases from the Department of Revenue and the Department of Labor and Industries and settlement of any liens filed under RCW 60.28, whichever is later.

**18. Warranty.** Contractor warrants that it shall correct all defects in workmanship and materials that occur within one (1) year from the date of the City's final acceptance of the Contract Work, or within the product or manufacturer's warranty period, whichever is longer. The expiration of this warranty shall be tolled for any defects in workmanship and materials until the defects are corrected. Thereafter, the warranty for the corrected portion of the Contract Work shall extend for one (1) year from the date that such correction is completed and accepted by the City. Contractor shall begin to correct any defects within the timeframe set forth in the notice of defect from the City. If Contractor does not accomplish the corrections within a reasonable time as determined by the City, the City may complete the corrections and Contractor shall pay all costs incurred by the City to achieve the correction.

Upon the City's final acceptance of the Contract Work, Contractor shall, at the option and upon demand of the City, provide the City with a warranty bond in a form and amount that is acceptable to the City.

**19. Debarment.** Contractor certifies that it is neither excluded nor disqualified as defined in 2 CFR Part 180. Contractor shall refrain from becoming excluded or disqualified, and shall fully comply with the requirements of Subpart C of 2 CFR Part 180 and any applicable parts of 2 CFR Parts 300 through 5899. Contractor shall require each person or entity with whom Contractor enters into a covered transaction at the next lowest tier, as defined in 2 CFR Part 180, to fully comply with the requirements of Subpart C of 2 CFR Part 180, and any applicable parts of 2 CFR Parts 300 through 5899. If Contractor or a person or entity with whom Contractor enters into a covered transaction is excluded or debarred, Contractor shall immediately notify the City in writing.

**20. Indemnification & Hold Harmless.** Contractor shall defend, indemnify and hold the City, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with the performance of this Contract, except for injuries and damages caused by the sole negligence of the City.

Should a court of competent jurisdiction determine that this Contract is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of Contractor and the City, its officers, officials, employees, and volunteers, Contractor's liability hereunder shall be only to the extent of Contractor's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes Contractor's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Contract.

**21. Work Performed at Contractor's Risk.** Contractor shall take all precautions necessary and shall be responsible for the safety of its employees, agents, and subcontractors in the performance of this Contract. All work shall be done at Contractor's own risk, and Contractor shall be responsible for any loss of or damage to materials, tools, or other articles used or held for use in connection with the work.

**22. Termination.** The City shall be entitled to terminate this Contract for good cause. "Good cause" shall include, but shall not be limited to, any one or more of the following events:

a. Contractor's refusal or failure to supply a sufficient number of properly skilled workers or proper materials for completion of the Contract Work;
b. Contractor's failure to make timely progress or complete the work within the timeframe required by the City;
c. Contractor's failure to make full and prompt payment to subcontractors or for material or labor;
d. Contractor's failure to comply with Federal, state or local laws, rules or regulations;
e. Contractor's filing for bankruptcy or becoming adjudged bankrupt;
f. Contractor's breach of any portion of this Contract; or
g Changes in budgetary allocations or funding.

**23. Liquidated Damages.** Contractor acknowledges and agrees as follows: The Contract Work is ultimately for the benefit of the public, and as such, there is a compelling need to complete the Contract Work in the time specified in the Contract. Due to the expenditure of public funds for the Contract Work, and the need to complete the Contract Work for the health, safety and welfare of the public, the failure to complete the Contract Work within the time specified in the Contract will result in loss and damage to the City. A delay will likely result in damages that arise as a consequence of, or are incidental to, the delay, additional costs and expenses to the City that are difficult to determine, tangible and intangible detriments to the City, and loss of use and inconvenience to the public. However, damages for delay in the performance or completion of the Contract Work are and will be difficult to ascertain.

Although difficult to quantify and ascertain, the sum listed as liquidated damages represents a fair and reasonable forecast or estimation of the actual damage caused by a delay in the performance or completion of the Contract Work. In addition, the liquidated damages set forth below are intended to compensate the City for its loss and damage caused by delay. The liquidated damages are not intended to induce the performance of Contractor.

Accordingly, for each day that the Contract Work is not completed beyond the completion date specified in the Contract, or the completion date as directed by the City, the sum of **$ 2,413.17** shall be deducted from the amount to be paid Contractor and shall be retained by City as damages. In the event that the Contract is terminated by City for good cause pursuant to the general conditions of the Contract, this liquidated damages section shall apply, but only to the extent that the Contract Work is delayed. In addition to liquidated damages, City shall be permitted to recover from Contractor the cost of completion of the work if the cost of completion exceeds the original sum of money agreed upon.

**24. Remedies Cumulative.** Any remedies provided for under the terms of this Contract are not intended to be exclusive, but shall be cumulative with all other remedies available to the City at law, in equity or by statute.

**25. Subcontractors.** All subcontractors or use of subcontractors shall require the prior written approval of the City. Contractor shall incorporate the terms and conditions of this Contract into any subcontract used in connection with this project.

**26. Assignment.** Contractor shall not assign any interest in this Contract and shall not transfer any interest in same (whether by assignment or notation), without the prior written consent of the City thereto; provided, however, that claims for payment under this Contract may be assigned.

**27. Notices.** Any notices required to be given by the City to Contractor or by Contractor to City shall be in writing and delivered to the parties at the addresses listed at the end of this Contract.

**28. Waiver.** Failure of the City to insist upon strict compliance with any terms, covenants or conditions of this Contract shall not be deemed a waiver of such, nor shall any waiver or relinquishment of such right or power at any time be taken to be a waiver of any other breach.

**29. Applicable Law - Venue.** This Contract shall be construed and interpreted in accordance with the laws of the State of Washington and, in the event of dispute, the venue of any action brought hereunder shall exclusively be in the Pierce County Superior Court.

**30. Discrimination Prohibited.** In all Contractor services, programs or activities, and all Contractor hiring and employment made possible, directly, indirectly, by or resulting from this Contract, Contractor shall not discriminate against any protected class or on any basis prohibited by federal or state law, including, but not limited to, sex, race, color, creed, religion, national origin, disability, use of a guide dog or service animal by a person with a disability,

HIV/AIDS or hepatitis C status, sexual orientation, gender identity, or honorably discharged veteran and military status.

**31. Modification.** No waiver, alteration, or modification of any of the provisions of this Contract shall be binding unless in writing and signed by a duly authorized representative of the City and Contractor.

**32. Equal Opportunity to Draft.** The parties have participated and had an equal opportunity to participate in the drafting of this Contract, and the incorporated documents, if any. No ambiguity shall be construed against any party upon a claim that that party drafted the ambiguous language.

**33. Severability.** If any term, provision, covenant, or condition of this Contract is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated as a result of such decision, unless the purpose and intent of this Contract is made materially ineffective or destroyed.

**34. Entire Agreement.** The written provisions and terms of this Contract, together with any attachments, supersede all prior verbal statements by any representative of the City, and those statements shall not be construed as forming a part of or altering in any manner this Contract. This Contract and any attachments contain the entire Contract between the parties. Should any language in any attachment conflict with any language contained in this Contract, the terms of this Contract shall prevail.

**35. Concurrent Originals**. This Contract may be executed in any number of counterparts, which counterparts shall collectively constitute the entire Contract.

IN WITNESS WHEREOF, the parties below have executed this Contract, and by doing so, acknowledge that they have read this Contract understand its terms, and enter this Contract in a knowing, intelligent, and voluntary manner.

**[Conway Construction Company]**

Dated: 9/21/15

By:
Its:

# APPENDIX F

257 Or.App. 382
Court of Appeals of Oregon.

SHELTER PRODUCTS, INC.,
an Oregon corporation, Plaintiff,
v.
STEELWOOD CONSTRUCTION, INC., a
Washington corporation, Defendant–Respondent,
and
Catamount Constructors, Inc., a Colorado
corporation, Defendant–Appellant,
and
HD Salem or Landlord, LLC; and Safeco
Insurance Company of America, a
Washington corporation, Defendants.
Steelwood Construction, Inc., Third–Party Plaintiff,
v.
Home Depot, Inc., Third–Party Defendant.

10C20285; A148959.
|
Argued and Submitted Sept. 18, 2012.
|
Decided July 3, 2013.

**Synopsis**
**Background:** Supplier brought action against subcontractor and general contractor to obtain payment for the materials it had provided on the project. Subcontractor cross-complained against general contractor for breach of contract and construction lien foreclosure. The Circuit Court, Marion County, Pamela L. Abernethy and Bernard L. Smith, JJ., granted summary judgment for subcontractor and entered a limited judgment against general contractor. General contractor appealed.

**Holdings:** The Court of Appeals, Sercombe, J., held that:

[1] general contractor could not obtain offset for allegedly defective work after terminating subcontractor for convenience;

[2] legal argument about meaning of contract was not improper extrinsic evidence; and

[3] suppliers' liens against construction project did not arise "out of any act or omission" by subcontractor.

Judgment affirmed, and one appeal dismissed.

**Attorneys and Law Firms**

****451** D. Brent Carpenter argued the cause for appellant. With him on the briefs were Joseph A. Yazbeck, Jr., and Yazbeck, Cloran & Bowser, PC.

Shawn A. Elpel, Washington, argued the cause for respondent. On the brief were Albert F. Schlotfeldt and Duggan Schlotfeldt & Welch PLLC.

Before ORTEGA, Presiding Judge, and SERCOMBE, Judge, and HADLOCK, Judge.

**Opinion**

SERCOMBE, J.

**[1]** ***384** This case involves a dispute between a general contractor, Catamount Constructors, Inc. (Catamount), and one of its subcontractors, Steelwood Construction, Inc. (Steelwood).[1] Catamount contracted with Steelwood to perform work and provide certain materials for the construction of the Salem Home Depot regional distribution center (the project). However, after Steelwood provided the materials in question and began work on the project, Catamount terminated its agreement with Steelwood "for convenience." Steelwood filed a construction lien on the project and, as part of this action, alleged claims for, among other things, breach of contract and construction lien foreclosure.[2] Thereafter, Steelwood sought summary judgment against Catamount and, after a hearing, the trial court granted the motion and entered a limited judgment against Catamount.[3] On appeal, Catamount raises five assignments of error, asserting that the trial court erred in granting summary judgment in favor of Steelwood. For the reasons explained below, we affirm the grant of summary judgment.

1 Both Catamount and Steelwood were defendants in an action initiated by Shelter Products, Inc. (Shelter Products), one of Steelwood's suppliers for the project. Steelwood then filed cross-claims against Catamount. Shelter Products eventually obtained

payment and dismissed its claims. It is Steelwood's claims against Catamount that are at issue on appeal.

2 After the lien was recorded, Catamount filed a release of lien bond.

3 The trial court subsequently entered a "Supplemental Limited Judgment" awarding Steelwood attorney fees and costs. It also entered a "Second Supplemental Limited Judgment" awarding Steelwood additional fees and costs. We note, first, that Catamount did not file a notice of appeal from the "Second Supplemental Limited Judgment." Furthermore, this court has held that a supplemental judgment awarding attorney fees based on a limited judgment is not appealable. *See Interstate Roofing, Inc. v. Springville Corp.,* 217 Or.App. 412, 426–27, 177 P.3d 1, *adh'd to as modified on recons.,* 224 Or.App. 94, 197 P.3d 27 (2008), *aff'd in part and rev'd in part on other grounds,* 347 Or. 144, 218 P.3d 113 (2009). Accordingly, this court does not have jurisdiction over Catamount's appeal from the "Supplemental Limited Judgment" and that portion of this appeal must be dismissed.

When reviewing a trial court's grant of summary judgment, we view the facts and all reasonable inferences that may be drawn from them in the light most favorable to the nonmoving party—in this case, Catamount. *Vaughn v. First Transit, Inc.,* 346 Or. 128, 132, 206 P.3d 181 (2009).

