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Court of Appeals  
Division III  
State of Washington

NO. 32305-6

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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GENERAL CONSTRUCTION COMPANY, a Delaware corporation,

Respondent,

vs.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, a  
Washington municipal corporation,

Appellant.

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**BRIEF OF APPELLANT**

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Jeffers, Danielson, Sonn & Aylward, P.S.  
DAVID E. SONN, WSBA #07216  
H. LEE LEWIS, WSBA #46478  
P.O. Box 1688  
Wenatchee, WA 98807-1688  
(509) 662-3685  
Attorneys for Appellant  
Public Utility District No. 2 of Grant  
County, a Washington municipal  
corporation

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## I. INTRODUCTION

On 5/31/05, General Construction Company, Inc. (“GCC”) signed a contract to construct a fish bypass through future unit 11 of Wanapum Dam, a hydroelectric dam on the Columbia River that has been in service since 1963.<sup>1</sup> CP 13592-13593; CP 219. GCC contracted to construct the fish bypass for \$29,449,100 and to complete construction by 3/15/07. CP 13592-13593; 2253. Signed change orders and a 2/8/07 “Release and Settlement Agreement” increased the contract price by \$6,577,513 and extended the completion date to 12/15/07.<sup>2</sup> CP 13589; CP 4857-4859. GCC did not complete its work by the contractually agreed upon date, continuing activities on site into May 2008. CP 5267.

On 10/10/08, GCC sued Public Utility District No. 2 of Grant County (“PUD”), asserting sixteen claims (at least five of which had multiple subparts). CP 1-15. GCC alleged entitlement to “a sum not less than \$20,000,000” and to “an extension of time.” CP 8.

In 2010, the PUD sought summary judgment dismissal of six of GCC’s claims (Claims 1, 2, 7, 10, 11, and 16).<sup>3</sup> CP 171-172; CP 4817-

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<sup>1</sup> “G-1 SCOPE OF WORK” specified: “... modify an existing concrete skeleton bay (Future Unit 11) at Wanapum Dam to provide a new fish bypass spillway through the existing structure.” CP 2253.

<sup>2</sup> GCC signed Change Order No. 4, but later announced that it disagreed with it. CP 13611. GCC refused to sign Change Order No. 5. CP 13611.

<sup>3</sup> The court had previously dismissed GCC’s Claim 12. In response to the PUD’s motion for reconsideration, the court dismissed subpart (1) of GCC’s Claim 2 and subparts (3) and (4) of Claim 11. CP 11017.

4818; CP 4914-4915; CP 31-32; CP 5994-5995. Approximately 2½ years later, the trial court denied dismissal “based on statements of law contained in” five “proposed orders” listed on page 3 of its 1/31/14 “Order Certifying For Appeal Summary Judgment Orders and Orders on Motions for Reconsideration.” CP 10904.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error.**

**No. 1** The trial court erred in ruling that, as a matter of Washington law, a contractor’s noncompliance with mandatory notification and claim submittal requirements of the contractor/owner contract does not bar the contractor’s claim. CP 10904; *see also* 10845; 10858; 10870; 10892.

**No. 2** The trial court erred in ruling that, as a matter of Washington law: (a) mandatory notification and claim submittal requirements of a contract are unenforceable unless the owner establishes prejudice to it as a result of the contractor’s noncompliance with the contract requirements; and (b) a contractor’s providing no notification and no claim to the owner until after performing that for which the contractor claims does not prejudice the owner. CP 10904; *see also* 10845; 10858; 10870; 10892-10893.

**No. 3** The trial court erred in ruling that, as a matter of

Washington law, mandatory notification and claim submittal requirements of a contract apply only to “additional work,” i.e., work that the contractor asserts is “perhaps unforeseen by the parties but necessary to complete the construction contract to the contract specifications,” but not to “extra work,” i.e., work that the contractor asserts is “beyond the scope of the contract.” CP 10904; *see also* 10845; 10858-10859; 10870; 10893.

