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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CITY OF PUYALLUP,
a Washington municipal corporation,

Appellant,

vs.

CONWAY CONSTRUCTION COMPANY,
an Oregon corporation,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Respondent Conway Construction Company (“Conway”) respectfully requests that this Court affirm the trial court in all respects.

This case is about the City of Puyallup’s (“the City”) improper termination of Conway from a public works contract for default, when the termination was really for convenience. Conway filed this action for a declaration that the termination for default was invalid and that it should be converted to a termination for convenience.

After the City decided that it did not want to work with Conway anymore, the City concocted a list of items that it claimed needed to be cured. But the City did not actually want Conway to cure the items or even respond to them; the City simply wanted to terminate Conway.¹ After a complex, two-phase, ten-week trial that spanned four months, Conway prevailed and obtained a judgment against the City. The City simply failed to meet its burden to prove that Conway remained in default at the time that the City terminated the Contract. The trial court properly converted the termination for default to a termination for convenience.

Following its loss at trial, the City appealed. The trial court’s

¹ CP 2476. Finding of Fact 71 is unchallenged and is a verity on appeal. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006).

findings of fact were supported by substantial evidence, and its conclusions of law were correct. This Court should affirm.

II. ASSIGNMENTS OF ERROR

Conway does not assign any error to the trial court's findings of fact, conclusions of law, or rulings below.

III. STATEMENT OF THE ISSUES

1. The City assigned error to findings of fact but failed to argue that any were not supported by substantial evidence.

2. The trial court was correct to conclude—within the context of Conclusion No. 7—that neglect or refusal to correct rejected work within the 15-day cure period applied to the cure items 1–8 in the City's default letter. But even if that conclusion were incorrect as phrased and included in item 9 (the safety issue), any such error would have been harmless because the sole safety issue was cured before the City terminated the Contract.

3. The trial court was correct to conclude—within the context of Conclusion No. 7—that if Conway demonstrated that it was not neglecting or refusing to correct the cure items,² then any alleged default that the City provided notice of in Exhibit 44 was resolved.³ But even if that

² The City's opening brief uses the phrases "cure items" and "the nine items" interchangeably, but Conclusion No. 7 referred to "defects" and "cure items," not "the nine items."

³ The City's opening brief states that the trial court concluded that "any

conclusion were incorrect as phrased as to remedy item 9 with respect to safety, any such error was harmless because there was no remaining safety issue at the time that the City terminated the Contract.

4. The trial court was correct to conclude that the City was required to justify its termination for default and that the City failed to demonstrate that its termination of Conway for default was justified. To the extent that the conclusion is or contains a finding of fact, the finding of fact was supported by substantial evidence. Regardless, the City failed to meet its burden on justification for termination for default.

5. Findings of Fact 16 and 9–22 were supported by substantial evidence and were not reversible error. In addition, the City failed to argue in its opening brief that these findings were not supported by substantial evidence.

6. The trial court's 15th finding of fact was supported by substantial evidence and was not reversible error. In addition, the City failed to argue in its opening brief that this finding of fact was not supported by substantial evidence.

7. The trial court's 59th finding of fact was supported by substantial evidence and was not reversible error. In addition, the City failed

alleged breach ... were cured,” but Conclusion No. 7 did not use the word “cured.” CP 2478.

to argue in its opening brief that this finding was not supported by substantial evidence.

8. The trial court correctly concluded that the City should not be permitted to pursue a claim for defective work where (1) Conway was provided neither notice nor an opportunity to cure the allegedly defective work, (2) Conway was not in breach of the Contract, and (3) once the termination was converted to one for convenience the City was not permitted to seek an offset. There was no error in the trial court's 16th-19th conclusions of law.

9. The Contract contained a unilateral fee and cost provision, drafted solely by the City, which the trial court correctly applied as bilateral pursuant to RCW 4.84.330. Judgment was entered in Conway's favor. Under settled law of the Washington Supreme Court, RCW 39.04.240 is not an exclusive remedy and does not preclude parties from seeking fees and costs under statutory, contractual, or equitable bases. The trial court was correct to award fees and costs to Conway.

10. Conway should be awarded its fees and costs incurred in connection with this appeal.

IV. STATEMENT OF THE CASE

This case is about the City's failed attempt to terminate Conway for default. The City sent Conway a notice of default, and pursuant to the

Contract, Conway cured the defaults. The City terminated Conway anyway.

Because Conway had addressed the issues in the City's notice of default, the City could not prove that its termination was justified. The trial court was correct to convert the termination to one for convenience.

A. The subject contract

The City and Conway entered into a public works contract ("the Contract") on or about September 21, 2015, for certain improvements to be constructed on, under, and around 39th Avenue Southwest, between 11th Street Southwest and 17th Street Southwest in the City of Puyallup, Washington. CP 2461 and Trial Ex. 5. The Contract incorporated by reference the project manual. Trial Ex. 5. The project manual incorporated by reference the Standard Specifications of the Washington State Department of Transportation ("the Standard Specifications"). *See* Appellant's Opening Brief at 1 and Trial Ex. 1; *see also* Verbatim Report of Proceedings ("VRP") Vol. 13⁴ at 15:8–16. The Standard Specifications, at § 1-08.10, establish specific grounds for termination for default:

The Contracting Agency 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. If the Contractor refuses or fails to prosecute the

⁴ Volume 13 is trial testimony from June 29, 2017, and was marked as Volume V.

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.

Trial Ex. 1 at 1-80.⁵ The Standard Specifications also mandate a process—

⁵ The Contract contemplates an ability to terminate for good cause. Trial Ex. 5 at CON002013. However, neither the City's default notice to Conway nor the termination notice to Conway made any reference whatsoever to this

one requiring notice and an opportunity to cure—before the Contract can be terminated for default:

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.

Id. (emphasis added).

As discussed in the following sections, the City did not follow the Contract. Instead, after Conway had been working on the Project, the City

section of the Contract. *See* Trial Exs. 44 and 58. Rather, notice was made solely under § 1-08.10(1) of the Standard Specifications. *Id.*

Paragraph 22 of the Contract did not spell out the City's termination rights; rather, those rights were set forth in the Standard Specifications. VRP Vol. 23 at 38:24–39:9. The City cited 1-08 of the Standard Specifications because it felt that it was “the most applicable process for the termination.” VRP Vol. 23 at 39:10–18.

sent Conway a cure notice that was a mere pretext—the City did not actually want Conway to respond to the items⁶—hoping that there would be a basis upon which to terminate Conway for default. Although Conway cured the items pursuant to the Contract, the City terminated Conway for default anyway, inaccurately claiming that it could do so based solely on a discretionary basis.

B. The important difference between a termination for convenience and a termination for default

The City was permitted to terminate the Contract for convenience without showing cause:

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.

⁶ CP 2476–77.

Trial Ex. 1 at 1–81. When the City terminates for convenience, payment is to be made for actual work performed and pursuant to § 1-09.5. *Id.* at 1–82. That section provides that payment for completed items will be at unit prices under the Contract. *Id.* at 1–88. That section also provides 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.

Id. at 1–89. In contrast, the remedies resulting from a termination for default are very different.

Upon termination for default, “[a]ny extra costs or damages to the Contracting Agency shall be deducted from any money due or coming due to the Contractor under the Contract. *Id.* at 1–80. In addition, the contractor’s remedies are limited, and the City’s recourse is substantial:

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 for 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.

Id. at 1–81 (emphasis added).

C. Pertinent individuals⁷

Conway is a duly licensed Washington business engaged in general

⁷ For the convenience of the Court, this section identifies the individuals who are referred to in this appeal.

construction activities, more than 75% of which involve contracts requiring the placement of underground utilities. CP 2461. David Conway is a civil engineer and owner of Conway. *Id.* Ken Conway is a project superintendent for Conway. *Id.* Fernando Fierro is a former Conway employee. CP 2460.

Mark Palmer was the city engineer for the City of Puyallup. CP 2461. Charles “Ted” Hill is a senior project engineer for the City of Puyallup and was the project engineer on the Project. CP 2461 and 2462. Steven Cox is a field inspector for KBA, Inc., a consulting firm hired to provide construction observation services for the City. CP 2460 and 2462. Mr. Cox was to be the City’s “onsite ‘eyes and ears’ as the Project went forward.” CP 2462. David Stewart is a civil engineer and owner of Stewart Consulting. CP 2461. Mr. Stewart was an expert hired by the City’s lawyer. VRP Vol. 16 at 32:2–33:7.

David Lundeen is a former employee of the Washington State Department of Labor and Industries (“L&I”). CP 2460.

Wilson Concrete Construction, Inc. (“Wilson”) was a subcontractor on the Project. CP 2467–68. Olson Brothers Excavating, Inc. (“Olson”), was the replacement contractor hired by the City to complete the Project after Conway was terminated for default. CP 2471.