***385** Catamount, as noted, was the general contractor on the project and hired Steelwood as a subcontractor. Catamount and Steelwood entered into a purchase order, a subcontract, and a joint check agreement. Pursuant to the purchase order, which was signed "in conjunction with the Subcontract for a complete Steel erection and panelized roof system," Steelwood was to provide materials for which Catamount was to pay a total of $300,000. Under the subcontract, Steelwood was to complete the installation of structural steel and the roofing system for the project. The agreement, which the parties signed on March 24, 2010, provided a schedule pursuant to which work was to begin by May 2010 and be completed in July. The subcontract specified that time was of the essence. Among other things, the subcontract provided that Catamount could terminate the agreement for convenience:

> "18. Termination for Convenience. The Contractor may, upon seven (7) days written notice to the Subcontractor, without cause and without prejudice to any other right or remedy, terminate this Subcontract, in whole or in part, for its convenience. Upon receipt of any such notice, Subcontractor shall, unless the notice directs otherwise, immediately discontinue ****452** the work on that date and to the extent specified in the notice, place no further orders or subcontracts for materials, equipment, services, or facilities, except as may be necessary for completion of such portion of the work as is not discontinued; promptly make every reasonable effort to procure cancellation upon terms satisfactory to Contractor of all orders and subcontracts to the extent they relate to the performance of the discontinued portion of the work and shall thereafter do only such work as may be necessary to preserve and protect work already in progress and to protect materials, plant and equipment on the site or in transit thereto. The obligations of the Subcontractor shall continue as to portions of the work already performed and as to bona fide obligations assumed by Subcontractor prior to the date of termination. Subcontractor shall be entitled to be paid the full cost of all work properly done by Subcontractor to the date of termination not previously paid for, less sums already received by Subcontractor on account of the portion of the work performed. Should the Contractor's termination of the Subcontract under this ***386** paragraph be deemed improper or wrongful, then such termination shall be deemed automatically to have occurred pursuant to Contractor's rights under paragraph 17."

(Boldface omitted.) The agreement also provided that Catamount could make payment to Steelwood through

joint checks made payable "to the joint order of [Steelwood and its] sub subcontractors, suppliers or others * * *." The joint check agreement, executed by representatives of Catamount, Steelwood, and Shelter Products (one of Steelwood's suppliers on the project) on the same day as the subcontract,[4] provided that Catamount would "endeavor to make monthly payments jointly to [Shelter Products] and [Steelwood] for all amounts owing to [Shelter Products] during the course of the Project * * *."

4 Catamount's representative signed the joint check agreement on March 23, 2010, and representatives of the other two companies signed on March 24, 2010.

All of the materials required under the purchase order were delivered to the work site and, thereafter, Steelwood invoiced Catamount for those materials. Catamount did not pay the invoice at that time. After Steelwood began work on the project, on Wednesday, June 16, 2010, Catamount's project manager sent Steelwood a letter outlining concerns about the progress of work on the project. In particular, he set out several issues: (1) there would be additional costs if the work was not complete within the agreed time period; (2) daily housekeeping at the work site was inadequate and Catamount planned to begin cleaning up after Steelwood and billing Steelwood for that; (3) certain work was deficient—certain braces and nailing were incomplete and some nails, bolts, and plates were missing; and (4) "[p]roduction is not where committed to in [the] contract." The project manager stated that "[o]n Monday morning we will evaluate where you are and how to best assist you in meeting your contractual obligations." However, on Saturday, June 19, 2010, Catamount terminated the contract for convenience pursuant to paragraph 18 of the subcontract. Accordingly, on Monday, June 21, Steelwood vacated the work site.

After it terminated Steelwood for convenience, Catamount refused to pay Steelwood's invoice for materials delivered under the purchase order. It also declined to pay ***387** Steelwood for work performed under the subcontract prior to termination. Thereafter, Steelwood recorded a construction lien for $369,679.30. Several of Steelwood's suppliers for the project-Shelter Products, White Cap Construction Supply, and Ahern Rentals—also filed construction liens on the property, and Catamount posted bonds on those liens.

Catamount, for its part, cleaned debris left by Steelwood on the project site and entered into a subcontract with a new company, Panelized Structures, to complete the work Steelwood was to have done. According to Catamount, it incurred $75,440 in conjunction with the clean up and to repair Steelwood's work:

> "That amount is comprised of $61,668 which Catamount paid to Panelized Structures ****453** to repair and clean up Steelwood's defective work; $276.00 Catamount incurred for clean-up of the Project site that it performed; $150.00 Catamount spent to hire a locksmith to enter a storage unit which Steelwood had left locked; and $13,350.00 which Catamount incurred in additional labor and travel costs in coordinating and supervising the above-described repairs and clean-up."[5]

5 In particular, to "repair Steelwood's defective work," Panelized Structures had to do work pursuant to a number of change orders:

> "Change Order 1 totaled $4,225.00 and required Panelized Structures to cut joists to the center of girders, install nailers on concrete walls, cover openings with plywood, replace missing studs in mechanical openings, replace 2x6s over girders, and install blocks. Change Order 2 totaled $5,611.00 and required Panelized Structures to relocate mechanical openings, finish placing 2x6s over girders, frame five fill bays between doublers, and clean up material left behind by Steelwood. Change Order 3 totaled $3,134.00 and required Panelized Structures to pull nails, remove and relocate incorrect mechanical openings, clean the rooftop, and set straps. Change Order 4 totaled $3,876.00 and required Panelized Structures to

correct Steelwood's over-nailing of plywood, install 6x6 nailers, and tear out and replace frame rooftop unit # 1. Change Order 5 totaled $13,019.00 and required Panelized Structures to pick up nails left behind by Steelwood, install additional tie straps, add nails to tie straps in area installed by Steelwood and at the request of the inspector, install new subperlin as a corrective measure as required by the Project structural engineer, and repair roof nailing. Change Order 6 totaled $2,215.00 and required Panelized Structures to perform additional bolting and welding on work performed by Steelwood, install 2x6s as directed by the Project structural engineer to repair Steelwood's work, and further clean rooftop area in which Steelwood had performed work. Change Order 7 totaled $1,669.00 and required Panelized Structures to reinstall joist brackets that were incorrectly installed by Steelwood and bolt plates at girder that were missed by Steelwood. Change Order 9 totaled $14,289[.00] and required Panelized Structures to reinstall additional joist brackets that were incorrectly installed by Steelwood and install a 6x6 nailer. Change Order 10 totaled $6,400.00 and required Panelized Structures to purchase additional materials to replace materials that Steelwood had overnailed. Change Order 11 totaled $2,319.00 and required Panelized Structures to relocate two columns placed by Steelwood. Change Order 13 totaled $3,269.00 and required Panelized Structures to purchase additional nails to correct Steelwood's work. Change Order 14 totaled $702.00 and required Panelized Structures to purchase special nails to attach additional subperlins which the Project engineer ordered to correct Steelwood's work. Change Order 15 totaled $940.00 and required Panelized Structures to purchase special nails to attach additional subperlins which the Project structural engineer ordered to correct Steelwood's work."

***388** However, after terminating the contract with Steelwood, Catamount did not provide Steelwood with notice that its work was defective or needed repair, nor did it give Steelwood an opportunity to enter the work site with respect to any defects in the work it performed.

After filing its lien, Shelter Products filed an action against Steelwood and Catamount to obtain payment for the materials it had provided on the project. Steelwood, in turn, filed cross-claims against Catamount for payment of the materials and labor it had supplied under the purchase order and subcontract. Catamount then asserted that it was entitled to an offset and maintained that Steelwood was responsible for the amounts Catamount incurred repairing the work Steelwood had done and for attorney fees and other amounts incurred by Catamount relating to the liens. While the action was pending, Catamount paid Shelter Products, White Cap Construction Supply, and Ahern Rentals the amounts they were owed and discharged their liens.

Eventually, Steelwood sought summary judgment against Catamount on its claims for construction lien foreclosure and breach of contract, asserting that it was entitled to

recover the amount owed under the purchase order and, as a result of the termination for convenience, the full cost of all work it had performed under the subcontract. In particular, as costs, it asserted it was entitled to recover amounts it expended on the project as well as profit and overhead. Catamount responded that Steelwood was not entitled to summary judgment because "Catamount's costs incurred in repairing Steelwood's defective work, in discharging Steelwood's suppliers' and subcontractor's liens, and its costs relating to Steelwood's overstated lien total a greater sum than it owes Steelwood under **454 the subcontract between them." Steelwood *389 replied, in part, that, because Catamount had terminated Steelwood for convenience, it could not avoid paying by asserting that the work Steelwood had done was defective. Furthermore, according to Steelwood, it was "terminated from the site before finishing" work and was not given notice after that termination that its work was defective.

At the end of the hearing on the summary judgment motion, the court ruled from the bench and granted summary judgment in favor of Steelwood. It explained:

> "Catamount argues that summary judgment should not be granted because, 'Its costs incurred in repairing Steelwood's defective work, and discharging Steelwood's supplies, and subcontractor liens, and its costs relating to Steelwood's overstated lien total a great[er] sum than the amount it owes Steelwood under the contract.'
>
> "So Catamount is admitting that it does owe money under the contract. It just says at the end of the day there are no damages. So that gets us to address the two bases of damages that it claims are the offset.
>
> "The first is the purchase order, which we've just been discussing. And the court finds under these circumstances that it was an act or omission of the contractor, not an act or omission of the subcontractor that started the chain of events that resulted in these subs not being paid.
>
> "When looking at both the contract and the joint check agreement, which is an agreement in pari materia, or reading them both together, Catamount was to endeavor to make monthly payments jointly to the supplier and subcontractor, and all amounts owing to the supplier during the course of the project. And this was not done.
>
> "So when I read act or omission subparagraph 32 [of the subcontract], in light of the joint check agreement * * * I conclude that even looking at the facts in light most favorable to Catamount in this regard."

Turning to the issue of whether "the 'repair of defective work' [defense] is somehow viable," the court explained:

> "Looking at the evidence in light most favorable to Catamount, they're claiming $75,444. And the Court agrees with [Steelwood's argument] that when there is a *390 termination for convenience, not a termination for cause, there's been no opportunity to inspect and cure. In fact, the exhibit that was provided by Catamount itself clearly demonstrates that. The exhibit * * * suggest[s] that there be a Monday meeting. Never was a Monday meeting because by Saturday the date of the termination of convenience was executed.
>
> "So to go back now without giving [Steelwood] an opportunity to inspect, to cure, to do anything, and just say that the contract somehow allows under termination of convenience for the contractor to then go in and discover all of these things that it now charges against the subcontractor, is not provided by the terms of the contract, is not provided by any case law that I can find. And I don't think it's appropriate.
>
> "So that $75,444 does not offset the amount owed for Catamount's breach, which as I said it essentially admitted in this matter."

In view of the payments to suppliers by Catamount during the litigation, the court determined that it owed $27,737.84 on the purchase order. With respect to Steelwood's cost on the project, the court observed that approximately $50,000 was actual cost owed. However, Steelwood sought profit and overhead as well. The court initially determined that there was not sufficient legal authority for the recovery of profit and overhead, which Steelwood asserted amounted to $27,231.90 (according to Steelwood, at the time of the termination, it was owed $60,785.50 for work performed and its profit and overhead would have been 44.8 percent over and above that). Later in the hearing, Steelwood asserted that, even if the court did not award profit, it should recover some amount for its overhead. The court questioned how that would be calculated: "[I]f 45 cents on the dollar is profit and overhead, are there documents that would tell me which portion of that 45 cents is profit, and which portion is

overhead?" Steelwood responded **455 that, because it did not anticipate the court's ruling, it had not broken the two amounts down in its affidavits, but that, typically, "profit's 20 percent, but your overhead is like 25 percent." The court observed that Steelwood's $61,633.30 lien did not include any amount for profit and overhead and, ultimately, decided *391 that it would simply allow the full lien amount. Thus, in its order, the court concluded that Steelwood "is entitled to collect its lien amount with respect to the purchase order in the amount of $27,737.84 and is entitled to collect, with respect to the subcontract, the amount of $61,633.30, which represents the full cost of all work[ ] performed by Steelwood until terminated by convenience by Catamount." In view of those conclusions, the court entered a limited judgment awarding Steelwood $89,417.14 along with prejudgment interest, post-judgment interest, and attorney fees and costs.