**No. 4** The trial court erred in ruling that, as a matter of Washington law, the contract notification and claim submittal requirements of the GCC-PUD contract allow the “finder of fact” to interpret the requirements as applying only to “additional work” but not to “extra work.” CP 10904; *see also* 10846; 10859-10860; 10871-10872; 10893-10894.

**No. 5** The trial court erred in ruling that, as a matter of Washington law, the contractor’s testimony through its CR 30(b)(6) designee that the contractor seeks neither money nor time for an item does not bar the contractor from proceeding with a legally viable claim for that item. CP 10904; *see also* CP 10860.

**No. 6** The trial court erred in ruling that, as a matter of Washington law, the contractor’s testimony through its CR 30(b)(6) designee that the item claimed falls within the scope of the contractor’s original contract obligation does not preclude the contractor’s claim for

extra money and extra time for that item. CP 10904; *see also* 10860-10861.

**No. 7** The trial court erred in ruling that, as a matter of Washington law, a contractor states a viable claim for extra money and extra time for an item that does not, as a matter of law, qualify as a changed condition. CP 10904; *see also* 10881.

**No. 8** The trial court erred in ruling that, as a matter of Washington law, the following contract provisions do not preclude the contractor's claim for extra money and extra time for the elevation to which the tailrace (the river level downstream of Wanapum Dam) rose, even though the tailrace never exceeded 497.09' MSL (mean sea level). CP 10904; *see also* CP 10881-10882:

T-11 DEWATERING

1.04 DEFINITIONS

...

A. A cellular coffer dam is a temporary structure constructed ... to exclude water from an enclosed area. CP 99.

1.05 GENERAL REQUIREMENTS

...

C. The dewatering system(s) ... shall be of sufficient size and capacity ... to allow the construction to be accomplished in the "dry." CP 100.

...

E. The Contractor shall be solely responsible for proper design, fabrication, installation, operation ... of the dewatering system(s). CP 100.

SR-11. UNFAVORABLE CONDITIONS.

...

- B. **The Contractor may encounter ... high tailrace levels** (tailrace elevation 500.0) during the course of the work. Notwithstanding Section GC-10, **no time extensions or extra compensation will be given** by the District **based on river conditions**. The Contractor shall be responsible for the cost of protecting/sheltering of all work vulnerable to such extreme river conditions so that work can proceed ... CP 101 (emphasis added).

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

1. Future Unit 11, through which GCC contracted to construct the Wanapum Fish Bypass, consisted of three slots, designated slots "A," "B," and "C". In its 12/20/05 Submittal<sup>4</sup> 58 Schedule, GCC provided its concrete pour sequence for the three slots. CP 10496-10502. GCC made its first pour in Slot B on 1/03/06 and its final structural pour in Slot A on 7/10/06. CP 199; CP 11046.

GC-14 of the GCC-PUD contract addressed "Changes in Work." CP 103-104. *See* Appendix A. It authorized the PUD to "make changes by altering, adding or deducting from the work." CP 103. However, GC-14 specified that only the PUD's Board of Commissioners had authority to approve a change order that exceeded \$10,000. CP 103. GC-14 continued:

Except as provided herein, no official, employee, agent,

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<sup>4</sup> "SR-18 SUBMITTALS TO BE FURNISHED BY THE CONTRACTOR," required GCC to furnish certain "information, drawings, and data ... prior to the commencement of the contracted work." CP 2240-41.

or representative of the District is authorized to approve any change in this Contract and it shall be the responsibility of the Contractor before proceeding with any change, to satisfy himself that the execution of the written Change Order has been properly authorized on behalf of the District.

...

When a change is ordered by the District, as provided herein, a Change Order shall be executed by the District and the Contractor before any Change Order work is performed. The District shall not be liable for any payment to Contractor, or claims arising therefrom, for Change Order work which is not first authorized in writing as set forth in this Section GC-14. CP 103 (emphasis in original).