D. The City's notice of default and nine remedy items

On or about March 9, 2016, the City sent a “Written Notice of Suspension and Breach of Contract” to Conway. Trial Ex. 44.⁸ This letter provided notice of alleged grounds of default under Section 1-08.10 of the Standard Specifications. Trial Ex. 44. Nowhere did the letter mention Paragraph 22 of the Contract. Trial Ex. 44.⁹

The City's representative, Mark Palmer, testified that notice and an opportunity to cure was a condition precedent to terminating for default. VRP Vol. 22¹⁰ at 147:3–17. The intent of sending a cure notice is to obtain compliance with the Contract by the contractor. VRP Vol. 22 at 158:21–23. Nevertheless, Mr. Palmer had no meetings with Conway before February 18, 2016, and none between February 18 and March 9, 2016, in which he discussed performance of the Contract. VRP Vol. 22 at 149:7–150:22.

On March 11, two days after sending the notice, Mr. Palmer went on vacation until March 20, 2016. *See* VRP Vol. 22 at 150:3–22 and CP

⁸ Although the letter shows a date of 2015, it should have been 2016. *See* VRP Vol. 11 at 69:6–17. Volume 11 is trial testimony from June 22, 2017, and was marked as Volume III from the trial.

⁹ Rather than citing Paragraph 22 of the Contract, the City cited 1-08 of the Standard Specifications because it felt that it was “the most applicable process for the termination.” VRP Vol. 23 at 39:10–18.

¹⁰ Volume 22 is trial testimony from July 18, 2017, and was marked as Volume XIII.

2472 (unchallenged Finding of Fact 50). During that period, Mr. Hill had no conversations with Mr. Palmer. VRP Vol. 19 at 91:15–18. Mr. Palmer admitted that he never met one-on-one with Conway. VRP Vol. 22 at 167:21–24.

The March 9 notice of default identified the following nine issues:

- Remedy Item No. 1—The City alleged that a retaining wall along the sidewalk of 39th Avenue known as “Wall C” was “incorrectly placed.” The City demanded that Wall C be removed and re-installed.
- Remedy Item No. 2—The City alleged that a traffic signal pole adjacent to the road excavation was leaning, and therefore the City directed Conway to remove the span wire from the existing pole and move it to a temporary pole.
- Remedy Item No. 3—This road project was unique in that it involved the first-in-the-nation installation of pervious concrete, a form of concrete that water can penetrate, on an arterial street. Below the concrete sits a reservoir of “permeable ballast,” which is a form of crushed rock. The City alleged that Conway had installed too much permeable ballast, and the City was not going to pay for ballast allegedly installed “beyond plan specified limits.”¹¹
- Remedy Item No. 4—The City alleged that some installed permeable ballast had been “contaminated.” The City directed Conway to “remove and replace” any such ballast.
- Remedy Item No. 5—The City alleged that some installed pervious concrete panels were “out of tolerance,” referring to the tolerance specifications for one-quarter inch over ten feet. The City demanded that Conway replace the panels.
- Remedy Item No. 6—The City instituted a 90-day suspension period to allow the franchise utilities to complete their work.¹²

¹¹ The City was looking for justification as to why the amount of permeable ballast being installed under the roadway was exceeding the City’s estimated quantities. *See* VRP Vol. 20 at 87:3–17. This was merely a payment issue. *See* VRP Vol. 20 at 88:11–90:23.

¹² This did not involve work or cure on Conway’s part; it simply required

- Remedy Item No. 7—The City alleged that traffic control signage had “not been installed per traffic control plans and per the Engineer’s direction.”
- Remedy Item No. 8—The City alleged that Conway was not properly maintaining the pervious concrete road and directed Conway to sweep the road with a “regenerative air sweeper.”
- Remedy Item No. 9—The City alleged that it had observed “un-safe site conditions (such as improper shoring)” and advised that the City had requested assistance from the Department of Labor and Industries.¹³

See Trial Ex. 44. At that point, the only work that the City would permit Conway to perform for the next 15 calendar days was work related to the aforementioned nine cure items. VRP Vol. 13 at 78:1–20; *see also* VRP Vol. 19¹⁴ at 116:5–15.

Mere hours later, Conway responded by letter to each and every allegation, point by point. Trial Ex. 45. Due to the lack of specificity in the City’s letter with regard to safety, Conway requested additional information and noted that “[n]one of us are aware of ‘numerous occasions that the City has observed unsafe site conditions’” and “[w]e welcome assistance from the Department of Labor and Industries.” Trial Ex. 45.¹⁵ Conway addressed

Conway to leave the site for a period of time, in order to accommodate CenturyLink’s exclusive use of the area. VRP Vol. 19 at 117:7–9.

¹³ Mr. Hill admitted that the safety issues did not require any physical work by Conway. VRP Vol. 19 at 116:16–21.

¹⁴ Volume 19 is trial testimony from July 13, 2017, and was marked as Volume XI.

¹⁵ The Contract did not require a site-specific safety plan, and the City never

that issue. *See* § IV F at 27–37, *infra*.

Conway addressed the other eight issues point by point and indicated what steps were being taken to address each item. Trial Ex. 45. Although Conway protested some of the issues, it neither neglected nor refused to correct any rejected work, and it did not otherwise disregard the instructions of the engineer. *See, e.g.*, Trial Ex. 45. Conway proceeded with the work, reserving its rights under protest to contend that the requested work was extra to the Contract (*i.e.*, a change order). This is permissible under the Contract. *See* Trial Ex. 5 at CON002008.

On March 10, 2016, the City responded by letter. Trial Ex. 46. The City thanked Conway for curing issue #2 (the span wire) and addressed or clarified issues #1 and #3–8. As to safety under #9, the City stated as follows:

The Department of Labor and Industries is aware of the project, and will likely be in contact with Conway to discuss safe construction practices. While the City cannot directly penalize the Contractor for safety violations, the City will notify the Department of Labor and Industry of any *future violations* of safety regulations, and if the Contractor does not correct the deficiency *to L&I's satisfaction*, the City will suspend operations until the work site is deemed safe again by L&I.

Trial Ex. 46 (emphasis added). Mr. Palmer characterized this letter as

asked Conway for one. VRP Vol. 22 at 171:17–25.

“saying if they do not satisfy L&I, we would *suspend* further operations until the work site is deemed safe.” VRP Vol. 23¹⁶ at 64:7–15 (emphasis added).

Mr. Palmer testified to a litany of other requirements that were not mentioned anywhere in the City’s letter of March 10. VRP Vol. 23 at 65:2–67:13. The City refused to meet with Conway, claiming at trial that it would not be a fruitful meeting. VRP Vol. 23 at 67:14–68:15.

The City also rebuffed Conway’s request for a meeting to discuss the remedy items. Trial Ex. 46. By separate letter, the City stated that “[t]he City does not find your written explanations, contained in your letter dated March 9, 2016, acceptable and the City’s Order of Suspension, dated March 9, 2016 remains in place.” Trial Ex. 47. On March 11, Mr. Palmer left town on vacation.

On March 14, 2016, Conway advised the City that the work to remove and replace Wall C “is proceeding as directed.” Trial Ex. 49.

On March 16, 2016, Conway wrote to the City, asked for a meeting the next day, and addressed all nine issues with specificity. Trial Ex. 50. In doing so, Conway asked the City whether the City accepted or found satisfactory the progress that Conway was making. Trial Ex. 50. As to each

¹⁶ Volume 23 is trial testimony from July 19, 2017, and was marked as Volume XIV.

issue, Conway specifically asked the City whether there was more that the City wanted Conway to do. Trial Ex. 50.

On March 18, 2016, Conway reported on the status of items in the City's prior letters and requested a meeting. Trial Ex. 52. Once again, as to each issue, Conway specifically asked the City whether there was more that the City wanted Conway to do. Trial Ex. 52. Mr. Palmer was "essentially incommunicado from March 11, 2016, through March 20, 2016." CP 2472.

On March 21, 2016, Mr. Palmer return to the office from vacation and declined Conway's request for a meeting. Trial Ex. 53. In that letter, the City stated that Conway "has until March 24, 2016 to completely remedy all 9 items," but the City also admitted that issues #3, #6, #7, and #8 had been cured. *Id.*; *see also* VRP Vol. 23 at 57:3-10.

The City then stated that issues #1, #2, #4, and #5, and the safety issue (issue #9) were "yet to be completed and must be finished by March 24th." Trial Ex. 53. The City then claimed that it had "received further reports of unsafe practices on the job site," the most recent of which related to an asbestos cement concrete water pipe, but no other unsafe practice was identified. *Id.* The City did not identify when these alleged acts occurred or the source of the allegations. During this period, Mr. Hill's input was "inconsequential," and he was in "radio silence," leaving Conway to communicate with an absent and generally unresponsive Mr. Palmer. CP

2472 (unchallenged Findings of Fact 51–53).

On March 21, 2016, Conway provided an update to the City. Trial Ex. 54. Conway noted that it was unreasonable for the City to require completion of issues #1, #4, and #5 by March 24, but Conway did not disavow its prior assurances that the issues were being addressed. *Id.* Conway pointed out that issue #2 was cured. *Id.* Conway also noted that it had cured issues #6, #7, and #8. *Id.* As to job site safety, Conway advised that the “[p]ipe work near the daycare was performed long before the City’s suspension” and asked why the City had not brought this issue up at that time. *Id.*

The City admitted that, by March 22 and 23, 2016, the only remaining issues were the panels (issue #5) and safety (issue #9). VRP Vol. 23 at 59:3–60:1 and 62:16–18. At trial, Mr. Palmer testified that it was not physically possible for Conway to remove and replace defective panels within 15 days. VRP Vol. 23 at 62:19–22. Conway was, however, working with Mr. Hill¹⁷ to open traffic, and Conway and the City were addressing traffic issues relating to the panels. VRP Vol. 23 at 77:4–83:6. Despite Conway’s responsiveness, the City issued a written notice of termination for default on March 25, 2016. Trial Ex. 58.