On appeal, we review the trial court's summary judgment ruling to determine whether we agree that "the pleadings, depositions, affidavits, declarations and admissions * * * show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." ORCP 47 C; *O'Dee v. Tri–County Metropolitan Trans. Dist.,* 212 Or.App. 456, 460, 157 P.3d 1272 (2007). There is no genuine issue of material fact if, "based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." ORCP 47 C. In response to a summary judgment motion, "an adverse party may not rest upon the mere allegations or denials of that party's pleading," but must, by affidavits, declarations, or as otherwise provided by the summary judgment rule, "set forth specific facts showing that there is a genuine issue as to any material fact for trial." ORCP 47 D.

[2] In its first assignment of error, Catamount contends that the trial court erred in granting summary judgment because Steelwood failed to provide legally sufficient evidence of its costs. In particular, Steelwood documented its costs in a profit and loss statement along with an affidavit from the president of the company stating that the profit and loss statement was "a true copy of all expenses incurred by Steelwood on the Home Depot Project under the subcontract." Catamount argues that, because the contract was terminated for convenience, the evidence provided by Steelwood was legally insufficient. It asserts that "[t]estimony alone" is insufficient. Furthermore, in its view, *392 in the absence of documentation (such as "invoices, receipts, or payroll records") to substantiate the profit and loss statement, Steelwood failed to demonstrate its costs with sufficient certainty. Steelwood responds that Catamount failed to preserve this issue for appeal and that, in any event, Steelwood "proved its actual costs with reasonable certainty" by providing a "profit and loss statement that showed its actual costs incurred on the project." We agree with Steelwood that Catamount failed to preserve the issue raised in its first assignment of error.

[3] [4] Ordinarily, this court will not consider an issue on appeal unless it was first presented to the trial court. ORAP 5.45(1). The preservation requirement is designed to apprise the trial court of a party's position so that the court can consider it, to avoid surprise and unfairness to the opposing party, and to foster full development of the record. *Peeples v. Lampert,* 345 Or. 209, 219–20, 191 P.3d 637 (2008). The "determination whether a particular issue was preserved for appeal is a 'practical one'; it will depend on whether the policies behind the preservation requirement-judicial efficiency, full development of the record, and procedural fairness to the parties and the trial court-are met in an individual case." *Charles v. Palomo,* 347 Or. 695, 700, 227 P.3d 737 (2010) (quoting *State v. Parkins,* 346 Or. 333, 340–41, 211 P.3d 262 (2009)). We will consider "an issue advanced by a party on [appeal] as long as that party raised the issue below with enough particularity to assure that the trial court was able to 'identify its alleged error' so as to 'consider and correct the error immediately, if correction is warranted.' " *Id.* (quoting *State v. Wyatt,* 331 Or. 335, 343, 15 P.3d 22 (2000)).

**456 In this case, in its motion for summary judgment, Steelwood asserted that the "full cost" of the work it performed was $60,785.50 plus profit and overhead and that, in view of a payment Catamount made to a subcontractor of Steelwood, the amount still owed was $50,225.50 plus profit and overhead. It attached to its motion an affidavit from Steve Eckman, the company president, stating that, at the time of the termination for convenience, "Steelwood *393 was owed not less than $60,785.50 for work performed under the Subcontract plus profit and overhead," and that Steelwood was still "owed at a minimum, $50, 2[2]5.50" plus profit and

overhead. Catamount, in its response to the motion for summary judgment, asserted, among many other things, that "Steelwood provides no substantiation, not even the slightest detail, of how it arrived at the amount it is allegedly owed under the Subcontract. Is it the reasonable value of its labor? Even if it is, the reasonable value of Steelwood's labor is irrelevant because the parties had entered into the Subcontract." Thereafter, Steelwood filed a reply and attached to it a supplemental affidavit from Eckman. Furthermore, Steelwood attached to Eckman's affidavit Exhibit C, which Eckman stated was "a true copy of all expenses incurred by Steelwood on the Home Depot Project under the subcontract." Exhibit C is a profit and loss statement that includes a breakdown of Steelwood's expenses on the project for, among other things, payroll, construction supplies, equipment rental, fuel, and postage and delivery.

At the hearing, the court noted that Steelwood had submitted "documentation here to say [that it] spent around $50,000." It was Catamount's position, however, that it was entitled to offset its expenses to repair the work done by Steelwood against the amount Steelwood asserted was owed under the subcontract. The court, during the hearing, specifically noted Exhibit C in an exchange with Catamount's counsel:

> "[CATAMOUNT'S COUNSEL]: I mean even accepting that $60,785.50 number—
>
> "THE COURT: Yeah.
>
> "[CATAMOUNT'S COUNSEL]:—it's still—at the end of the day, they still owe us $33,000.
>
> "THE COURT: Okay. So you'll at least go with me as far as to say probably now that we have Exhibit C, the $50,000 that they say they actually spent is a fair representation of what they actually spent.
>
> "[CATAMOUNT'S COUNSEL]: Right."

***394** As noted, before Exhibit C was submitted, Catamount asserted that Steelwood had failed to substantiate its asserted costs. However, Catamount never argued that the later submitted Exhibit C was insufficient to document those costs. And it certainly never expressed the position, as it does here, that, because the contract was terminated for convenience, to provide legally sufficient evidence of its costs, Steelwood could not rely on testimony and was required to submit certain types of documentation—invoices, receipts, payroll records, and the like—to substantiate the information contained in Exhibit C. Indeed, as set forth above, at the summary judgment hearing, Catamount appeared to agree with the trial court that, "probably now that we have Exhibit C, the $50,000 that they say they actually spent is a fair representation of what they actually spent." In other words, in the proceedings below, Catamount failed to make any argument that would have alerted the trial court and opposing counsel of its current assertion that the evidence submitted by Steelwood to substantiate its costs on the project is legally insufficient. Accordingly, we do not address the issue raised in Catamount's first assignment of error.

**[5]** In its second assignment of error, Catamount contends that the court erred in awarding Steelwood overhead when Steelwood "had not met its burden of proving its overhead." In particular, Catamount complains that "Steelwood claimed a lump sum for both profit and overhead and did not segregate the amounts it claimed for profit and for overhead." According to Catamount, because the subcontract was terminated for convenience, Steelwood had the burden of proving overhead with "sufficient certainty" but "failed to provide a reasonable basis on which the trial court could compute [its] ****457** overhead" and "failed to present information sufficient to allow" the application of a federal formula for determining overhead. Steelwood responds that, first, this issue was not preserved before the trial court and, second, the " 'overhead' costs awarded by the trial court were fair and reasonable, and determined with reasonable certainty." Again, we agree with Steelwood that Catamount failed to preserve before the trial court the arguments that it advances on appeal.

***395** As with its first assignment of error, in support of its position that it preserved this argument, Catamount points to the assertion in its response to Steelwood's summary judgment motion that Steelwood had provided "no substantiation, not even the slightest detail, of how it arrived at the amount it is allegedly owed under the Subcontract." However, in context, that assertion clearly was not aimed at Steelwood's evidence relating to profit and overhead. Catamount's argument was as follows:

> "The $105,195.74 figure [Steelwood seeks] is comprised of the amount owing under the Purchase Order, $27,737.84, plus the *amount*

> *allegedly currently owing under the Subcontract,* $50,225.03, plus its profit and overhead on the same, $27,231.90. Steelwood provides no substantiation, not even the slightest detail, of how it arrived at the amount it is *allegedly owed under the Subcontract.* Is it the reasonable value of its labor? Even if it is, the reasonable value of Steelwood's labor is irrelevant because the parties had entered into the Subcontract."

(Emphases added.) Thus, Catamount broke down three amounts sought by Steelwood: (1) the amount owing under the purchase order, (2) the amount "allegedly currently owing under the Subcontract," and (3) the profit and overhead. It asserted that Steelwood had failed to provide any substantiation of the second figure—the "amount it is allegedly owed under the Subcontract"—and did not contest the sufficiency of the proof submitted for the profit and overhead.

Indeed, Catamount's argument relating to profit and overhead in its opposition to the summary judgment motion had nothing to do with the sufficiency of Steelwood's proof. Instead, Catamount contended that Steelwood should only be able to recover for the percentage of work it had completed, and not the amount it sought as costs, profit, and overhead:

> "Here, the Subcontract was for a lump sum amount of $286,734.00. As stated above, at the time of Steelwood's termination, it had—at best—completed nine percent (9%) of its work under the Subcontract. Nine percent of the total Subcontract amount of $286,734.00 equals $25,806.06. Thus, the total amount of work that Steelwood had completed at the time of its termination could not exceed ***396** $25,806.06. As Steelwood admits in its motion, Catamount paid $10,560.47 of that total to Ahern, one of Steelwood's equipment suppliers on the Subcontract, thereby reducing the amount currently owed to Steelwood under the Subcontract to no more than $15,245.59.
>
> "Because Steelwood is owed, at most, $15,245.59, not $50,225.03, its claim of profit and overhead of $27,231.90 is clearly erroneous. Further, in alleging that it is entitled to profit and overhead on that amount, Steelwood is actually seeking profit and overhead *on top* of profit and overhead. That is, when Steelwood submitted its bid to Catamount to perform its work on the Project in a lump sum amount of $286,734.00 that figure included Steelwood's costs, profit, and overhead. As a practical matter, if Steelwood had fully performed its work under the Subcontract, it would have received the total Subcontract amount of $286,734.00 and no additional sum for profit and overhead. As stated above, Steelwood performed nine percent of the Subcontract, and therefore is entitled to nine percent of that amount, at most. Because the total Subcontract includes profit and overhead, nine percent of that amount includes profit and overhead. To award Steelwood an additional $27,231.90 in overhead would be a windfall for Steelwood, to which it is not entitled."

(Citations omitted; emphasis in original.) The trial court rejected Catamount's assertion that Steelwood was entitled to recover only nine percent of the total contract price ****458** and concluded that Steelwood was entitled to recover its costs. With respect to profit, it was the court's view that there was not sufficient legal authority for such an award. It stated:

> "I'm not going to allow that to be paid in this instance. I just don't see enough support for it. I have one little New York case. I don't have any Oregon law. I don't have anything in the statute. I don't have anything in the contract. I just don't have enough basis for it."

Later in the hearing, Steelwood brought up the issue of overhead:

"[STEELWOOD'S COUNSEL]: We just want to clarify as far as the damages is the full cost, does that include the amounts for actual overhead. Because that's part of his cost as well, as opposed to profit, which is profit on top of that. Overhead is something that is actually is part of your ***397** full cost. As so we just want to clarify if that's part of it, or not, and actually we request that the actual overhead portion should be part of the full cost of the damages.

"THE COURT: Well—

"[STEELWOOD'S PRESIDENT]: That's actual cost. That's actual cost, not full cost.

"THE COURT: $50,275 is actual cost.

"[STEELWOOD'S PRESIDENT]: Correct.

"THE COURT: And then you're stating that the other —the 45 cents on the dollar included not just profit, but overhead.

"[STEELWOOD'S PRESIDENT]: But overhead. Correct.

"THE COURT: And we didn't segregate the two when we were arguing about them. I only addressed the profit piece, and not the overhead piece. Is that—

"[STEELWOOD'S COUNSEL]: Correct, Your Honor.

"THE COURT: Okay. So question before I decide about that. How would we calculate-if 45 cents on the dollar is profit and overhead, are there documents here that would tell me which portion of that 45 cents is profit, and which portion is overhead? So that if you want a differential for overhead on top of this $50,000, what would it be? It wouldn't be 45 cents on the dollar because some of that's profit.

"[STEELWOOD'S COUNSEL]: Well, typically—and I'm not sure if it's stated in the affidavit, but I think profit's 20 percent, but your overhead is like 25 percent.

" * * * *

"[STEELWOOD'S PRESIDENT]: We didn't break it out. We weren't anticipating."

As Catamount notes, "the trial court allowed an additional $11,358.30 (*i.e.,* actual costs of $50,275 plus $11,358.30 in overhead for a total of $61,633.30) as overhead to Steelwood."