GC-14 expressly limited the authority of the Engineer to “minor changes in the work” that did “not involve any additional cost” and that did “not require an extension of the contract completion date.” CP 104. GC-14 required as a condition precedent to waiver of “any provision of the Contract” or “consent to departure therefrom” a “writing ... signed by the waiving or consenting party.” CP 104. G-15 “Delays and Extensions of Time” authorized time extensions for “any unforeseeable causes beyond the control of the contractor.” CP 102. *See* Appendix B. To obtain a time extension, G-15 required GCC to submit a timely written claim and specified that “all changes of the construction time ... shall be made by Change Orders ... pursuant to ... GC-14.” CP 102. Failure to follow the specified procedure waived any claim for a time extension. CP 102. GC-10 required GCC to submit a timely written claim for “[a]ny claims arising

under the Contract.” CP 211. *See* Appendix C. Failure to follow this procedure waived the claim. CP 211. For its Claim 1: Slot Claim, GCC neither sought nor obtained a change order as GC-14 required, made no written claim for a time extension as G-15 required, and made no written claim as GC-10 required. Did GCC’s noncompliance with GC-14, G-10, and GC-15, under Washington law, require dismissal of GCC’s Slot Claim?

2. GCC testified through its CR 30(b)(6) designee that GCC’s Claim 2: Upstream Stoplog Guiderails consists of three subparts (CP 5801) but that GCC seeks neither money nor time for subparts 2.1 and 2.3. CP 4912-4913. Does GCC’s testimony that it seeks neither money nor time for subparts 2.1 and 2.3 call for dismissal of these two subparts?

3. GCC identified the second subpart of its Claim 2, “Concrete Bulge,” as consisting of “chip out interfering concrete and modify the South guiderail” to address “(i)rregularities in existing concrete.” CP 4869. GCC testified through its CR 30(b)(6) designee that GCC both knew and expected that “there were irregularities in that concrete just due to the nature that we’re doing remodel rather than new construction.” CP 4877. Does GCC’s testimony that removing a concrete irregularity (bulge) constituted a necessary and expected part of GCC’s contractual obligation, as a matter of law, preclude GCC’s claim for extra

money and extra time for that item?

4. GCC's Claims 7 and 16 assert entitlement to extra money and extra time for 28 District Instructions ("DIs")<sup>5</sup> that GCC did not sign. CP 5239, 5259. Does Washington law call for dismissal of GCC's claims for all DIs for which GCC did not comply with GC-14, G-15, GC-10, and/or GC-18?

5. The contract allocated to GCC sole responsibility for design, fabrication, installation, and operation of its coffer cell, specifying that it "shall be of sufficient size ... to allow the construction to be accomplished in the 'dry'." CP 100. The contract further specified that GCC "may encounter ... high tailrace levels (tailrace elevation 500.0)" and that "no time extensions or extra compensation will be given ... based on river conditions." CP 101. GCC designed its coffer cell so that when the tailrace reached elevation 496.5' MSL, the coffer cell would flood. CP 116. Predictably, on four days, the tailrace elevation exceeded 496.5' MSL, although it never exceeded 497.09' MSL. CP 15156. In its Claim 10: Coffe Cell Flooding, GCC asserts entitlement to extra money and extra time for "High River Flows and Flooding of Coffe Cell." CP 15162. Did both SR-11B of the contract and well-established Washington

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<sup>5</sup> GC-14 spells out what District Instructions cover: "minor changes in the work, where such changes are not inconsistent with the purposes of the Contract, do not involve any additional cost and will not require an extension of the Contract completion date." CP 104.

common law call for dismissal of GCC's Claim 10: Coffe Cell Flooding?