¹⁷ Mr. Hill admitted that he was “not the best person with dates” and had trouble recalling the accuracy of dates. VRP Vol. 19 at 41:21–25.

At trial, the City claimed—for the first time—that some other of Conway’s concrete panel work was non-conforming by way of a claim to correct defective work that was not disclosed at the time of termination. The City failed to provide Conway with any notice or an opportunity to cure any non-conforming work after it improperly terminated the Contract. VRP Vol. 33¹⁸ at 125:18–126:25, 160:22–161:5, and 162:9–12; *see also* VRP Vol. 32¹⁹ at 120:17–121:1.

E. There was substantial evidence that Conway did not neglect or refuse to address the cure items in the City’s notice.

The Contract provided that Conway could be in default if it “performs Work which deviates from the Contract, and neglects or refuses to correct rejected Work.” Trial Ex. 1. There was substantial evidence that Conway was neither neglecting nor refusing to address cure items as of March 25, 2016.

On March 21, 2016, the City admitted in writing that issues #3, #6, #7, and #8 had been addressed. Trial Ex. 53. Written communications demonstrated that Conway was neither neglecting nor refusing to address the items in the City’s notice. *See* Trial Exs. 45, 49, 50, 52, and 54.

¹⁸ Volume 33 is trial testimony from September 14, 2017, and was marked as Volume XXV.

¹⁹ Volume 32 is trial testimony from September 13, 2017, and was marked as Volume XXIV.

At trial, Mr. Palmer admitted that he did not expect Conway to complete all nine items in the notice by March 25. VRP Vol. 20²⁰ at 112:18–113:7. Rather, Mr. Palmer expected only “substantial progress.” VRP Vol. 20 at 112:25–113:7. He admitted that, by March 21, the only items in contention were #1, #5, and #9. VRP Vol. 23 at 57:23–25. Mr. Hill agreed that the City was not insisting that #1, #5, #7 and #8 be completed by March 25 and just wanted to be sure that substantial progress was being done. VRP Vol. 19 at 116:3–118:2.

As discussed in the following sections, there was substantial evidence at trial that Conway had cured and was neither neglecting nor refusing to correct any ground for default when the City terminated the Contract for default.

1. Item #1: Wall C

Wall C had been placed in a location that was contrary to the plans. VRP Vol. 20 at 69:3–6. Within the cure period, Conway agreed to completely remove and replace Wall C, and Conway made substantial progress toward doing so. VRP Vol. 22 at 44:11–12 and VRP Vol. 13 at 80:22–81:25. Ken Conway informed Steve Cox²¹ that he expected Wall C

²⁰ Volume 20 is trial testimony from July 17, 2017, and was marked as Volume XII.

²¹ Mr. Cox acted as an assistant and as an inspector on the Project. VRP

to be demolished by March 14. *See* VRP Vol. 13 at 85:18–23. The wall was demolished and the area was cordoned off on March 14, as promised. *See* VRP Vol. 13 at 85:18–86:1; *see also* Trial Ex. 119 at 11. On March 16, Conway was working on the subgrade excavation for Wall C, and the whole area was fenced off. *See* VRP Vol. 13 at 86:22–25.

The City admitted that Conway provided the City, before March 25, 2016, with a proposed sequence of work to complete the re-installation of Wall C. Trial Ex. 119 at 11. Mr. Palmer admitted that Conway agreed to remove and replace Wall C. VRP Vol. 20 at 117:18–118:9. Mr. Palmer also admitted that work had been performed on the wall, including tearing it down. VRP Vol. 20 at 113:8–23. Mr. Hill admitted this as well. VRP Vol. 17²² at 80:21–25. At the time that the City terminated Conway, Mr. Palmer did not know that rebar had been ordered and delivered to the site. VRP Vol. 20 at 113:18–21. The rebar, in fact, had been delivered. CP 2473. Mr. Palmer had no recollection as to whether he went to the Project site between March 9 and March 25 to inspect the work. VRP Vol. 20 at 114:4–10.²³

Vol. 13 at 17:9–11.

²² Volume 17 is trial testimony from July 11, 2017, and was marked as Volume IX.

²³ Any information that Mr. Palmer got on the progress of the cure items between March 9 and March 25 came from Mr. Hill or Mr. Cox. VRP Vol. 20 at 114:13–16. Mr. Palmer could not say how long it took to build Wall C in the first instance, and he imagined that it was probably more than 14

According to Mr. Palmer, “[s]ubstantial progress would have been that they still would have been working on [Wall C].” VRP Vol. 20 at 116:10–13. Wall C was item #1 on the City’s notice. Trial Ex. 44. Mr. Palmer admitted that Conway had made substantial progress by March 22. VRP Vol. 23 at 59:13–60:1.²⁴

2. Item #2: The signal pole

The signal pole, which was item #2 on the City’s notice, was addressed during the cure period. *See* VRP Vol. 13 at 82:6–8, VRP Vol. 23 at 57:13–16, and Trial Ex. 44. In fact, it was cured on the day of the notice. *See* VRP Vol. 13 at 83:14–16; *see also* VRP Vol. 19 at 94:5–10. The trial court noted that the City admitted that this item was cured. VRP Vol. 20 at 85:9–15.

3. Item #3: Payment dispute for quantities

The City admitted that this item was cured before the City terminated the Contract. Trial Ex. 53.

days and might have been more than 15 days. VRP Vol. 20 at 115:17–24.

²⁴ Any delay on rework was not caused by Conway but rather by a lack of detail in the plans and the need for clarification from the City; initial unwillingness by Parametrix to accomplish re-staking; and the need to get a storm water discharge permit from the City. *See generally* CP 2467–68 (Findings of Fact 31–37) and CP 2473 (Findings of Fact 56–58).

4. Item #4: Contaminated permeable ballast

On the morning of March 16, Conway began removing contaminated permeable ballast. VRP Vol. 13 at 86:22–88:21. Mr. Cox had walked through the roadway site with Ken Conway in order to identify the areas that needed attention. *See* VRP Vol. 13 at 87:11–17. Conway removed everything that Mr. Cox pointed out. VRP Vol. 13 at 88:19–21. Mr. Palmer agreed that Conway had made efforts to clean up the permeable ballast. VRP Vol. 20 at 93:10–15. Mr. Palmer also thought that all of it had been cleaned up, except for an area that CenturyLink continued to work in and contaminate. VRP Vol. 20 at 93:16–20.

Mr. Palmer admitted that the contaminated ballast issue had been cured by at least March 21. VRP Vol. 20 at 96:1–7. Mr. Hill testified that Conway had removed contaminated ballast by March 16, and there was nothing more to do until CenturyLink finished its work. VRP Vol. 19 at 96:15–97:13.

Regardless, there was evidence that all permeable ballast had been removed by March 17. VRP Vol. 13 at 90:10–13. Mr. Hill testified that this item was cured by March 16. VRP Vol. 19 at 96:15–97:13. Mr. Palmer testified that it was cured by March 25. VRP Vol. 23 at 57:17–19.

5. Item #5: Concrete panels

Before the City's notice, Conway had proposed to remove and

replace certain panels at no cost to the City. VRP Vol. 13 at 81:12–17.²⁵ Mr. Cox felt that the proposal was a reasonable one. VRP Vol. 13 at 81:18–82:2.²⁶ The panels had been discussed on January 21, and the City did not direct either Conway or Wilson, a subcontractor, to correct any out-of-tolerance issues at that meeting. VRP Vol. 14²⁷ at 14:3–17:7. Wilson planned to replace cracked panels, and it communicated this to the City. VRP Vol. 14 at 34:23–35:1 and 36:1–41:25. At a February 24 meeting, the City was receptive to Wilson’s plans regarding concrete panels. VRP Vol. 14 at 43:18–44:18.

Nevertheless, on March 10, the City rejected Conway’s proposal to correct the panels. Trial Ex. 46. Wilson proposed to remove and replace the panels at no cost to the City. VRP Vol. 14 at 52:11–53:6 and 93:7–97:11.

As of March 18, there was a proposal to remove and replace rejected panels at no cost to the City. Trial Ex. 52; *see also* VRP Vol. 14 at 98:7–17. Mr. Palmer testified that the “substantial progress” that he was looking for

²⁵ Conway also had offered to repair the panels. VRP Vol. 19 at 127:9–16.

²⁶ In fact, other than paying for this work instead of having it done at no cost, it was exactly what the City had Olson do later. VRP Vol. 13 at 82:3–5. Grinding had been discussed, but it was not what the City preferred. VRP Vol. 20 at 106:2–107:5. Wilson indicated that if grinding was not acceptable, Wilson would replace the panels at its own cost. VRP Vol. 20 at 111:19–112:1; *see also* Trial Ex. 73.