At no point before the trial court did Catamount raise any of the issues it seeks to argue in its second assignment of error-those are, that the court could not award overhead in the absence of an evidentiary submission segregating ***398** amounts that Steelwood "claimed for profit [from amounts] for overhead," and that a federal formula should be used to compute Steelwood's overhead but that "Steelwood [had] failed to present information sufficient to allow" an analysis under that formula. Indeed, Catamount raised no issue at all regarding the proof of Steelwood's overhead and, when the issue of overhead was specifically discussed at the hearing, Catamount said nothing. Thus, as with the first assignment of error, before the trial court, Catamount failed to raise the issues it seeks to argue on appeal such that the trial court could have considered and corrected the alleged error immediately, if correction was warranted. *See Wyatt,* 331 Or. at 343, 15 P.3d 22. Accordingly, we do not consider further Catamount's second assignment of error.

**[6]** Catamount next argues, in its third assignment of error, that the trial court incorrectly concluded that Catamount was not entitled to offset any amount owed to Steelwood with costs "incurred in repairing Steelwood's defective work." According to Catamount, even though it terminated Steelwood for convenience, it continues to have a "right in breach of contract against Steelwood for its breach of the Subcontract by performing its work in a deficient manner." Steelwood ****459** responds that the "trial court properly rejected Catamount's request for setoff for alleged defective work, when Catamount terminated Steelwood for convenience, failing to give Steelwood notice and opportunity to inspect, cure, or complete its work." In Steelwood's view, a party cannot assert an offset after it has terminated for convenience. As explained below, we conclude that the trial court correctly concluded in this case that Catamount was not entitled to an offset.

As noted, the trial court observed that, "when there is a termination for convenience, [as opposed to] a termination for cause, there[ has] been no opportunity to inspect and cure." It concluded that neither the case law nor the terms of the subcontract would permit Catamount, after terminating Steelwood for convenience, to "go in and discover all of these things that it now charges against the subcontractor" and, thereby, receive an offset. We agree.

***399** First, we agree with the trial court that, contrary to Catamount's assertions, the text of the termination for convenience clause, in context, does not under the circumstances of this case permit Catamount to both terminate Steelwood without cause *and* subsequently proceed against Steelwood as if it had terminated the agreement for cause. *See Yogman v. Parrott,* 325 Or. 358, 361, 937 P.2d 1019 (1997) (in interpreting a contractual provision, the court examines the text of the provision in context). Again, paragraph 18 of the subcontract provides that Catamount may, "without cause and without prejudice to any other right or remedy, terminate

this Subcontract, in whole or in part, for its convenience." Upon receiving notice of termination for convenience, the subcontractor

> "shall * * * immediately discontinue the work * * *, place no further orders or subcontracts for material, equipment, services or facilities * * *, promptly make every reasonable effort to procure cancellation upon terms satisfactory to Contractor of all orders and subcontracts to the extent they relate to the performance of the discontinued portion of the work and shall thereafter do only such work as may be necessary to preserve and protect work already in progress and to protect materials, plant and equipment on the site or in transit thereto. The obligations of the Subcontractor shall continue as to portions of the work already performed and as to bona fide obligations assumed by Subcontractor prior to the date of termination. Subcontractor shall be entitled to be paid the full cost of all work properly done by Subcontractor to the date of termination not previously paid for, less sums already received by Subcontractor on account of the portion of the work performed."

Catamount asserts that several clauses from that paragraph allow it to obtain an offset from Steelwood regardless of the fact that it terminated the agreement for convenience.[6] Initially, it states that the termination without cause is "without prejudice to any other right or remedy." That clause, however, does not itself confer any right or remedy. And it certainly does not, as Catamount asserts, permit Catamount ***400** to pursue two inconsistent paths simultaneously: both terminating the agreement for convenience *and* seeking damages against Steelwood as if it had terminated for cause and given Steelwood an opportunity to cure. As discussed below, Catamount fails to identify any generally applicable legal rule or provision of the contract that, in our view, would permit Catamount to both terminate without cause, fail to provide an opportunity to cure, and, at the same time, proceed against Steelwood as if it had terminated the agreement for cause and given an opportunity to cure. Accordingly, in our view, the "without prejudice" clause is not particularly helpful to Catamount's position.

6 We note that, although Catamount cites several portions of the contract that it asserts provide for the offset it seeks in this case, its arguments focus primarily on case law that it asserts supports its position.

[7] Catamount also points out that paragraph 18 provides that Steelwood's obligations "continue as to portions of the work already performed" at the time of the termination for convenience and that it states that costs may be recovered for "all work properly done by Subcontractor." In Catamount's ****460** view, those clauses permit it to obtain an offset for work it deems deficient after terminating the agreement for convenience. We disagree. As to the reference to work "properly" done by the subcontractor, read in context, the term does not refer to the quality of work completed. Rather, the term unambiguously refers to work done by the subcontractor prior to termination for convenience, as opposed to work that should have been discontinued after the subcontractor received notice of termination. It is preceded by discussion of the requirement that, upon receiving notice of termination, the subcontractor must "immediately discontinue the work," "place no further orders or subcontracts for materials, equipment, services or facilities," "promptly make every reasonable effort to procure cancellation" of orders and subcontracts, and "thereafter do only such work as may be necessary to preserve and protect work already in progress and to protect materials, plant and equipment on the site or in transit thereto." Thus, only as to work done either prior to termination or under the terms of that provision will the subcontractor be entitled to recover its costs—only that work is "properly done." Thus, that phrase in paragraph 18 does not assist Catamount.

Likewise, the clause providing that Steelwood's obligations "continue as to portions of the work already ***401** performed" does not permit Catamount to terminate for convenience and also obtain an offset under the circumstances of this case. We first note that the subcontract provides a warranty pursuant to which Steelwood warrants to the owner its work and materials. Thus, paragraph 18 would not relieve Steelwood of that

obligation to provide a warranty-an existing obligation as to the work it already performed.

In addition, we observe that, in contrast with paragraph 18, paragraph 17 of the agreement (which relates to default) provides, among other things, that, if Steelwood fails to maintain Catamount's schedule or "fail[s] to correct, replace and/or re-execute faulty or defective work," Catamount "shall have the right to declare [Steelwood] in breach of this Agreement and may, without prejudice to any other right or remedy Contractor may have, terminate this agreement." If Catamount had terminated the agreement under paragraph 17, the agreement specifically provides that "Subcontractor shall not be entitled to any further payments until the Work covered by this Subcontract has been completed." Furthermore, "[i]f the expense to correct, replace or complete Subcontractor's work together with any liquidated damages attributable to delay in Subcontractor's performance exceeds the unpaid balance of the Subcontract, Subcontractor shall pay Contractor the difference." Thus, the remedy Catamount seeks here was available pursuant to its right to terminate for cause under paragraph 17. However, even that paragraph presupposes that, where Catamount terminates for cause based on defective work, there will have been provided an opportunity for Steelwood to "correct, replace and/or re-execute faulty or defective work." Catamount elected not to terminate for cause, but instead terminated for convenience and, therefore, required Steelwood to immediately stop work with no opportunity to inspect and cure.

Similarly, paragraph 10a(4), which permits Catamount to withhold payment under the subcontract "pending satisfactory correction, repair, replacement, and/or restoration of deficient work, materials, supplies, machinery, equipment or plant, or of any work rejected as not conforming with" the subcontract, does not entitle Catamount to the offset ***402** in question. Again, immediately after sending the letter to Steelwood discussing its concerns with Steelwood's progress on the project, Catamount terminated the agreement pursuant to paragraph 18 "without cause." As required, Steelwood immediately discontinued work on the project and removed its equipment from the project site. Thereafter, Catamount did not request that Steelwood correct, repair, or replace any of the work that it had done on the project. Under those circumstances, nothing in the contract permits Catamount to receive an offset against Steelwood's costs for allegedly defective work done by Steelwood prior to the termination.

**[8]** We further observe that, although, as the parties note, there are no previous Oregon cases discussing termination for convenience, ****461** there is some persuasive authority from other jurisdictions relating to the issue and that authority supports our view. In particular, we are persuaded, at least in the absence of an opportunity to correct allegedly defective work, that, where a party has terminated a contract for convenience, that party may not then counterclaim for the cost of curing any alleged default. *See Paragon Restoration Group, Inc. v. Cambridge Sq. Condominiums,* 839 N.Y.S.2d 658, 660, 42 A.D.3d 905, 906 (2007); *Tishman Contr. Corp. v. City of New York,* 643 N.Y.S.2d 589, 590, 228 A.D.2d 292, 293 (1996).[7] Here, the amounts Catamount seeks to offset are costs incurred in curing an alleged default by Steelwood. The facts on summary judgment are that, after it was terminated for convenience, Steelwood did no further work on the project as required under paragraph 18. After that time, Catamount did not notify Steelwood of any alleged defects or provide it with any opportunity to correct any defective work. Indeed, the defects in question were first asserted as part of this litigation. Under the ***403** circumstances, the trial court correctly concluded on summary judgment that, because it terminated the contract for convenience, Catamount was not entitled to offset any amounts it owed Steelwood with amounts it incurred in correcting Steelwood's allegedly defective work.

7 Catamount asserts that, under federal authority, it has a right to an offset. As noted, we find the rule from the cases cited above persuasive. Furthermore, we observe that the Federal Circuit has declined to decide whether the government may deduct the cost of repairing or replacing defective work from a contractor's recovery following a termination by the government for convenience. *See Lisbon Contractors, Inc. v. United States,* 828 F.2d 759, 769 (Fed.Cir.1987). At least one administrative board with authority over federal government contracts has permitted an offset for defective work; however, in that case, it was noted that, "where no opportunity to correct deficiencies was afforded, no deduction for uncorrected work should be made." *Aydin Corp.,* EBCA No. 355–5–86, 89–3 BCA ¶ 22044, 1989 WL 74785.

Finally, we turn to Catamount's fourth and fifth assignments of error. Those assignments both involve the same issue—that is, whether the trial court erred when it determined that Catamount was not entitled to offset amounts it owed Steelwood by amounts it incurred in discharging liens from Steelwood's suppliers on the project that were filed after Catamount terminated Steelwood for convenience. In order to discuss Catamount's assertions, some background is necessary.

As discussed above, Catamount and Steelwood executed both a subcontract and a purchase order relating to the project. Under the purchase order, Steelwood was to supply materials for the project for which Catamount was to pay $300,000. The subcontract contained a number of clauses. As pertinent to the fourth and fifth assignments of error, paragraph 32 of the subcontract provided that,

> "[i]f any lower tier subcontractor, laborer or supplier of [Steelwood] files a mechanic's lien or claim against [Catamount], its surety, or the Project, *which lien arises out of any act or omission of [Steelwood] under this Subcontract,* [Steelwood] shall satisfy or take steps to remove or discharge such lien or claim at [Steelwood's] cost and expense, including all recording fees, within five (5) days of the date of notice thereof. If such lien(s) is not discharged within 30 days, [Catamount] shall, without any further notice to [Steelwood], cause such lien to be discharged by any means [Catamount] deems appropriate. All costs incurred by [Catamount] to discharge or otherwise address said lien shall be borne by [Steelwood], including without limitation bonding costs and [Catamount's] reasonable attorney's fees."

(Emphasis added.) In light of that provision in the subcontract, in opposition to Steelwood's summary judgment motion, Catamount asserted that it was entitled to offset against any amounts owed Steelwood costs it incurred in discharging the liens placed by the suppliers. It asserted ***404** that Steelwood was obligated to pay the suppliers and failed to do so and, therefore, the liens "arose out of an act or omission of Steelwood." Steelwood responded that it was undisputed that Catamount failed to pay the $300,000 due under the purchase order:

> "Catamount doesn't dispute that it received the materials under the Purchase ****462** Order. Nor does Catamount allege that * * * any of the materials were defective or nonconforming. Nor does Catamount dispute that all the materials were used on the project. Nor does Catamount dispute that it didn't pay for the materials after being billed for them. In fact, Catamount gives no defense or justification as to why it didn't pay for the materials."