6. GCC identifies subpart 1 of its Claim 11: "Flow Fairing Changes": "PUD added a requirement that the mating sections be pre-fit before assembly." ("Pre-Fit Claim") CP 6089. For this subpart, GCC signed DI 8 that, in compliance with GC-14, recited: "By following this instruction, Contractor hereby agrees that as a result thereof, there will be no change in Contract Price or time of completion and waives any claim relating thereto." CP 6045-6046. Does GCC's signing DI 8 and not asserting its Prefit Claim until after performing the activity for which it claims necessitate dismissal of GCC's "Pre-Fit" claim?

7. GCC identifies subpart 2 of its Claim 11: "GCC was required to procure and install shrink wrap to close the open sides of Module 3 before installation" ("Shrink Wrap Claim"). CP 6141. For this subpart, GCC neither timely sought nor obtained a change order as GC-14 required, did not timely submit a claim for a time extension as G-15 required, and did not timely submit a written notice of claim as GC-10 required. Does GCC's noncompliance with the mandatory notification and claim submittal requirements of the GCC-PUD contract call for dismissal of GCC's Shrink Wrap Claim?

### III. STATEMENT OF CASE

#### A. Claim 1: Slot Claim.

##### 1. GCC'S Claim.

GCC's Complaint alleges its Slot Claim as consisting of three parts – rejection, delay, and timely notification:

10. **PUD rejected out of hand the 2-slot protocol** and required that the slot work be performed on a 1-slot at a time basis. As a result, ... **GCC sustained a significant delay ...** together with the attendant costs.. At all times, **GCC timely notified PUD** of the 2-slot claim... CP 3-4 (emphasis added).

GCC clarified its Slot Claim in its response to Interrogatory 6, alleging a post-1/03/06 directive as the basis of its claim:

**In early January**, GCC proceeded with its **first concrete placement** in the lower part of **Slot B**, completing that work on **January 3, 2006**.

...

**Thereafter, PUD directed GCC to abandon** the July 31, 2005 schedule and the **December 2005 schedule and resequence all slot work on a sequential basis**. CP 8733-8734 (emphasis added).

##### 2. GC-14;G-15; GC-10.

GC-14 of the GCC-PUD contract authorized the PUD to “make changes by altering, adding or deducting from the work,” but required, as a condition precedent to any change order work, a written change order:

When a change is ordered by the District ..., a Change Order **shall** be executed by the District and the Contractor **before any Change Order work is performed**. CP 103 (emphasis added).

GC-14 specified the consequence of noncompliance with this condition precedent:

The District shall not be liable for any payment to Contractor, or claims arising therefrom, for Change Order work which is not first authorized in writing as set forth in this Section GC-14. CP 103 (emphasis original).

For any delay caused by “any unforeseeable cause beyond the control of the Contractor,” G-15 authorized a time extension. CP 102. However, G-15 required the contractor to submit a timely written claim for a time extension and specified that the contractor waived any claim by not doing so:

All claims for extension of time shall be made in writing to the District no more than 3 days after the Contractor knows or by reasonable diligence should know of the event causing or likely to cause the delay; **otherwise they shall be waived...**

All changes of the construction time ... shall be made by Change Order to the Contract pursuant to Section GC-14. CP 102 (emphasis added).

GC-10 required the contractor to make any claim in writing “no later than ten calendar days after the beginning of the event or occurrence giving rise to the claim.” CP 211. It specified waiver as the consequence of nonsubmittal of a timely written claim:

Failure to make written claim prior to the time specified in the Contract Documents shall constitute waiver of any such claim. CP 211.

3. GCC's Noncompliance.

GC-12 of the contract required GCC to "designate in writing" its site representative whom GCC "authorized to represent and act for the Contractor in all matters relating to the Contract." CP 211. GCC designated Ben Hugel as its authorized site representative during all activities that make up GCC's Claim 1: Slot Claim:

Ben Hugel, project manager, is authorized to act for the contractor on all contract issues and construction phases of this project. In addition, Mr. Hugel is authorized to negotiate and settle all contract changes with regard to both time and cost. CP 10495.

Mr. Hugel testified:

Q: And you were the senior GCC person on site on the Wanapum Fish Bypass Project?

A: I was. CP 10457.