²⁷ Volume 14 is trial testimony from July 5, 2017, and was marked as Volume VI.

regarding replacement of the concrete panels included “having started to remove the panels and work towards replacing them.” VRP Vol. 23 at 85:22–86:2. Mr. Palmer admitted that there was no problem with Conway’s proposal:

Q: What was wrong with the contractor’s proposal to remove and replace the panels once the traffic moved to the south side?

A: I had no confidence in the contractor’s ability to produce a quality product. I didn’t want him producing more defective material on the south side before he had corrected the items on the north side.

Q: So it had nothing to do with the proposal itself? It had to do with your faith in the contractor?

A: To a large degree it did.

VRP Vol. 23 at 86:20–87:4.²⁸ Yet, this was Wilson’s work and responsibility, and the City had faith in Wilson, who was the primary concrete contractor. *Id.* at 87:5–88:9.

By March 18, Conway had made a proposal to move and replace all of the panels after the traffic moved to the south side of 39th Avenue. VRP Vol. 23 at 90:14–91:4. That is precisely what Olson, the replacement contractor, did a year later, in 2017. VRP Vol. 23 at 91:1–9; *see also* VRP

²⁸ Mr. Palmer claimed to have lost faith in Conway, even though he never sat down with Conway to discuss its proposals. VRP Vol. 23 at 89:2–5. Mr. Palmer admitted that the City was not permitted to terminate a contractor for default simply due to a lack of confidence in the contractor. VRP Vol. 23 at 91:21–24.

Vol. 19 at 135:5–136:21 and CP 2471–2472 (Findings of Fact 49 and 51).²⁹ Olson completed the panel work in March 2017. VRP Vol. 19 at 135:5–24; *see also* VRP Vol. 23 at 91:5–11. The City admitted that issues #6, #7, and #8 had been addressed. Trial Ex. 53.

F. There was substantial evidence that there were no remaining safety issues at the time that the City terminated the Contract.

The City admitted in pretrial discovery that “the City did not observe Conway violate any safety rule, regulation, or standard while working on the Project after March 9, 2016.” Trial Ex. 119 at 12.³⁰ Mr. Hill testified

²⁹ CP 2468–69 and 2471–72 (Findings of Fact 38–41 and 47–51). In Finding of Fact 51, which is unchallenged on appeal, the trial court noted with alarm 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.” CP 2472.

³⁰ On April 13, 2016, the Washington State Department of Labor & Industries issued an invoice for a penalty assessment. Trial Ex. 59; *see also* VRP Vol. 22 at 33:1–25. However, the opening conference on this issue occurred on March 16, 2016, and the closing conference occurred on March 29, 2016. Trial Ex. 59; *see also* VRP Vol. 22 at 34:15–35:17. Notably, the invoice noted that a correction due date was not applicable; this was because the issue had been resolved by backfilling the trench. Trial Ex. 59; *see also* VRP Vol. 22 at 35:18–36:2. There was no evidence that the invoice was based on any safety issue that was unresolved before the City terminated the Contract.

L&I did not say anything to Ken Conway about safety after March 16. VRP Vol. 22 at 38:2–6.

At trial, the City simply failed to put on convincing evidence of ongoing or recurrent unsafe work practices.

Mr. Hill testified that he observed an unsafe condition regarding pedestrian

that this was an accurate statement. VRP Vol. 20 at 9:4–19.³¹

The evidence established that there were no unsafe trenches, because the trenches were within the acceptable limits based upon either the full depth of trench or the standing depth of the trench, when accounting for material or standing platforms in the trench.

The City contended that there was traffic going by deep trenches on roads and that there were people in deep trenches. VRP Vol. 20 at 9:16:8–99:1. The record belied this contention.

There was no mention of any trenching or shoring concerns in the

access after March 2, 2016, but there was no documentation of this, and the City admitted in pretrial discovery that “the City did not observe Conway violate any safety rule, regulation, or standard while working on the Project after March 9, 2016.” VRP Vol. 19 at 101:3–104:1 and Trial Ex. 119 at 12.

³¹ Although the City called David Stewart to testify that there were unprotected trenches with depths of four feet or more, the trial court obviously did not find his testimony to be persuasive. The trial court expressed concerns regarding the lack of measurements and that the photography created a misleading impression about the depth of trenches, location of benches, and width of benches in the trenches. VRP Vol. 15 at 132:2–134:19; *see also id.* at 142:6–9 and 143:14–144:12. Volume 15 is testimony from July 6, 2017, and was marked as Volume VII. The trial court also noted that Mr. Cox “didn’t measure anything” and “took a bunch of pictures that were from an angle above that I believe, frankly, were misleading.” *Id.* at 134:7–9. The trial court did not rely on or cite to Mr. Stewart’s testimony when it issued its findings of fact.

Even Mr. Hill could not tell by looking at the first photograph in Exhibit 114 how deep the trench was. VRP Vol. 19 at 58:12–20; *see also id.* at 60:7–8 (testifying that “[t]here was no photograph taken while the measurement was done of 5 to 6 feet deep”).

Inspector's Daily Reports. *See* Trial Ex. 19. Conway utilized every kind of protective system for trenches. VRP Vol. 22 at 10:16–11:16. Conway measured the trenches and examined the soil type and condition in order to determine what kind of protective system was appropriate. VRP Vol. 22 at 11:17–12:4; *see also id.* at 20:8–15. Ken Conway never saw the City or Mr. Cox ever measure the trenches. VRP Vol. 22 at 12:5–14. Conway held regular safety meetings and invited the City to attend, but the City never attended them. VRP Vol. 22 at 13:15–14:6.³² When trench work was being performed, it was always a topic of discussion at Conway's safety meetings. VRP Vol. 22 at 22:25–23:13.³³

Ken Conway had one conversation with Mr. Hill regarding a concern that Mr. Hill had about the depth of a trench. VRP Vol. 22 at 20:16–22. Ken Conway went with Mr. Hill to the trench, measured it, and found it to be 4.5 feet in depth. VRP Vol. 22 at 21:4–13. No one was in the trench, and Ken Conway had not seen anyone in it previously. VRP Vol. 22 at 21:18–22. Conway added rock bedding to the trench in order to bring its

³² Mr. Cox attended a few of the safety meetings but never raised any concerns. VRP Vol. 24 at 107:5–9. (Volume 24 is trial testimony from July 20, 2017, and was marked as Volume XV.) Mr. Hill was invited to attend but never did so. *Id.* at 107:10–14.

³³ Conway had a safety plan that covered trenching safety, but the City never asked for a copy of it. VRP Vol. 22 at 40:17–23. L&I raised no concerns with the sufficiency of the plan. *Id.* at 40:24–41:2.

depth to less than 4 feet. VRP Vol. 22 at 21:23–22:18. As a result, no protective systems were required for that trench. VRP Vol. 22 at 23:14–19.

After that, neither Mr. Hill nor anyone from the City raised any safety concerns before the City’s letter of March 9. VRP Vol. 22 at 23:14–25. Ken Conway knew of no safety concerns raised by either L&I or the City that occurred after March 9. VRP Vol. 22 at 28:1–3. Conway did not disregard the law. VRP Vol. 22 at 42:13–23. Ken Conway testified unequivocally that the safety issue raised by the City was completely remedied before the City terminated Conway for default. VRP Vol. 22 at 42:24–43:9. There was no evidence to the contrary.

Before cutting a trench, Conway would remove the top of the roadway. VRP Vol. 22 at 17:15–18. Cutting to the subgrade requires excavating grass, dirt, or whatever is at that level. VRP Vol. 22 at 17:24–18:4. The depth of pervious concrete was 9 inches, and the depth of the permeable ballast in the roadway was 12 inches in the intersection and 4 inches in the roadway. VRP Vol. 22 at 18:5–17. Conway would excavate to the subgrade elevation approximately 13 inches below the finished grade. VRP Vol. 22 at 18:18–22. Therefore, when Conway began excavation, the top of the trench was at the subgrade elevation, which was around 13 inches

below the finished grade. VRP Vol. 22 at 19:2–8.³⁴

Mr. Palmer never observed any trench issue, and he never went to the site for the purpose of looking at a trench issue. VRP Vol. 23 at 9:3–10.³⁵ By February 18, Mr. Palmer had never discussed any safety concerns with David Conway or Ken Conway, attended any meeting in which he raised a safety concern to Conway, or asked for a site-specific safety plan. VRP Vol. 23 at 10:15–25.³⁶ Mr. Palmer had no personal knowledge that would permit him to testify that Conway was unresponsive to safety concerns. VRP Vol. 23 at 14:18–15:4.

Between February 2 and February 24, Mr. Hill did not go to the site

³⁴ All or nearly all of the water line work was in the roadway. VRP Vol. 22 at 19:9–19.

³⁵ Although Mr. Hill told Mr. Palmer about a single issue involving a water line trench as of February 18, Mr. Palmer recalled from other evidence introduced at trial that the trench could not have been observed that day. VRP Vol. 23 at 9:8–10:14.

Mr. Palmer could not recall any safety incident other than the one that Mr. Hill told him about. VRP Vol. 23 at 11:14–18. Mr. Palmer had no recollection of talking with Mr. Cox about trench safety before February 18. VRP Vol. 23 at 11:19–12:2.