According to Steelwood, "[b]y failing to pay for the materials" as required under the purchase order, "Catamount triggered a chain of events which culminated in Steelwood and its material suppliers filing liens against the project." In other words, it was Steelwood's position that it was Catamount's act or omission that resulted in the liens and, therefore, Steelwood was not responsible for any costs associated with those liens.

During the hearing, the court heard argument from the parties regarding paragraph 32. Catamount took the position that, under paragraph 32 of the subcontract, Steelwood was responsible for the costs to discharge all the liens. The court then questioned Steelwood's attorney regarding the effect of the provision, asking how Steelwood "g[o]t around paragraph 32." Steelwood's attorney argued that "[paragraph] 32 in the construction industry presupposes in that contract that Catamount is going to pay Steelwood, and Steelwood is going to take that money and pay his material men." The court clarified:

> "THE COURT: So you're saying that the lien doesn't arise out of an act or omission of the subcontractor because—
>
> "[STEELWOOD'S COUNSEL]: No. Not at all. If you —
>
> "THE COURT: -the act or omission was that of Catamount to start the chain of events.

"[STEELWOOD'S COUNSEL]: Yeah. They refused to pay."

***405** Catamount's attorney responded that there was "no implied pay-when-paid clause." Rather, according to Catamount's counsel, paragraph 32 "says plainly that if an act or omission * * * leads to a lien, then the contractor is entitled to its costs and fees in dealing with the lien." The court, however, agreed with Steelwood and concluded that "under these circumstances that it was an act or omission of the contractor, not an act or omission of the subcontractor that started the chain of events that resulted in these subs not being paid." The court looked at the purchase order and the subcontract, as well as the joint check agreement, which, it observed, provided that "Catamount was to endeavor to make monthly payments jointly to the supplier and subcontractor, and all amounts owing to the supplier during the course of the project." Having read the agreements together, the court concluded that Catamount was not entitled to offset the amounts it paid to discharge the liens. In other words, the court relied on the agreements to conclude that it was Catamount's act or omission that gave rise to the liens.

In its fourth assignment of error, Catamount challenges the court's reasoning with respect to the joint check agreement, asserting that the joint check agreement did not impose on it an obligation to "pay Shelter Products independent of its obligation to pay Steelwood." In its fifth assignment of error, Catamount asserts that summary judgment was inappropriate in this case because it was entitled to offset amounts it owed Steelwood by costs it incurred in discharging suppliers' liens. As part of that assignment of error, Catamount contends that paragraph 32 of the subcontract is unambiguous, and that the trial court improperly considered extrinsic evidence of the meaning of that provision. As explained below, we conclude that the trial court properly interpreted paragraph 32 of the subcontract based on the text and context of that provision and, in light of that interpretation, correctly concluded that Catamount was not entitled to offset amounts it expended in discharging the suppliers' liens. In light of that conclusion, we reject both the fourth and fifth assignments of error.

**[9]** **[10]** ***406** To interpret a contractual provision, the court begins by examining the text of the provision in question "in the context of the document as a whole. If the provision is clear, the analysis ends." *Yogman,* 325 Or. at 361, 937 P.2d 1019. "Words or terms of a contract are ambiguous when they can, in context, be given more than one meaning." *Id.* at 363–64, 937 P.2d 1019 (internal ****463** quotation marks omitted). If the provision in question is ambiguous, the trier of fact will "ascertain the intent of the parties and construe the contract term consistent with the intent of the parties." *Id.* at 363, 937 P.2d 1019 (internal quotation marks omitted). To resolve that question, the trial court may consider extrinsic evidence relating to intent. *Id.* "If the meaning of a contractual provision remains ambiguous after the first two steps have been followed, the court relies on appropriate maxims of construction." *Id.* at 364, 937 P.2d 1019.

**[11]** We begin by addressing Catamount's contention that, on summary judgment, the trial court improperly considered extrinsic evidence in interpreting paragraph 32 of the subcontract. It asserts that the trial court "create[d] an ambiguity" by allowing and adopting extrinsic evidence that " 'the construction industry presupposes in that contract that Catamount is going to pay Steelwood.' " Additionally, it argues that "the nature of the [extrinsic] evidence Steelwood submitted was not sufficient" because it was an "argument that was entirely unsupported by anything in the record, but was merely an oral assertion." The fundamental problem with Catamount's first assertion is illuminated in that second argument. That is, the trial court did not consider (nor was it presented with) any extrinsic evidence regarding the meaning of paragraph 32 of the subcontract. Instead, the court heard legal argument from Steelwood's counsel regarding how paragraph 32 should be interpreted. Catamount made no objection to the propriety of that argument, but merely provided its own arguments regarding the import of paragraph 32. Under those circumstances, Catamount's contention that the court improperly considered extrinsic evidence regarding the meaning of paragraph 32 is without merit; we agree with Steelwood that the court made its determination based on the text of the agreements and the undisputed facts.

**[12]** ***407** Turning to the proper interpretation of paragraph 32, based on the text of provision, in context, we agree with the trial court's conclusion that Catamount was not entitled to offset amounts it expended to discharge the suppliers' liens. As noted, paragraph 32 of the subcontract provides that Steelwood is responsible to

pay costs and fees incurred as a result of suppliers' liens if those liens "arise[ ] out of any act or omission" of Steelwood under the agreement. Conversely, then, if the lien in question does not arise out of an act or omission of Steelwood, *i.e.,* if the lien arises out of an act or omission of Catamount, then Steelwood is not responsible for the costs and fees associated with discharging the lien under paragraph 32. The term "arising out of means to originate from a specified source." *Webster's Third New Int'l Dictionary* 117 (unabridged ed 2002). Originate, in turn, means to "cause the beginning of or "give rise to." *Id.* at 1592.

In this case, Steelwood (by way of its suppliers) provided materials for the project pursuant to the purchase order. After the materials were provided, Catamount never asserted that there was any problem with them. Although, after accepting the materials, Catamount had a legal obligation to pay, it failed to do so. Instead, after terminating the contract for convenience, Catamount refused to make payment for any of the labor or materials it had received pursuant to its agreements with Steelwood. It was that refusal to pay any amount to Steelwood, including amounts clearly owing under the purchase order, despite an obligation to do so, that led to the liens at issue. [8] Thus, in view of the unambiguous terms of the contract, together with the facts on summary judgment, the liens in question clearly arose out of an act or omission of Catamount, rather than an act or omission of Steelwood. [9] The trial court did not err in so concluding.

8 We note that the amount due pursuant to the purchase order (along with the subcontract) at the time of the termination for convenience was far greater than any amount Catamount later asserted was due for offsets. Indeed, as the trial court observed, it "was pretty cheeky [for Catamount] to come in here and ask [Steelwood] to pay all the fees related to the litigation that had to be filed to force payment" from Catamount.

9 The joint check agreement, which the trial court discussed in its reasoning, supports that conclusion. As noted, the subcontract provides that Catamount may make payment to Steelwood through "checks made payable to the joint order" of Steelwood and Steelwood's suppliers. At the same time as it entered into the subcontract and purchase order, Catamount also entered into a joint check agreement with both Steelwood and Shelter Products, one of the suppliers on the project. Under that joint check agreement, Catamount agreed to "endeavor to make monthly payments jointly" to Steelwood and Shelter Products for any amounts owing to Shelter Products for materials and services provided on the project. We note that, although Catamount makes a number of arguments that are directed at the trial court's inclusion of the joint check agreement in its reasoning regarding the interpretation of paragraph 32, those arguments actually relate to the trial court's ultimate conclusion that it was an act or omission of Catamount that led to the liens in this case. Given that we agree with the trial court's interpretation of paragraph 32 and its conclusion that Catamount's act or omission gave rise to the liens, we do not discuss the joint check agreement further.

****464 *408** In light of the foregoing, we conclude that the trial court properly granted summary judgment in favor of Steelwood.

Limited Judgment affirmed; appeal from "Supplemental Limited Judgment" dismissed.

**All Citations**

257 Or.App. 382, 307 P.3d 449

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# APPENDIX G

2018 WL 6002933
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

UNPUBLISHED OPINION
Court of Appeals of Washington, Division 3.

POWER CITY ELECTRIC INC., Appellant,
v.
WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.

No. 35676-1-III
|
NOVEMBER 15, 2018

**Opinion**

Korsmo, J.

*1 KORSMO, J. — Power City Electric (PCE) appeals from a decision of the Board of Industrial Insurance Appeals that found it to have committed four serious violations of the Washington Administrative Code (WAC). Concerned about the adequacy of the Board's factual findings, we remand for more detailed findings and clarification of the standard applied by the Board in its ruling.

## FACTS

An effort to reroute underground power cables in Pasco is the basis for this case. PCE was hired to move the power cables and had to dig a hole on the side of Court Street to do so. A Department of Labor and Industries (DLI) compliance officer, Reynaldo Gomez, was driving by the scene when he noticed only the helmeted head of a worker in the hole. Concerned about the depth of the dig, he stopped to investigate.

Two men stepped out of the excavation by use of a notch dug into the shallower south side of the hole. Dirt from the dig was piled immediately next to the deep end of the trench. [1] The excavation measured about six feet wide by ten feet long. A one foot section on the north side of the dig was measured to be six feet deep. The depth ranged from 30 to 48 inches in the remainder of the dig. Gomez graded the sandy soil in the excavation as Type C—unstable. There were no measures in place to prevent collapse of either the hole or of the spoils pile. Photographs of the scene were taken.

The two workers had been clearing fiber optic lines by shovel in the shallower side of the trench. Their work zone was within 3.5 feet of the six foot deep section where the backhoe was excavating.

DLI issued four major infraction notices, fining PCE $7,200. The Industrial Appeals Judge (IAJ) heard testimony from Mr. Gomez and the PCE foreman, Julian McCarthy. The IAJ upheld the citation for failure to provide a safe means of ingress and egress, but rejected the other citations. Both PCE and DLI appealed.

The Board upheld all four citations and the $7,200 in total fines for the four serious violations. The Board entered a decision that included an extensive discussion as well as findings of fact and conclusions of law. Clerk's Papers (CP) at 5-12. The superior court adopted the Board's conclusions of law and affirmed its decision.

PCE appealed to this court. A panel heard oral argument on the case.

## ANALYSIS

This appeal challenges, for varying reasons, whether the record supports the Board's factual findings. PCE also alleges that the Board applied the wrong standard in assessing the risk of danger to workers. In order to explain our uncertainty and the need for clarification by the Board, we need to address some of the regulations at issue and the corresponding findings.

In order to establish a serious violation of state worker safety standards, RCW 49.17.180 requires proof that "death or serious physical harm could result" from an existing condition. With respect to construction work, state safety standards are set out in chapter 296-155 WAC. Washington adopted the federal standards governing the role of likelihood of harm in assessing a violation of the state safety standards in *Adkins v. Aluminum Company,* 110 Wn.2d 128, 750 P.2d 1257, 756 P.2d 142 (1988). A violation of safety standards is established when an

employee has "access" to the unsafe condition; access is established when DLI shows "a reasonable predictability that, in the course of their duties, employees will be, are, or have been in the zone of danger." *Id.* at 147 (emphasis omitted). *Accord, Mid Mountain v. Labor & Indus.,* 136 Wn. App. 1, 5, 146 P.3d 1212 (2006) (applying *Adkins* standard to an excavation setting).

***2** WAC 296-155-657(1) requires that workers in an excavation be protected from the dangers of cave-ins by either sloping the excavation or installing protective systems. WAC 296-155-657(2), (3). No protection is needed if the excavation is less than four feet *and* an examination reveals "no indication of a potential cave-in." WAC 296-155-657(1).

Although the discussion segment of the Board's decision addressed the facts in a detailed manner similar to (but more extensive than) our brief recitation of them at the beginning of this opinion, its formal findings of fact are more conclusory. Finding 2 states in part that PCE:

> exposed its employees to potential cave-ins in a trench excavation of four feet or more in depth. The workers had access to the hazard posed by the unprotected portion of the excavation while in the course of their normal duties.

CP at 10.