The City's practice was to talk with a contractor about safety issues as a warning and would not call L&I. VRP Vol. 23 at 12:3–13:8. Mr. Hill agreed that his intent in contacting L&I was to "scare" Conway, "[f]or lack of better terminology." VRP Vol. 19 at 87:6–10.

³⁶ Mr. Hill also did not ask Conway for a safety plan. VRP Vol. 19 at 79:2–11. Mr. Hill decided to contact L&I rather than Conway. VRP Vol. 19 at 80:3–6. Mr. Hill never put safety on the agenda for weekly project meetings, which he controlled. VRP Vol. 19 at 80:7–17.

and note any unsafe condition. VRP Vol. 19 at 68:2–9. He also did not speak with Ken Conway regarding site safety during that time or after February 2. VRP Vol. 19 at 68:2–69:1 and 87:15–23.

The observations that Mr. Cox recorded on the Inspector’s Daily Reports (“IDRs”)³⁷ were those that he thought were the most important on the issues of payment, work progress, and any concerns. VRP Vol. 13 at 9:5–10:13. There was no record of any conversations about safety in his daily reports. *See, e.g.*, VRP Vol. 13 at 105:21–106:10 (testifying regarding February 24, 2016). There was testimony that although Mr. Cox was on the Project, he was never seen taking a tape measure to the trench. VRP Vol. 12³⁸ at 31:6–14. Mr. Palmer testified that there was a trench safety issue on February 24, but he did not go out and observe it. VRP Vol. 23 at 18:16–20. He agreed that L&I did not issue a citation about that incident, and he did not know at the time that he terminated Conway whether the trench box at issue was resting on firm ground or whether the panels went all the way down below the trench box. VRP Vol. 23 at 61:13–19. Mr. Palmer did not know whether a worker was ever in the area while the trench was not shored. VRP Vol. 23 at 61:20–22. Mr. Palmer did not recall whether Mr. Cox ever

³⁷ CP 2462.

³⁸ Volume 12 is trial testimony from June 28, 2017, and was marked as Volume IV.

told him that it was an unsafe condition. VRP Vol. 23 at 61:25–62:6.

In addition, there was testimony that it is typical—and not unsafe—for a worker to work in a trench while standing on a pipe with his foot on a bench. VRP Vol. 12 at 32:7–19. Indeed, that was what was depicted in certain photographs in Exhibit 37. VRP Vol. 12 at 28:24–41:23.

Mr. Lundeen admitted that there are a number of ways to implement a trench protection system. VRP Vol. 12 at 65:6–10. For example, one can use a trench box, shoring, benching, or other methods. VRP Vol. 12 at 65:11–12. Benching is a method by which one uses the earth itself to reduce risk. VRP Vol. 12 at 65:13–19.

At trial, the City called Mr. Fierro, who testified that trenches in photographs were at or under 4 feet deep. VRP Vol. 12 at 36:3–41:23. Some photographs did not show a bench that was present in a trench. VRP Vol. 12 at 50:8–51:6.

Mr. Hill called L&I on February 19, 2016. *See, e.g.*, VRP Vol. 20 at 60:4–14 and VRP Vol. 19 at 68:10–12; *see also* Trial Ex. 61.³⁹ When he made that call, Mr. Hill had observed only one condition regarding a trenching issue. VRP Vol. 19 at 68:10–23. Mr. Hill then left the matter in

³⁹ Mr. Hill admitted that when L&I met with Conway on March 16, he had accomplished the purpose of his February 19 call to L&I. VRP Vol. 19 at 105:8–11.

L&I's hands. *See* VRP Vol. 19 at 86:15–25. Mr. Hill did not know whether gravel or a trench box was placed in the trench after he departed the site. VRP Vol. 19 at 69:6–10. After warning Conway on February 2, and before calling L&I on February 19, Mr. Hill did not speak with David Conway or Ken Conway about safety concerns. VRP Vol. 19 at 78:5–79:24 at 87:6–23. Mr. Hill had no recollection of visiting the site between March 9 and March 25, and he had no notes to indicate that he was there. VRP. Vol. 19 at 95:4–18.

Regardless, except for the one violation that was addressed and resolved before the City's notice of default, L&I found no safety violations. Mr. Lundeen sent two investigators to the site on February 22, 2016. *See* VRP Vol. 12 at 66:10–13; *see also* Trial Ex. 61.⁴⁰ The L&I investigators

⁴⁰ Safety was not on a list of discussion items at the City's informal meeting of February 18, 2016, which was called to discuss Conway. *See* VRP Vol. 20 at 53:15–54:14; *see also* VRP Vol. 19 at 72:10–14. No decision was made at that meeting about whether to terminate Conway, though it was discussed. VRP Vol. 20 at 55:5–18. Mr. Hill prepared the agenda for that "issues meeting." *See* VRP Vol. 19 at 42:7–15 and 43:6–7; *see also* Trial Ex. 112.

At this meeting, Mr. Hill vented that Conway was not listening to him about trench issues. VRP Vol. 19 at 52:7–53:1. The water main trench safety incident occurred before February 18, 2016, in early February. *See* VRP Vol. 19 at 53:2–12; *see also id.* at 54:19–55:13 and 57:4–10. Mr. Hill did not ask Ken Conway to shore the trench or ask Mr. Fierro to get out of the trench. VRP Vol. 19 at 62:10–19.

There was no documentation of any other incident until a deep trench incident occurred on February 24. VRP Vol. 19 at 56:7–10, 57:11–18, and

did not find any trenching hazard. VRP Vol. 12 at 66:14–67:5. If there had been any other L&I activity on this issue between February 22, 2016, and March 9, 2016, it would have been reflected in the L&I case file. VRP Vol. 12 at 67:19–68:5. Mr. Lundeen had no recollection of any such activity during that time period. VRP Vol. 12 at 68:6–10. Although Mr. Hill sent Mr. Lundeen IDRs from February 24, 2016, and March 7, 2016, Mr. Lundeen found no safety concerns noted in those IDRs. VRP Vol. 12 at 70:1–71:9; *see also* Trial Ex. 56. Mr. Hill agreed that none of the February IDRs indicated any safety concern. VRP Vol. 19 at 65:21–66:8.

Mr. Cox was on the Project in January and February of 2016. VRP Vol. 13 at 19:15–18. Although Mr. Cox carried a tape measure with him, he did not measure every trench in which Conway was working. VRP Vol. 13 at 14:15–17. When Mr. Cox was shown photographs of trenches at trial, he admitted that he did not measure the depths of those trenches. VRP Vol. 13 at 112:7–113:9. Mr. Cox never saw any condition that caused him to say that he should stop the work because of safety concerns. *See* VRP Vol. 13 at 18:9–20. Mr. Cox testified that he was not aware of any instance in which Mr. Hill suspended work because of a lack of shoring. VRP Vol. 13 at 19:6–

67:13–21.

The City had another meeting on March 4. VRP Vol. 19 at 46:25–47:14.

8. Mr. Hill agreed that he had the authority to suspend work any time that there was an unsafe condition, but he did not contact David Conway and ask to discuss any safety concerns. VRP Vol. 19 at 73:8–12 and 77:1–78:13.

The City wrote to Conway on March 10, noting that L&I was aware of the Project and would be in contact to discuss safety, and Mr. Palmer was aware that L&I had been called. Trial Ex. 46 and VRP Vol. 20 at 102:8–10. Mr. Palmer never got anything from L&I to indicate that the site was unsafe, beyond the issue of a citation for one trench, which citation was not issued until after the termination for default. VRP Vol. 20 at 102:16–23.⁴¹ Mr. Cox was not aware of any safety issues with Conway between March 9 and March 25. VRP Vol. 13 at 114:16–18. Mr. Cox told Mr. Fierro that a couple of trenches “might need to be shored or protected,” and in those instances, Mr. Cox also talked with Ken Conway. VRP Vol. 13 at 21:9–14. If Mr. Cox saw an unsafe condition, he could have directed Conway to address it, if necessary. VRP Vol. 13 at 22:13–20.

Although Mr. Hill was giving Mark Palmer reports on safety issues, Mr. Palmer did not recall ever telling Mr. Hill to call L&I. VRP Vol. 20 at 58:14–15. Mr. Hill testified that L&I came to the site and did not see anything wrong. VRP Vol. 19 at 111:11–13. By March 22, Conway had not

⁴¹ The citation issued more than two weeks after the City terminated Conway. Trial Ex. 59 and VRP Vol. 22 at 33:1–25.

been cited by L&I for safety, and by the time that the City terminated Conway, L&I had not finished its investigation. VRP Vol. 23 at 60:2–7. Mr. Hill admitted that safety had been cured by March 16:

Q: I think we have established that you were fine with safety as of March 16th. And at that point we have seven working days—nine days before the termination date. As far as you were concerned on the 16th, safety had been cured, hadn't it?

A: What I expected to come out of calling L&I happened, yes.

VRP Vol. 19 at 110:16–21.