This finding lacks detail allowing this court to understand *how* PCE exposed its workers and *how* they had access to the hazard. Several possibilities exist in the record that would support the Board's ruling. The excavation was not sloped, nor were there protective systems installed. Thus, if the workers were working in a portion of the trench that was four feet or deeper, the violation would be clear. However, there is no fact finding that the men were working in that area. Similarly, the south side of the trench was described as 30 to 48 inches deep, with no clear finding that the men worked in that portion of the trench either. Moreover, the lack of sloping or protective equipment, in combination with the Type C soil, may have been hazardous in and of itself. The Board's reasoning on this point is unclear.

Instead, finding 2 simply says that the men had "access" to areas "four feet or more in depth." The word "access" is insufficiently descriptive to explain how the men were endangered. Were they working in an area that was four feet deep? Was the soil in danger of collapsing on them? Did the hole slope sufficiently that a worker might be expected to tumble into the deep end? Were they working so close to the deeper portion of the trench that they would have been endangered by a collapse occurring on the north side?

In contrast to these findings are the details in *Mid Mountain.* There the excavation occurred in Type B soil that required an excavation of four feet six inches deep to have a similar set back and that the "zone of danger" was an area within four feet six inches of the south wall. 136 Wn. App. at 6. As in this case, the employer there argued that its employees "were working in a portion of the trench that was less than four feet deep and more than five feet away from the zone of danger." *Id.* at 5. Based on the requirements for Type B soil and the evidence of the dimensions of the excavation, the *Mid Mountain* court was able to conclude that the worker was working within close proximity of the zone of danger and it was reasonably likely that he could have walked into that zone during the normal course of his work. *Id.* at 7.

The Board's findings in this case are not sufficiently detailed to allow this court to analyze the contentions in the same manner as *Mid Mountain.* We do not know what facts the Board relied on in making its determination and thus cannot discern why the Board considered the workers within the "zone of danger". We also do not know whether, assuming the area to which the workers were exposed was under four feet, an examination revealed "no indication of a potential cave-in."

***3** Similarly, the findings related to spoils pile do not suggest why the pile constituted a hazard to the workers. The presence of the pile within two feet of the excavation constituted a violation of WAC 296-155-655(10)(b), but why it constituted a major violation due to the risk it imposed to the workers is not explained in the Board's findings. Did the pile threaten to collapse the north end of the trench? Was it likely to slide into the trench of its own accord?

Thus, we remand to the Board for entry of more detailed findings of fact that explain its determination that the PCE workers had access to the zone of danger. Because PCE argues that the Board applied the wrong

standard in making its determination, we also direct the Board to ascertain that it applied the *Adkins* "reasonable predictability" standard to its determination that the workers had access to the zone of danger.

This court will retain jurisdiction over the appeal. Upon entry of appropriate findings, they shall be transmitted to the clerk of this court. The panel will determine whether additional briefing is necessary, but will remain open to a request from either party to file a supplemental brief concerning the supplemental findings.

Remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Fearing, J.

Siddoway, J.

**All Citations**

Not Reported in Pac. Rptr., 2018 WL 6002933

Footnotes

1 This is referred to as the "spoils pile."

**End of Document**

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# APPENDIX H

# SENATE BILL REPORT

# SHB 1671

As Reported By Senate Committee On:
Judiciary, March 29, 1999

**Title:** An act relating to actions arising out of public works contracts.

**Brief Description:** Eliminating a maximum amount threshold for pleadings in actions arising from public works contracts.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representatives Constantine, Radcliff, Kessler, Mastin, Sullivan, Grant, G. Chandler, Reardon, Lisk, Esser, Alexander, McMorris and Mitchell).

**Brief History:**
**Committee Activity:** Judiciary: 3/22/99, 3/29/99 [DP].

## SENATE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass.
Signed by Senators Heavey, Chair; Kline, Vice Chair; Costa, Goings, Hargrove, Haugen, Johnson, Long, McCaslin, Roach and Thibaudeau.

**Staff:** Dick Armstrong (786-7460)

**Background:** In a civil action for damages of not more than $10,000, certain procedures apply when a party makes an offer of settlement prior to trial. If the case goes to trial after an offer of settlement has been made, the prevailing party is awarded reasonable attorney fees and costs.

The prevailing party is determined by who improved his or her position at trial when compared to the offer of settlement. The plaintiff is the prevailing party if he or she is awarded damages that at least equal the amount the plaintiff offered in settlement. The defendant is the prevailing party if the amount awarded is zero or is not more than the defendant's offer of settlement.

**Summary of Bill:** All public works contract disputes are subject to the offer-of-settlement and prevailing party attorney fees law. The $250,000 limit is removed.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** The bill will not result in spurious claims; the offer of settlement acts as a deterrent to such claims. The bill requires each side to a lawsuit to carefully analyze the

merits of their claims. The bill encourages settlements. The statute now works well and should be expanded.

**Testimony Against:** Please take a close look at this bill. Colleges are concerned because the bill will be an incentive to spurious claims. There will be a negative impact on construction budgets.

**Testified:** Dave Ducharme, Arnie Hedeen, Chip Graeber, Dan Cain, Utility Contractors of Washington (pro); Larry Ganders, WSU (con).

# APPENDIX I

Progress payments for work performed shall not be evidence of acceptable performance or an admission by the Contracting Agency that any work has been satisfactorily completed. The determination of payments under the contract will be final in accordance with Section 1 05.1.

*(******)*
Supplement this section with the following:

Lump sum item breakdowns are not required when the bid price for the lump sum item is less than $20,000.

*(******)*
Supplement this section with the following:

Estimates will be issued on the 1st day of the month for all work completed to the 26th day of the preceding month. Progress estimates will be prepared as accurately as the available information will permit, but the only estimate that is binding will be the semifinal estimate. Before the semifinal estimate is prepared, all quantities will be reviewed and checked. Progress payments will be made from City funds unless otherwise provided. Each of the progress payments will be equal to the value of work performed during the preceding pay period, less any retainage.

**1-09.11 Disputes and Claims**

*(******)*
Supplement this section with the following:

The Owner and Contractor each agree that in the event either of said parties brings an action in any court arising out of this Contract, the prevailing party in any such lawsuit shall be entitled to an award of its cost of defense.

"Cost of Defense" shall include, without limiting the generality of such term, expense of investigation of plaintiff's claims, engineering expense, expense of deposition, exhibits, witness fees, including reasonable expert witness fees, and reasonable attorney's fees. The obligation of payment under this clause shall be incorporated in any judgment rendered in such action either in the form of a judgment against plaintiff for any defendant or in the form of reduction of the judgment otherwise rendered in favor of plaintiff against any defendant, and shall be paid within thirty (30) days after entry of judgment.

It is agreed by the Contractor that venue for any lawsuit arising out of this Contract shall be Pierce County. Contractors shall include a stipulation of venue in said county clause in all subcontracts hereunder.

If, through acts of neglect on the part of the Contractor, any other contractor or any subcontractor shall suffer loss or damage on the work, the Contractor agrees to settle with such other contractor or subcontractor by agreement or arbitration, if such other contractor or subcontractor will so settle. If such other contractor or subcontractor shall assert any claim against the Owner on account of any damage alleged to have been sustained, the Owner shall notify the Contractor, who shall indemnify and save harmless the Owner against such claim.

# APPENDIX J

c. An adjustment for the anticipated contribution to unavoidable fixed cost and overhead from the units representing the difference between the adjusted final quantity and 75 percent of the original Plan quantity.

The following limitations shall apply to renegotiated prices for increases and/or equitable adjustments for decreases:

1. The equipment rates shall be actual cost but shall not exceed the rates set forth in the AGC/WSDOT Equipment Rental Agreement (referred to in Section 1-09.6) that is in effect at the time the Work is performed.
2. No payment will be made for extended or unabsorbed home office overhead and field overhead expenses to the extent that there is an unbalanced allocation of such expenses among the Contract Bid items.
3. No payment for consequential damages or loss of anticipated profits will be allowed because of any variance in quantities from those originally shown in the Proposal form, Contract Provisions, and Contract Plans.
4. The total payment (including the adjustment amount and unit prices for Work performed) for any item that experiences an equitable adjustment for decreased quantity shall not exceed 75 percent of the amount originally Bid for the item.

If the adjusted final quantity of any item does not vary from the quantity shown in the Proposal by more than 25 percent, then the Contractor and the Contracting Agency agree that all Work under that item will be performed at the original Contract unit price.

When ordered by the Engineer, the Contractor shall proceed with the Work pending determination of the cost or time adjustment for the variation in quantities.

The Contractor and the Contracting Agency agree that there will be no cost adjustment for decreases if the Contracting Agency has entered the amount for the item in the Proposal form only to provide a common Proposal for Bidders.

### 1-04.7 Differing Site Conditions (Changed Conditions)

During the progress of the Work, if preexisting subsurface or latent physical conditions are encountered at the site, differing materially from those indicated in the Contract, or if preexisting unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the Work provided for in the Contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing site conditions before they are disturbed and before the affected Work is performed.

Upon written notification, the Engineer will investigate the conditions and if he/she determines that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any Work under the Contract, an adjustment, excluding loss of anticipated profits, will be made and the Contract modified in writing accordingly. The Engineer will notify the Contractor of his/her determination whether or not an adjustment of the Contract is warranted.

No Contract adjustment which results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice.

The equitable adjustment will be by agreement with the Contractor. However, if the parties are unable to agree, the Engineer will determine the amount of the equitable adjustment in accordance with Section 1-09.4. Extensions of time will be evaluated in accordance with Section 1-08.8.

If the Engineer determines that different site conditions do not exist and no adjustment in costs or time is warranted, such determination shall be final as provided in Section 1-05.1.

If there is a decrease in the costs or time required to perform the Work, failure of the Contractor to notify the Engineer of the differing site conditions shall not affect the Contracting Agency's right to make an adjustment in the costs or time.

No claim by the Contractor shall be allowed unless the Contractor has followed the procedures provided in Sections 1-04.5 and 1-09.11.

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### 1-04.8 Progress Estimates and Payments

Engineer-issued progress estimates or payments for any part of the Work shall not be used as evidence of performance or quantities. Progress estimates serve only as basis for partial payments. The Engineer may revise progress estimates any time before final acceptance. If the Engineer deems it proper to do so, changes may be made in progress estimates and in the final estimate.

### 1-04.9 Use of Buildings or Structures

The Engineer will decide whether any building or Structure on the Right of Way may remain during the Work and whether the Contractor may use such a building or Structure.

### 1-04.10 Use of Materials Found on the Project

With the Engineer's written approval, the Contractor may use on the project: stone, gravel, sand, other materials from on-site excavation, or timbers removed in the course of the Work. Approval will not be granted if:

1. The excavated materials or timber fail to meet Contract requirements;
2. The excavated materials or timber are required for other use under the Contract;
3. The excavated materials are required for use as Selected Materials under Section 2-03.3(10); or
4. Such use is not in the best interests of the Contracting Agency as determined by the Engineer, whose decision shall be final as provided in Section 1-05.1.

Any material disturbed by, but not used in, the Work shall be disposed of as provided elsewhere in the Contract or as ordered by the Engineer in accordance with Section 1-04.4.

### 1-04.11 Final Cleanup

The Contractor shall perform final cleanup as provided in this Section to the Engineer's satisfaction. The Engineer will not establish the Physical Completion Date until this is done. The Highway Right of Way, material sites, and all ground the Contractor occupied to do the Work shall be left neat and presentable. The Contractor shall:

1. Remove all rubbish, surplus materials, discarded materials, falsework, camp buildings, temporary structures, equipment, and debris; and
2. Deposit in embankments, or remove from the project, all unneeded, oversized rock left from grading, surfacing, or paving.

The Contractor shall not remove warning, regulatory, or guide signs unless the Engineer approves.

# 1-05 Control of Work

## 1-05.1 Authority of the Engineer

The Engineer shall be satisfied that all the Work is being done in accordance with the requirements of the Contract. The Contract and Specifications give the Engineer authority over the Work. Whenever it is so provided in this Contract, the decision of the Engineer shall be final: provided, however, that if an action is brought within the time allowed in this Contract challenging the Engineer's decision, that decision shall be subject to the scope of judicial review provided in such cases under Washington case law.