V. STANDARDS OF REVIEW

This is an appeal from a bench trial. This Court reviews a trial court's findings of fact to determine if they are supported by substantial evidence. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006). Unchallenged findings of fact are verities on appeal. *Id.* at 556. An appellate court will not overturn a trial court's finding of fact when it is supported by substantial evidence in the record. *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 730 n.1, 853 P.2d 913 (1993). Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the asserted premise. *State v. Hoffman*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

Upon appeal of a nonjury trial, the “respondents are entitled to the benefit of all evidence and reasonable inference therefrom in support of the

findings of fact entered by the trial court.” *Mason v. Mortgage Am.*, 114 Wn.2d 842, 853, 792 P.2d 142 (1990). After all, “the trial court, having the witnesses before it, is in a better position to arrive at the truth than is the appellate court.” *Hallin v. Bode*, 58 Wn.2d 280, 281, 362 P.2d 242 (1961).

This Court reviews conclusions of law *de novo*. *Id.* The Court generally does not consider assignments of error that are unsupported by argument and citations to the record. *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978). For example, when a party purports to assign error to a finding of fact as written but fails to argue why substantial evidence does not support it, this Court need not consider it. *Shelcon Constr. Group, LLC v. Haymond*, 187 Wn. App. 878, 351 P.3d 895 (2015). This Court may affirm on any basis that is supported by the record, even if the trial court did not consider it. *E.g.*, *King County v. Seawest Inv. Assocs.*, 141 Wn. App. 304, 310, 170 P.3d 53 (2007).

VI. ARGUMENT

The City terminated Conway under the pretense that Conway was in default. At the time that Conway was terminated, Conway had cured the alleged defaults. Contrary to the City’s argument, the Contract did not permit the City to terminate Conway for default on a whim.⁴²

⁴² In contrast, termination for convenience can be made on a whim, without justification.

A. **The trial court was correct to conclude that “neglects or refuses to correct rejected Work” applied to all relevant default provisions in the Contract, and if it were error, it was harmless.**

The City improperly terminated Conway for default. The trial court properly converted that termination to one for convenience, because the City failed to meet its burden to prove that Conway was in default at the time that the City terminated the Contract. The City concocted a list of items that it claimed needed to be cured, but Conway addressed them and neither neglected nor refused to address them. Conway cured all safety issues before the City’s termination.

The City misconstrues the trial court’s Conclusion of Law No. 7 in the City’s first and second assignments of error, and reversal is not warranted. This conclusion addressed the City’s erroneous statement of the law that each and every item specified in its original notice needed to be completely cured within 15 days. The plain text of the Contract provided that Conway could be terminated for default if it “performs Work which deviates from the Contract, **and** neglects **or** refuses to correct rejected Work.” Trial Ex. 1 (emphasis added). Without neglect or refusal, there is no default to justify a termination.

Therefore, if Conway did not neglect or refuse to correct rejected

work, it could not be terminated for default.⁴³ Default status obviously depends on the circumstances and time. Even if Conway had neglected to correct rejected work but then began to correct the rejected work, then Conway would no longer be in default. A party cannot terminate a contract for a cured breach. *See generally Takota Corp. v. United States*, 90 Fed. Cl. 11, 17–18 (Fed. Cl. 2009) (noting that only two alleged breaches could be resolved on summary judgment, as some were subject to factual disputes and others were cured).

Contrary to the City’s argument, Conclusion No. 7 did not state that any safety issue did not need to be cured within 15 days. Rather, in the context of remedying “defects,” the conclusion pertained to “neglect or refusal to correct the rejected work.” CP 2478.

Nevertheless, even if it were error to apply the “neglects or refuses” requirement of subsection 6 to the safety issue raised in the City’s notice, any such error would be harmless because (1) the trial court found that there were no remaining safety issues; (2) that finding was supported by substantial evidence; and (3) the City admitted that no remaining safety issues were on site.

Error is not prejudicial and does not warrant reversal unless, within

⁴³ The City could have, at any time and for any reason, terminated the Contract for convenience.

reasonable probabilities, the outcome of the trial would have been materially affected. *State v. Kindell*, 181 Wn. App. 844, 854, 326 P.3d 876 (2014). In this case, the trial court concluded that the safety issue was “cured by the end of the suspension period.” CP 2474. This was based on substantial evidence, including not only the testimony of several witnesses, but also on the City’s express admission that there were no further safety issues after March 9, 2016. *See* § IV F at 27–37, *supra* and Trial Ex. 119 at 12. Therefore, even if it were error to apply the “neglects or refuses” requirement of subsection 6 to the safety issue raised in the City’s notice, any such error would be harmless because it did not materially affect the outcome. Accordingly, this Court should affirm.

B. The trial court was correct to require the City to prove that—at the time of termination—Conway remained in default and that, therefore, the City was justified in terminating Conway for default.

In cases involving the termination for default of a public works contractor, the government has the burden to prove that a termination for default was justified. *See, e.g., Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 754–55 and 765 (Fed. Cir. 1987); *see also Universal Shelters of Am., Inc. v. United States*, 87 Fed. Cl. 127, 144 (Fed. Cl. 2009), *The Libertatia Assocs., Inc. v. United States*, 46 Fed. Cl. 702, 705 (Fed. Cl. 2000), and *Fla. Engineered Constr. Prods. Corp. v. United States*, 41 Fed.

Cl. 534, 538 (Fed. Cl. 1998). It is appropriate to place the burden on the government, because “default-termination is a drastic sanction [that] should be imposed (or sustained) only for good grounds and on solid evidence.” *Libertatia*, 46 Fed. Cl. at 705. When the government fails to meet its burden, the default termination is to be overturned. *Lisbon*, 828 F.2d at 766–67. In Washington, “when one party terminates a contract for an express reason, he cannot thereafter sustain his action by specifying another breach not referred to at the time, but which, if referred to, could have been cured.” *Pearce v. Puget Sound Broadcasting Co.*, 170 Wash. 472, 481, 16 P.2d 843 (1932).

In this case, the trial court was correct to require the City to justify its default termination (i.e., carry the burden of proof). After all, there can be no termination for default unless there is an uncured default. *See generally DC Farms LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 226, 317 P.3d 543 (2014) (holding that “[a] party who has bargained for a notice-and-cure provision to protect against forfeiture and litigation is entitled to have that bargained-for protection honored”).

There was no uncured default because Conway was neither neglecting nor refusing to address the City’s noticed issues on allegedly defective work, and there were no remaining safety issues at the time that the City terminated the Contract. *See* §§ IV D at 13–20, E at 20–27, and F

at 27–37, *supra*.⁴⁴

C. **The trial court was correct to conclude that the City failed to carry its burden and demonstrate that its termination of Conway for default was justified.**

The evidence at trial established that there were no remaining uncured defaults at the time that the City terminated the Contract. All of the rejected work identified in the City’s notice either (1) was cured before the City terminated Conway or (2) was being addressed by Conway and was not being neglected or refused by Conway before the City terminated Conway. *See* §§ IV D at 13–20 and IV E at 20–27, *supra*. And the single safety issue was resolved before the City terminated Conway. *See* § IV F at 27–37, *supra*. The trial court was correct to conclude that the City did not

⁴⁴ The City impliedly argues that the burden of proof at trial contradicted the trial court’s ruling on motions for summary judgment. This implied argument fails for two reasons.

First, the trial court was entirely consistent with its summary judgment ruling. The establishment of a breach does not end a contract case; if the breach is cured, then the breaching party is no longer in breach and the earlier, cured breach is irrelevant. *See generally Takota Corp.*, 90 Fed. Cl. at 17–18 (noting that only two alleged breaches could be resolved on summary judgment, as some were subject to factual disputes and others were cured).

Second, it is axiomatic that a summary judgment ruling is “interlocutory in character.” WASH. R. CIV. P. 56(c). Therefore, any subsequent inconsistency with a prior summary judgment ruling is of no moment, especially since the trial court’s findings of fact and conclusions of law followed several weeks of evidence and testimony.

meet its burden.⁴⁵

On appeal, the City appears to argue that a termination for default can occur if the City merely states that it was not satisfied with Conway's response to the cure items. Yet the City cites no authority for its proposition that the City can base a termination for default on a disingenuous position. The trial court's Finding of Fact 71—which is unchallenged and a verity on appeal⁴⁶—establishes that the City's termination was disingenuous and was not based upon any genuine belief or lack of satisfaction with Conway's responses to the City's notice:

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.**

CP 2476–77 (emphasis added). This is also reflected in other findings. *See* CP 2466 (noting an “after-the-fact attempt to provide support for termination that is unsupported in the contemporaneous documentation

⁴⁵ To the extent that Conclusion of Law 8 is or contains a finding of fact, it is reviewed for substantial evidence and is not subject to *de novo* review.

⁴⁶ *Hegwine*, 132 Wn. App. at 556.

created as the Project went forward”), CP 2471 (stating that “[t]he 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”), CP 2472 (stating that “Mr. Palmer’s opinion in this regard lacks credibility”), *id.* (stating that “[w]ith 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”), CP 2474 (stating that “[i]n 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”), *id.* (stating that “[t]here is no mention at all in any of these exhibits of any of those alleged safety concerns”), CP 2475 (stating that “Mr. Palmer never spoke with David Conway directly about Mr. Palmer’s concerns”), and CP 2476 (stating that “Mr. Palmer was disengaged from the facts that should have informed his critical decision to terminate Conway” and “[t]his 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”).