The Engineer's decisions will be final on all questions including, but not limited to, the following:

1. Quality and acceptability of materials and Work,
2. Measurement of unit price Work,
3. Acceptability of rates of progress on the Work,
4. Interpretation of Plans and specifications,
5. Determination as to the existence of changed or differing site conditions,
6. Fulfillment of the Contract by the Contractor,
7. Payments under the Contract including equitable adjustment,
8. Suspension(s) of Work,
9. Termination of the Contract for default or public convenience,
10. Determination as to unworkable days, and
11. Approval of Working Drawings.

The Project Engineer represents the Engineer on the project, with full authority to enforce Contract requirements and carry out the Engineer's orders. If the Contractor fails to respond promptly to the requirements of the Contract or orders from the Engineer:

1. The Project Engineer may use Contracting Agency resources, other contractors, or other means to accomplish the Work; and
2. The Contracting Agency will not be obligated to pay the Contractor, and will deduct from the Contractor's payments any costs that result when any other means are used to carry out the Contract requirements or Engineer's orders.

At the Contractor's risk, the Project Engineer may suspend all or part of the Work according to Section 1-08.6.

Nothing in these Specifications or in the Contract requires the Engineer to provide the Contractor with direction or advice on how to do the Work. If the Engineer approves or recommends any method or manner for doing the Work or producing materials, the approval or recommendation shall not:

1. Guarantee that following the method or manner will result in compliance with the Contract,
2. Relieve the Contractor of any risks or obligations under the Contract, or
3. Create any Contracting Agency liability.

## 1-05.2 Authority of Assistants and Inspectors

The Project Engineer may appoint assistants and Inspectors to assist in determining that the Work and materials meet the Contract requirements. Assistants and Inspectors have the authority to reject defective material and suspend Work that is being done improperly, subject to the final decisions of the Project Engineer or, when appropriate, the Engineer.

Assistants and Inspectors are not authorized to accept Work, to accept materials, to issue instructions, or to give advice that is contrary to the Contract. Work done or material furnished which does not meet the Contract requirements shall be at the Contractor's risk and shall not be a basis for a claim even if the Inspectors or assistants purport to change the Contract.

Assistants and Inspectors may advise the Contractor of any faulty Work or materials or infringements of the terms of the Contract; however, failure of the Project Engineer or the assistants or Inspectors to advise the Contractor does not constitute acceptance or approval.

### 1-05.3 Plans and Working Drawings

The Contract Plans are defined in Section 1-01.3. Any proposed alterations by the Contractor affecting the requirements and information in the Contract Plans shall be in writing and will require approval of the Engineer.

To detail and illustrate the Work, the Engineer may furnish to the Contractor additional plans and explanations consistent with the original plans. The Contractor shall perform the Work according to these additional plans and explanations.

The Contractor shall submit supplemental Working Drawings as required for the performance of the Work. Except as noted, all drawings and other submittals shall be delivered directly to the Project Engineer. The drawings shall be on sheets measuring 22 by 34 inches, 11 by 17 inches, or on sheets with dimensions in multiples of 8½ by 11 inches. The drawings shall be provided far enough in advance of actual need to allow for the review process by the Contracting Agency or other agencies. This may involve resubmittals because of revisions or rejections. Unless otherwise stated in the Contract, the Engineer will require up to 30 calendar days from the date the submittals or resubmittals are received until they are sent to the Contractor. After a plan or drawing has been approved and returned to the Contractor, all changes that the Contractor proposes shall be submitted to the Project Engineer for review and approval. This time will increase if the drawings submitted do not meet the Contract requirements or contain insufficient details.

If more than 30 calendar days are required for the Engineer's review of any individual submittal or resubmittal, an extension of time will be considered in accordance with Section 1-08.8.

The Contractor shall obtain the Engineer's written approval of the drawings before proceeding with the Work they represent. This approval shall neither confer upon the Contracting Agency nor relieve the Contractor of any responsibility for the accuracy of the drawings or their conformity with the Contract. The Contractor shall bear all risk and all costs of any Work delays caused by nonapproval of these drawings or plans.

Unit Bid prices shall cover all costs of Working Drawings.

### 1-05.4 Conformity With and Deviations From Plans and Stakes

The Special Provisions may require that the Contractor be contractually responsible for part or all of the project surveying. For survey requirements not the responsibility of the Contractor, the Engineer will lay out and set construction stakes and marks needed to establish the lines, grades, slopes, cross-sections, and curve superelevations. These stakes and marks will govern the Contractor's Work. The Contractor shall take full responsibility for detailed dimensions, elevations, and slopes measured from them.

All Work performed shall be in conformity with the lines, grades, slopes, cross-sections, superelevation data, and dimensions as shown in the Plans, or as staked. If the Plans, Special Provisions, or these Specifications, state specific tolerances, then the Work shall be performed within those limits. The Engineer's decision on whether the Work is in conformity shall be final, as provided in Section 1-05.1.

The Contractor shall not deviate from the approved Plans and Working Drawings unless the Engineer approves in writing.

When the Contracting Agency is responsible for roadway surveying, and the Contractor trims the Subgrade with an automatic machine guided by reference lines, the Engineer will set control stakes for line and grade only once after grading is complete. To gain better control with unusual pavement widths or for other reasons, the Engineer may set more control stakes without added cost to the Contractor. The Contractor shall set reference lines from these control stakes for trimming Subgrade, for surfacing, and for controlling the paving machines.

The Contractor shall work to preserve stakes, marks, and monuments set by the Engineer. The Contracting Agency will deduct from payments due the Contractor all costs to replace such stakes, marks, and monuments carelessly or willfully damaged or destroyed by the Contractor's operation.

The Contractor shall provide enough safe areas to permit the Engineer to set those points and elevations that are the responsibility of the Contracting Agency and to perform random checks of the surveying performed by the Contractor.

The Contractor shall keep the Engineer informed of staking requirements to provide the Engineer with adequate time to set the stakes for which the Contracting Agency is responsible. Contractor requests for stakes shall be made at least 3 working days before the Engineer needs to begin the staking operation.

### 1-05.5 Vacant

### 1-05.6 Inspection of Work and Materials

The Engineer may inspect all Work and materials for conformity with Contract terms. To ensure the Engineer's safety and access during these inspections, the Contractor shall provide any equipment needed, such as walkways, railings, ladders, and platforms.

When the Engineer requests, the Contractor shall (without charge) provide samples of materials used or to be used in the Work. If the Contractor uses materials tested and approved for one project in an unrelated project, the Contracting Agency may deduct its testing and inspection costs from payments due the Contractor. The Engineer may order the Contractor to remove and replace, and bear the cost of doing so, any materials used without inspection.

Any inspections, tests, measurements, or other actions by Contracting Agency employees serve only one purpose: to assure the Engineer that Work, materials, progress rate, and quantities comply with Contract terms. Such work by Contracting Agency employees shall not relieve the Contractor from doing any Contract-assigned Work or from determining whether Contract requirements are being met. The Contractor shall correct any substandard Work or materials. The Engineer will reject unsuitable Work or materials even though inspected or paid for in a progress estimate.

If the Engineer requests, then the Contractor shall remove or uncover any area of the completed Work. After the Engineer inspects it, the Contractor shall restore the area to the standard the Contract requires. The Contractor shall bear the cost of uncovering, removing, and restoring the exposed Work: (a) if it proves unacceptable, or (b) if it was placed without authority or without due notice to the Engineer. The Contracting Agency will pay these costs by agreed price or by force account if the Work proves to be acceptable and the Contractor had performed the original Work with the authority of and due notice to the Engineer.

The Contractor, if advised to do so by the Engineer, shall permit representatives from other agencies to inspect the Work when it is to be done:

1. On any railroad, utility, or facility of a public agency; or
2. To the satisfaction of any federal, state, or municipal agency.

In any crushing or screening operation, the Contractor shall provide and install a mechanical sampler that:

1. Is automatic or semi-automatic;
2. Can safely and easily obtain representative samples of the materials being produced;
3. Can convey the samples to ground level in Contracting Agency-provided sacks;
4. Moves at an even rate through the full width of the materials stream falling from the discharge end of the belt, gate, or chute;
5. Is power driven during the material intercept cycle; and
6. Can be adjusted to take samples of about 100 pounds as often as the Engineer requires.

No material from the crushing or screen operation will be accepted until after the Engineer has approved the design and operation of the sampling equipment. The Contractor shall bear all costs of providing the sampling equipment, the power to operate it, and the space for its use.

### 1-05.7 Removal of Defective and Unauthorized Work

The Contracting Agency will not pay for unauthorized or defective Work. Unauthorized or defective Work includes: Work and materials that do not conform to Contract requirements; Work done beyond the lines and grades set by the Plans or the Engineer; and extra Work and materials furnished without the Engineer's written approval. At the Engineer's order, the Contractor shall immediately remedy, remove, replace, or dispose of unauthorized or defective Work or materials and bear all costs of doing so.

### 1-05.8 Vacant

### 1-05.9 Equipment

At the Engineer's request, the Contractor shall provide an operating and maintenance manual for each model or type of mixing, placing, or processing equipment before using it in the Work. The Contractor shall also provide test instruments to confirm whether the equipment meets operating requirements, such as vibration rate, revolutions-per-minute, or any other requirements.

The Contract may require automatically controlled equipment for some operations. If the automatic controls on such equipment fail, then the Contractor may operate the equipment manually for the remainder of that normal working day, provided the method of operation produces results otherwise meeting the Specifications. Continued operation of the equipment manually beyond this working day will be permitted only by specific authorization of the Engineer.

The Engineer will reject equipment that repeatedly breaks down or fails to produce results within the required tolerances. The Contractor shall have no claim for additional payment or for extension of time due to rejection and replacement of any equipment.

### 1-05.10 Guarantees

The Contractor shall furnish to the Contracting Agency any guarantee or warranty furnished as a customary trade practice in connection with the purchase of any equipment, materials, or items incorporated into the project.

### 1-05.11 Final Inspection

The Engineer will not make the final inspection until the physical Work required by the Contract, including final cleanup and all extra Work ordered by the Engineer, has been completed. The Physical Completion Date for the Contract will be determined as provided in Section 1-08.5.

### 1-05.12 Final Acceptance

The Contractor must perform all the obligations under the Contract before a Completion Date and final acceptance can occur. Failure of the Contractor to perform all the obligations under the Contract shall not bar the Contracting Agency from unilaterally accepting the Contract as provided in Section 1-09.9. The Secretary accepts the completed Contract and the items of Work shown in the final estimate by signature of the Final Contract Voucher Certification. The date of that signature constitutes the acceptance date. Progress estimates or payments shall not be construed as acceptance of any Work under the Contract.

The Contractor agrees that neither completion nor final acceptance shall relieve the Contractor of the responsibility to indemnify, defend, and protect the Contracting Agency against any claim or loss resulting from the failure of the Contractor (or the Subcontractors or lower tier subcontractors) to pay all laborers, mechanics, Subcontractors, materialpersons, or any other person who provides labor, supplies, or provisions for carrying out the Work

Liquidated damages will not be assessed for any days for which an extension of time is granted. No deduction or payment of liquidated damages will, in any degree, release the Contractor from further obligations and liabilities to complete the entire Contract.