It is clear from the findings of fact and conclusions of law that the trial court was not convinced that the City was genuinely dissatisfied with Conway’s responses to the City’s notice. Therefore, to the extent that the

City argues that it merely needed to establish a “reasonable belief on the part of the contracting officer that there was no reasonable likelihood [of performance],”⁴⁷ the court record and the trial court’s unchallenged findings of fact demonstrate that the City did not prove or persuade the trial court that the City had such a belief.⁴⁸

At the time of the City’s termination of the Contract, there was no remaining safety issue, and Conway did not refuse or neglect to address all noticed non-conforming items. Findings of Fact 55, 58, and 61⁴⁹—in which the trial court found Conway fully cured, made substantial progress, or was neither neglecting nor refusing to correct—are unchallenged and are verities on appeal. *Hegwine*, 132 Wn. App. at 556. And the City admitted that there were no remaining safety issues after March 9, 2016. *See* CP 2474 and Trial Ex. 119 at 12.

Therefore, the portion of Conclusion of Law 8 to which the City

⁴⁷ Opening Brief at 38 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (1987)).

⁴⁸ This Court can affirm on any basis that is supported by the record. *Seawest Inv. Assocs.*, 141 Wn. App. at 310. Bad faith is grounds for overturning a default termination. *Takota Corp. v. United States*, 90 Fed. Cl. 11, 16 (2009), *aff’d*, 401 Fed. Appx. 530 (Fed. Cir. 2010). The trial court’s unchallenged Finding of Fact 71, especially when viewed in context with unchallenged Findings of Fact 81 (“arbitrary”) and 85 (“[t]his disparate treatment...reflects some level of bad faith on Mr. Palmer’s part”), supports overturning any default on the basis of bad faith.

⁴⁹ CP 2473–74.

assigns error was correct, not erroneous, and, to the extent that it was a finding of fact, it was supported by substantial evidence. In addition, Finding of Fact 16 was supported by substantial evidence, as were Findings of Fact 9–22 and 59. *See* § IV F at 27–37, *supra*. A party cannot justify terminating a contract for reasons that are not included in a specific breach notification. *Pearce*, 170 Wash. at 481.

To the extent that the City argues that it should be able to justify its termination for default on a basis that arises or is discovered after termination, such an argument is unavailing as it conflicts with Washington law. In Washington, bargained-for notice provisions are material. *DC Farms LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 226 (2014). Any contrary authority from the United States Court of Federal Claims is not binding on this Court.

The City’s third, fourth, and sixth assignments of error fail, and this Court should affirm.

D. The trial court’s Finding of Fact 15 is supported by substantial evidence and does not warrant reversal.

As with all of the trial court’s findings of fact, the court’s 15th finding of fact was supported by substantial evidence.

1. The finding is consistent with the Contract, the WAC, and testimony elicited by the City.

The City’s fifth assignment of error misconstrues the trial court’s

Finding of Fact 15 by taking it out of context and omitting key aspects of the finding. And to the extent that there were any error, such error would be harmless and was invited by the City. The trial court found as follows:

Review of the waterline dimension in Exhibit 35 [designated] 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.

CP 2464. The project manual, which is incorporated by reference in the Contract,⁵⁰ provides in pertinent part as follows:

The contractor is responsible for maintaining safe excavation slopes and/or shoring. Any temporary excavation greater than 4 feet deep should be properly sloped or shored.

Trial Ex. 2 at RESP000780. The City also elicited testimony that was consistent on this point. VRP Vol. 22 at 84:12–85:3. Although the Washington Administrative Code requires an adequate protective system for excavations, no such system is required for excavations that “are less than 4 feet (1.22m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.” WAC 296-155-657(1)(a)(ii). In addition, it is consistent with WAC to the extent that the

⁵⁰ Trial Ex. 5 at CON002006.

trial court found that no benching or shoring is required for trenching that is “maintained . . . very near four feet.” The trial court was properly focused on the notion that trenches under four feet did not need benching or shoring. Finding of Fact 15 is supported by substantial evidence in the record.

2. Any ambiguity created by the insertion of the phrase “at or” is resolved in favor of affirming the judgment, consistent with the other findings and the evidence in the record.

To the extent that the City contends that the words “at or” render the finding inconsistent with the WAC provision and therefore erroneous, such a contention is not well taken. At most, the inclusion of “at or” merely introduced some ambiguity to Finding of Fact 15. Ambiguity in a finding of fact does not warrant reversal.

Findings of fact are to be read in context, and the intention of the trial court is to be determined from all parts of the document. *In re Marriage of Stern*, 57 Wn. App. 707, 713, 789 P.2d 807 (1990). A reviewing court “is not confined to ascertaining the meaning of a single word or phrase without regard to the entire judgment, and, if necessary, the judgment roll.” *Id.* (quoting *Callan v. Callan*, 2 Wn. App. 446, 448, 468 P.2d 456 (1970)). Moreover, “provisions in a judgment that are seemingly inconsistent will be harmonized if possible.” *Callan*, 2 Wn. App. at 449. And when findings are equivocal, courts interpret the findings in a manner so as to sustain the

judgment, not in a manner that would defeat it. *Choi v. Sung*, 154 Wn. App. 303, 317, 225 P.3d 425 (2010); *see also Shockley v. Travelers Ins. Co.*, 17 Wn.2d 736, 743, 137 P.2d 117 (1943). When addressing inconsistencies or ambiguities in findings, the reviewing court looks to the evidence in the record. *State v. Ridgway*, 57 Wn. App. 915, 920, 790 P.2d 1263 (1990). Even a finding that is “somewhat sketchy and ambiguous” is to be read in context with the trial court’s other findings and in light of the trial court’s oral opinion. *Bennett Veneer Factors v. Brewer*, 73 Wn.2d 849, 853, 441 P.2d 128 (1968).

Considering the trial court’s other findings of fact, it is clear that the trial court found that there was no safety violation when the City terminated Conway. CP 2464 and 2474. These findings were supported by ample evidence in the record, as well as the noted inadequacy of the City’s evidence. *See* § IV F at 27–37, *supra*. And the evidence was consistent with the standard set forth in the Contract. *See* VRP Vol. 22 at 84:12–85:3. The trial court should be upheld.

3. The finding was superfluous considering the other findings in the record, so reversal is not warranted.

Reversal is not warranted based on a superfluous finding of fact. *Pasco Housing Authority v. PERC*, 98 Wn. App. 809, 816, 991 P.2d 1177 (2000). Because the trial court found that there were no ongoing or recurrent

safety concerns,⁵¹ and that the single safety issue was cured before the City terminated Conway,⁵² it was not necessary to enter another finding regarding the height of the trenches. Therefore, the portion of Finding of Fact 15 to which the City assigns error is, at most, superfluous.

An appeal is not well founded by assigning error to a superfluous finding of fact. *Pasco Housing Authority*, 98 Wn. App. at 816. This Court should affirm.

4. Any error in the finding was harmless.

Even if a portion of Finding of Fact 15 were error, it was harmless. The trial court found that there were no remaining safety issues at the time that the City terminated Conway. Therefore, it cannot be said that any error in Finding of Fact 15 was anything other than harmless error. Accordingly, the trial court should be affirmed.

5. Any error was invited by the City.

Even if the trial court's statement were error and was not harmless error, such error was invited by the City, which elicited the following testimony from Ken Conway at trial:

Q: Let's look at Section 6.9.3 on RESP 780. Do you recognize this section?

A: I understand what it is.

⁵¹ CP 2464 (Finding of Fact 16).

⁵² CP 2474 (Finding of Fact 59).

Q: When you look at the third sentence, it says, “All temporary excavation should be performed in accord with part and of WAC—” Washington Administrative Code— “296-155.” Do you know what that is?

....

A: That is the rules regarding excavation and shoring.

Q: And then it says, “The contractor is responsible for maintaining safe excavation, slopes and/or shoring.” Would you agree with that?

A: Yes.

Q: “Any temporary excavation greater than 4 feet deep should be properly sloped or shored.” Would you agree with that?

A: Yes.

VRP Vol. 22 at 84:12–85:3. Therefore, the City invited the trial court to apply the contract standard.

Under the invited error doctrine, a party cannot set up error at trial and then complain about the error on appeal. *E.g., State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). The City cannot now complain that the trial court made a finding that was consistent with the testimony that the City elicited at trial.

E. The City was not entitled to a set-off for correcting work for which Conway received no notice or opportunity to correct.

The City was not entitled to any set-off for defective work for which it did not provide Conway with notice and an opportunity to cure, and its seventh assignment of error is not well taken. Contrary to the implications in the City’s brief, the trial court did make calculations and allowed some offsets for items for which Conway had notice and an opportunity to correct.

See CP 2697 and Trial Exs. 44, 69, 144, 145, and 172. The trial court's Findings of Fact 162–66 are unchallenged and therefore verities on appeal. *Hegwine*, 132 Wn. App. at 556.

The Contract specifies different remedies, depending on whether the Contract is terminated for default or convenience. Compare Trial Ex. 1 at 1-80–1-81 with *id.* at 1-82. The City, not Conway, was in breach of the Contract because the City breached by its improper termination for default and failure to give Conway any notice to cure any item that was not set forth in its notice letter. The City was not entitled to a set-off when it was the sole party in breach at the time that it terminated the Contract.

Although Washington courts have not previously addressed the circumstance of a single-party breach, the Oregon Court of Appeals issued a persuasive opinion in *Shelter Products, Inc. v. Steelwood Construction, Inc.*, 257 Or. App. 382 (2013). In *Shelter Products*, the contractor (Catamount) terminated its contract with the subcontractor (Steelwood) for convenience. *Id.* at 386. After doing so, Catamount did not provide Steelwood with notice that its work was defective or needed repair. *Id.* at 388. Catamount also did not provide Steelwood an opportunity to enter the work site to investigate the alleged defects in work. *Id.*

The *Shelter Products* court examined the contract and recognized that the text of the termination for convenience clause did not permit

Catamount to both terminate for convenience and subsequently proceed against Steelwood as though it had terminated for cause. *Id.* at 399. The *Shelter Products* court was also persuaded by other jurisdictions that had recognized that after a termination for convenience, the terminating party may not claim against the terminated party for an alleged default:

We further observe that, although, as the parties note, there are no previous Oregon cases discussing termination for convenience, 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). 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 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.**

Id. at 402–03 (emphasis added).

This case is similar. The trial court correctly reached a similar

outcome. The Contract provides for one remedy if termination is for default and a different remedy if termination is for convenience. If termination is for default, then “[a]ny extra costs or damages to the Contracting Agency shall be deducted from any money due or coming due to the Contractor under the Contract” and “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.” Trial Ex. 1 at 1-80–1-81. In addition, “[t]he 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.” *Id.* at 1-81.

In stark contrast, if termination is for convenience, then “payment will be made in accordance with Section 1-09.5 for the actual Work performed.” *Id.* at 1-82.⁵³ Once the trial court converted the termination to

⁵³ The City argues that the trial court erred because the Contract does not permit payment for defective or unauthorized work. Opening Brief at 39. But the Section 1-05.7 does not apply when the City has terminated the Contract for convenience:

Whenever the Contract is terminated in accordance with Section 1-08.10(2) [Termination for Public Convenience], payment will be made **in accordance with Section 1-09.5** for the actual Work Performed.

Trial Ex. 1 at 1-08.10(4) (emphasis added).

one for convenience, the City was not entitled to any remedies from a termination for default, which includes discounts for defects after termination.

Like the subcontractor in *Shelter Products*, the alleged defects were not disclosed until after the litigation was commenced. Conway was also not provided with notice and an opportunity to address the allegedly defective work. *See* § IV B at 20, *supra*.

In Washington, a contract provision that requires notice and an opportunity to correct is material, and the party who bargained for notice is entitled to have that provision enforced:

A party who has 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 terminate the contract truly believes that the default cannot be cured, then giving notice—with the result that any steps actually taken and proposals actually made will be in evidence—will produce a more reliable and thereby fairer basis for deciding whether the breach was curable.

DC Farms LLC v. Conagra Foods Lamb Weston, Inc., 179 Wn. App. 205, 226 (2014). Here, the City was not entitled to a set-off because it did not provide Conway with any opportunity to correct—or even investigate—the City’s claims of defective work. This Court should affirm.

The City’s reliance on *Duculon Mechanical, Inc v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 893 P.2d 1127 (1995), is entirely

misplaced. In *Duculon*, both parties were in material breach. *Id.* at 708. That critical difference makes *Duculon* inapplicable to this case. In fact, the *Duculon* court's holding was premised on the plaintiff being in default. *See id.* at 713 (framing the issue as “whether a *defaulting* subcontractor's restitutionary award should be offset by the general contractor's cost to complete and repair the subcontractor's work *when the general contractor is also in default*” (emphasis added)).

Conway was not in breach. The City breached by its improper termination for default. Conway was entitled to enforcement of the contractual notice provisions. Because Conway was not in breach of the Contract, the City was not entitled to a set-off. This Court should affirm.

F. Conway was the prevailing party because final judgment was rendered in its favor, and the trial court was correct to award Conway its fees and costs.

Washington law is clear: a party to a contract with an attorney fee provision is entitled to its fees and costs if final judgment is rendered in its favor. RCW 4.84.330;⁵⁴ *see also* RCW 4.84.010. Although the City argues

⁵⁴ The City argues that “any application of RCW 4.84.330...is subordinated to RCW 4.84.250...” Opening Brief at 49. This argument makes no sense. RCW 4.84.250 is limited to an action in which “the amount pleaded ... is seven thousand five hundred dollars or less...” RCW 4.84.250. In this Conway's prayer was far above that amount. CP 173 (praying for an amount of damages not less than \$1,249,377.08). RCW 4.84.330 is not so limited.

that this statute is somehow preempted by RCW 39.04.240, the Washington Supreme Court held that this simply is not the case, because RCW 39.04.240 is not an exclusive remedy. *King County v. Vinci Constr. Grands Projets/Parson RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 627–30, 398 P.3d 1093 (2017). The City’s eighth assignment of error is not well taken, and this Court should affirm the trial court’s award of fees and costs to Conway.

In Washington, the imposition of attorney fees must be based on an agreement, a statute, or some recognized ground in equity. *Hamm v. State Farm Mut. Auto Ins. Co.*, 151 Wn.2d 303, 325, 88 P.3d 395 (2004) (citing *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994)).

In this case, the Contract specifically incorporated an attorney fees and litigation costs provision:

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.

Trial Ex. 2. The trial court was correct to apply the provision reciprocally. CP 3397. The City does not appeal that conclusion. Indeed, the City concedes that the provision “is clearly a unilateral fee provision.” Opening Brief at 50.

Under RCW 4.84.330, any unilateral attorney fee provision is applied bilaterally:

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.*

RCW 4.84.330 (emphasis added). Under this statute, the term “‘prevailing party’ means the party in whose favor final judgment is rendered.” *Id.*⁵⁵

It is undisputed that Conway was the only party who received final judgment in its favor. Nevertheless, the City argues that RCW 39.04.240 is an exclusive remedy that precludes parties to a public works contract from

⁵⁵ This is consistent with Washington common law, which provides that the “prevailing party” is the party that receives an affirmative judgment in its favor. *See, e.g., Newport Yacht Basin Ass’n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 98, 285 P.3d 70 (2012). “A prevailing party need not succeed on its entire claim to qualify for attorney fees, but it must substantially prevail in order to be entitled to such an award.” *Id.*

enforcing an express attorney fee provision that is incorporated into the contract and was drafted by the City. The City's argument lacks merit and was roundly rejected by the Washington Supreme Court in 2017. *Vinci*, 188 Wn.2d at 627–30.

In *Vinci*, King County successfully sued three construction firms and their five sureties for breach of contract and performance bond coverage arising from a public works project. *Id.* at 622–24. The jury awarded King County \$130 million in damages, and the trial court awarded the county another \$15 million in attorneys' fees and costs pursuant to *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). The sureties contested the fee award, arguing that the county could not recover fees under *Olympic Steamship* because RCW 39.04.240 provides the exclusive fee remedy for public works disputes. The Washington Supreme Court disagreed, expressly stating that RCW 39.04.240 "is not the exclusive fee remedy available" in a public works contract. *Vinci*, 188 Wn.2d at 634. The Washington Supreme Court also held that parties to public works contracts may recover fees under other available remedies. *See Vinci*, 188 Wn.2d at 627–30.

In reaching this conclusion, the Washington Supreme Court evaluated the legislative history and found that "[t]here is nothing in the legislative history indicating that RCW 39.04.240 was intended to proscribe

alternative fee remedies.” *Id.* at 628. It is settled law that RCW 39.04.240 is not an exclusive remedy. Further, the City cites to no legislative history to indicate that RCW 39.04.240 was somehow intended to be exclusive.

The Contract—which was drafted entirely by the City—contained a fee provision, and Conway was the party in whose favor judgment was entered. If the City did not want to create this additional avenue to a fee award, it should not have written the Contract this way. It was not necessary for Conway to make an offer of settlement under RCW 39.04.240 in order to obtain a fee award under the plain language of both the Contract and RCW 4.84.330. It was correct to award fees and costs to Conway.

VII. REQUESTS FOR APPELLATE FEES AND COSTS

Pursuant to RAP 18.1, Conway requests its fees and costs on appeal. Attorney fees can be awarded based on an agreement, a statute, or some recognized ground in equity. *Hamm v. State Farm Mut. Auto Ins. Co.*, 151 Wn.2d 303, 325, 88 P.3d 395 (2004) (citing *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994)).

In this case, the Contract provides for attorney fees and costs, and it is correct to apply the provision bilaterally, because it was drafted unilaterally. RCW 4.84.330. Therefore, Conway should be awarded its fees and costs incurred with this appeal.

VIII. CONCLUSION

The City could not justify its termination for default because Conway had cured the defaults pursuant to the Contract before the City terminated the Contract.

The trial court's findings of fact were supported by substantial evidence, and its conclusions of law were correct and supported by the findings and the trial record. This Court should affirm the trial court in all respects.

Respectfully submitted this 20th day of February, 2019.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 20th day of February 2019, I served the foregoing **RESPONDENT'S BRIEF** on the following parties and/or counsel of records via *Electronic Court E-Service* as follows:

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