### 1-08.10 Termination of Contract

#### 1-08.10(1) Termination for Default

The Contracting Agency may terminate the Contract upon the occurrence of any one or more or the following events:

1. If the Contractor fails to supply sufficient skilled workers or suitable materials or equipment;
2. If the Contractor refuses or fails to prosecute the Work with such diligence as will ensure its Physical Completion within the original Physical Completion time and any extensions of time which may have been granted to the Contractor by change order or otherwise;
3. If the Contractor is adjudged bankrupt or insolvent, or makes a general assignment for the benefit of creditors, or if the Contractor or a third party files a petition to take advantage of any debtor's act or to reorganize under the bankruptcy or similar laws concerning the Contractor, or if a trustee or receiver is appointed for the Contractor or for any of the Contractor's property on account of the Contractor's insolvency, and the Contractor or its successor in interest does not provide adequate assurance of future performance in accordance with the Contract within 15 calendar days of receipt of a request for assurance from the Contracting Agency;
4. If the Contractor disregards laws, ordinances, rules, codes, regulations, orders or similar requirements of any public entity having jurisdiction;
5. If the Contractor disregards the authority of the Contracting Agency;
6. If the Contractor performs Work which deviates from the Contract, and neglects or refuses to correct rejected Work; or
7. If the Contractor otherwise violates in any material way any provisions or requirements of the Contract.

Once the Contracting Agency determines that sufficient cause exists to terminate the Contract, written notice shall be given to the Contractor and its Surety indicating that the Contractor is in breach of the Contract and that the Contractor is to remedy the breach within 15 calendar days after the notice is sent. In case of an emergency such as potential damage to life or property, the response time to remedy the breach after the notice may be shortened. If the remedy does not take place to the satisfaction of the Contracting Agency, the Engineer may, by serving written notice to the Contractor and Surety either:

1. Transfer the performance of the Work from the Contractor to the Surety; or
2. Terminate the Contract and at the Contracting Agency's option prosecute it to completion by contract or otherwise. Any extra costs or damages to the Contracting Agency shall be deducted from any money due or coming due to the Contractor under the Contract.

If the Engineer elects to pursue one remedy, it will not bar the Engineer from pursuing other remedies on the same or subsequent breaches.

Upon receipt of a notice that the Work is being transferred to the Surety, the Surety shall enter upon the premises and take possession of all materials, tools, and appliances for the purpose of completing the Work included under the Contract and employ by contract or otherwise any person or persons satisfactory to the Engineer to finish the Work and provide the materials without termination of the Contract. Such employment shall not relieve the Surety of its obligations under the Contract and the bond. If there is a transfer to the Surety, payments on estimates covering Work subsequent to the transfer shall be made to the extent permitted under law to the Surety or its agent without any right of the Contractor to make any claim.

If the Engineer terminates the Contract or provides such sufficiency of labor or materials as required to complete the Work, the Contractor shall not be entitled to receive any further payments on the Contract until all the Work contemplated by the Contract has been fully performed. The Contractor shall bear any extra expenses incurred by the Contracting Agency in completing the Work, including all increased costs for completing the Work, and all damages sustained, or which may be sustained, by the Contracting Agency by reason of such refusal, neglect, failure, or discontinuance of Work by the Contractor. If liquidated damages are provided in the Contract, the Contractor shall be liable for such liquidated damages until such reasonable time as may be required f r Physical Completion of the Work. After all the Work contemplated by the Contract has been completed, the Engineer will calculate the total expenses and damages for the completed Work. If the total expenses and damages are less than any unpaid balance due the Contractor, the excess will be paid by the Contracting Agency to the Contractor. If the total expenses and damages exceed the unpaid balance, the Contractor and the Surety shall be jointly and severally liable to the Contracting Agency and shall pay the difference to the State of Washington, Department of Transportation on demand.

In exercising the Contracting Agency's right to prosecute the Physical Completion of the Work, the Contracting Agency shall have the right to exercise its sole discretion as to the manner, method, and reasonableness of the costs of completing the Work. In the event that the Contracting Agency takes Bids for remedial Work or Physical Completion of the project, the Contractor shall not be eligible for the Award of such Contracts.

In the event the Contract is terminated, the termination shall not affect any rights of the Contracting Agency against the Contractor. The rights and remedies of the Contracting Agency under the Termination Clause are in addition to any other rights and remedies provided by law or under this Contract. Any retention or payment of monies to the Contractor by the Contracting Agency will not release the Contractor from liability.

If a notice of termination for default has been issued and it is later determined for any reason that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Termination for Public Convenience in Section 1-08.10(2). This shall include termination for default because of failure to prosecute the Work, and the delay was found to be excusable under the provisions of Section 1-08.8.

### 1-08.10(2) Termination for Public Convenience

The Engineer may terminate the Contract in whole, or from time to time in part, whenever:

1. The Contractor is prevented from proceeding with the Work as a direct result of an Executive Order of the President with respect to the prosecution of war or in the interest of national defense; or an Executive Order of the President or Governor of the State with respect to the preservation of energy resources;
2. The Contractor is prevented from proceeding with the Work by reason of a preliminary, special, or permanent restraining order of a court of competent jurisdiction where the issuance of such restraining order is primarily caused by acts or omissions of persons or agencies other than the Contractor; or
3. The Engineer determines that such termination is in the best interests of the Contracting Agency.

### 1-08.10(3) Termination for Public Convenience Payment Request

After receipt of Termination for Public Convenience as provided in Section 1-08.10(2), the Contractor shall submit to the Contracting Agency a request for costs associated with the termination. The request shall be prepared in accordance with the claim procedures outlined in Sections 1-09.11 and 1-09.12. The request shall be submitted promptly but in no event later than 90 calendar days from the effective date of termination.

The Contractor agrees to make all records available to the extent deemed necessary by the Engineer to verify the costs in the Contractor's payment request.

**1-08.10(4) Payment for Termination for Public Convenience**

Whenever the Contract is terminated in accordance with Section 1-08.10(2), payment will be made in accordance with Section 1-09.5 for the actual Work performed.

If the Contracting Agency and the Contractor cannot agree as to the proper amount of payment, then the matter will be resolved as outlined in Section 1-09.13 except that, if the termination occurs because of the issuance of a restraining order as provided in Section 1-08.10(2), the matter will be resolved through mandatory and binding arbitration as described in Sections 1-09.13(3)A and B, regardless of the amount of the claim.

**1-08.10(5) Responsibility of the Contractor and Surety**

Termination of a Contract shall not relieve the Contractor of any responsibilities under the Contract for Work performed. Nor shall termination of the Contract relieve the Surety or Sureties of obligations under the Contract Bond or retainage bond for Work performed.

### 1-09.4 Equitable Adjustment

The equitable adjustment provided for elsewhere in the Contract shall be determined in one or more of the following ways:

1. If the parties are able to agree, the price will be determined by using:
   a. Unit prices; or
   b. Other agreed upon prices;
2. If the parties cannot agree, the price will be determined by the Engineer using:
   a. Unit prices; or
   b. Other means to establish costs.

The following limitations shall apply in determining the amount of the equitable adjustment:

1. The equipment rates shall be actual cost but shall not exceed the rates set forth in the AGC/WSDOT Equipment Rental Agreement in effect at the time the Work is performed as referred to in Section 1-09.6, and
2. To the extent any delay or failure of performance was concurrently caused by the Contracting Agency and the Contractor, the Contractor shall be entitled to a time extension for the portion of the delay or failure of performance concurrently caused, provided it make such a request pursuant to Section 1-08.8; however, the Contractor shall not be entitled to any adjustment in Contract price.
3. No claim for anticipated profits on deleted, terminated, or uncompleted Work will be allowed.
4. No claim for consequential damages of any kind will be allowed.

### 1-09.5 Deleted or Terminated Work

The Engineer may delete Work by change order as provided in Section 1-04.4 or may terminate the Contract in whole or part as provided in Section 1-08.10(2). When the Contract is terminated in part, the partial termination shall be treated as a deletion change order for payment purposes under this Section.

Payment for completed items will be at unit Contract prices.

When any item is deleted in whole or in part by change order or when the Contract is terminated in whole or in part, payment for deleted or terminated Work will be made as follows:

1. Payment will be made for the actual number of units of Work completed at the unit Contract prices unless the Engineer determines the unit prices are inappropriate for the Work actually performed. When that determination is made by the Engineer, payment for Work performed will be as mutually agreed. If the parties cannot agree the Engineer will determine the amount of the equitable adjustment in accordance with Section 1-09.4;
2. Payment for partially completed lump sum items will be as mutually agreed. If the parties cannot agree, the Engineer will determine the amount of the equitable adjustment in accordance with Section 1-09.4;
3. To the extent not paid for by the Contract prices for the completed units of Work, the Contracting Agency will pay as part of the equitable adjustment those direct costs necessarily and actually incurred by the Contractor in anticipation of performing the Work that has been deleted or terminated;
4. The total payment for any one item in the case of a deletion or partial termination shall not exceed the Bid price as modified by approved change orders less the estimated cost (including overhead and profit) to complete the Work and less any amount paid to the Contractor for the item;
5. The total payment where the Contract is terminated in its entirety shall not exceed the total Contract price as modified by approved change orders less those amounts paid to the Contractor before the effective date of the termination; and

6. No claim for damages of any kind or for loss of anticipated profits on deleted or terminated Work will be allowed because of the termination or change order.

Contract time shall be adjusted as the parties agree. If the parties cannot agree, the Engineer will determine the equitable adjustment for Contract time.

Acceptable materials ordered by the Contractor prior to the date the Work was terminated as provided in Section 1-08.10(2) or deleted as provided in Section 1-04.4 by the Engineer, will either be purchased from the Contractor by the Contracting Agency at the actual cost and shall become the property of the Contracting Agency, or the Contracting Agency will reimburse the Contractor for the actual costs connected with returning these materials to the suppliers.

### 1-09.6 Force Account

The terms of the Contract or of a change order may call for Work or material to be paid for by force account. If so, then the objective of this Specification is to reimburse the Contractor for all costs associated with the Work, including costs of labor, small tools, supplies, equipment, specialized services, materials, applicable taxes and overhead and to include a profit commensurate with those costs. The amount to be paid shall be determined as described in this Section.

1. **For Labor** – Labor reimbursement calculations shall be based on a "Project Labor List" (List) prepared and submitted by the Contractor and by any Subcontractor before that firm commences force account Work. Once a List is approved by the Engineer, it shall be used to calculate force account labor payment until a new List is submitted and approved. The Engineer may compare the List to payrolls and other documents and may, at any time, require the Contractor to submit a new List. The Contractor may submit a new List at any time without such a requirement. Prior payment calculations shall not be adjusted as a result of a new List.

   To be approved, the List must be accurate and meet the requirements of this Section. It shall include regular time and overtime rates for all employees (or work classifications) expected to participate in force account Work. The rates shall include the basic wage and fringe benefits, the current rates for Federal Insurance Compensation Act (FICA), Federal Unemployment Tax Act (FUTA) and State Unemployment Tax Act (SUTA), the company's present rates for Medical Aid and Industrial Insurance premiums and the planned payments for travel and per diem compensation.

   In the event that an acceptable initial List or requested revised List is not received by the time that force account calculations are begun, the Engineer will develop a List unilaterally, utilizing the best data available, that will be used until a Contractor's List is received and approved. Again, prior calculations, prepared using the Engineer's List, will not be revised as a result of differences with the Contractor's List.

   In addition to compensation for direct labor costs defined above, the Contracting Agency will pay Contractor 29 percent of the sum of the costs calculated for labor reimbursement to cover project overhead, general company overhead, profit, bonding, insurance required by Sections 1-07.10 and 1-07.18, Business & Occupation tax, and any other costs incurred. This amount will include any costs of safety training and health tests, but will not include such costs for unique force account Work that is different from typical Work and which could not have been anticipated at time of Bid.

2. **For Materials** – The Contracting Agency will reimburse invoice cost for Contractor-supplied materials. For the purpose of this provision, "Materials" shall include those items incorporated into the Work, supplies used during the Work and items consumed. This cost shall include freight and handling charges and applicable taxes. Before Work is started, the Engineer may require the Contractor to obtain multiple quotations for the materials to be utilized and select the vendor with prices and terms most advantageous to the Contracting Agency.

## INSLEE, BEST, DOEZIE & RYDER, P.S.

## November 21, 2018 - 12:28 PM

## Transmittal Information

| | |
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| **Filed with Court:** | Court of Appeals Division II |
| **Appellate Court Case Number:** | 52041-9 |
| **Appellate Court Case Title:** | City of Puyallup, Appellant v. Conway Construction Company, Respondent |
| **Superior Court Case Number:** | 16-2-07731-1 |

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