...

A: Everybody on the job reported to me. CP 10470.

...

Q: Did you, as GCC's on-site Project Manager who managed GCC's slot work on the project, submit any such document? ["any claim in compliance with" G-15, GC-14, GC-10.]

A: Not to my recollection. CP 10482.

...

Q: Can you identify for us any notification that you gave to the PUD that, for anything related to the sequence of slot work construction, GCC claimed entitlement to either additional time or additional money?

...

A: I don't recall any. CP 10488.

...

Q: But you didn't submit any claim; correct?

A: I did not submit a claim. CP 10490.

Mr. Hugel's testimony establishes why GCC, for its Claim 1: Slot Claim, did not comply with GC-14, G-15 and GC-10 – the PUD never gave the directive that GCC posits as the basis of that claim:

Q: Did the PUD ever direct GCC, while you served as GCC's On-Site Project Manager, after you submitted your December 20, 2005 letter with your Submittal 58, did the PUD ever direct you to abandon the 2005 approved schedule and resequence slot work on a sequential basis while you were present on the project site as GCC's On-Site Project Manager?

A: I don't have any recollection of it.

Q: Do you have any recollection of any document contemporaneous with the performance of the slot work in Future Unit 11, while you were on site as GCC's On-Site Project Manager, that memorializes a PUD directive after January 3, 2006, that GCC abandon GCC's December 2005 approved schedule and resequence slot work on a sequential basis?

A: No. CP 10480.

On 1/3/06, GCC made its first concrete pour in Slot B of future unit 11. CP 199. On 1/5/06, monitors registered slight movement of the unit (less than .05"). CP 8698-8702. One week later, Ben Hugel represented GCC at the 1/12/06 weekly "Progress Meeting"<sup>6</sup> that GCC and PUD engineers attended. *Id.* GCC's minutes of the 1/12/06 Progress

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<sup>6</sup> GC-31 described the nature and content of "Progress Meetings": "Progress meetings will be utilized to review the work schedule and discuss any delays, unusual conditions, or critical items which have affected or could affect the progress of the work." CP 2256. Progress meetings took place weekly. CP 199. GCC recorded the minutes of the progress meetings: "On behalf of GCC, I [GCC project engineer James Durnford] took the notes of most progress meetings for the project, assembled those meeting minutes into final form, and circulated those meeting minutes to the PUD." CP 13878.

Meeting record the agreed upon resolution of the movement detected:<sup>7</sup>

The previously agreed construction sequence for slots A, B, & C is still acceptable. CP 10519.

GCC's 12/20/05 Submittal 58 identifies the "previously agreed construction sequence":

The construction and de-watering sequence shown [in the attached "project schedule update dated December 19, 2005"] is essentially the same as those submitted since our July update. This sequence reflects General Construction Company's understanding of the agreement reached in July with Jacobs and Grant County. The purpose of this agreement was to assure the dam remains stable during construction. CP 10496.

Mr. Hugel testified:

Q: Now, the statement says "The previously agreed construction sequence for slots A, B, & C is still acceptable." My question to you is this: Can you show us any document that memorializes a change in that position before GCC's completion of the slot work?

A: No. CP 10486.

GCC completed the last of its Slot B, C, and A structural concrete pours on 7/10/06 – two months and ten days before the 9/20/06 date that GCC listed in its Submittal 58 Schedule. CP 10498; CP 10502; CP 11046.

In summary, for GCC's Claim 1: Slot Claim there exists no written change order (or even a timely GCC request for a change order) that GC-14 required, no timely written claim for a time extension that G-15

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<sup>7</sup> GCC admits that it prepared the minutes of the 1/12/06 Progress Meeting. CP 10254.

required, and no timely claim that GC-10 required. There exists not one document delivered by GCC to the PUD before completion of the Slot B, C, and A concrete pours notifying the PUD that GCC claimed extra money or extra time for an alleged directive “to abandon the July 31, 2005 schedule and December 2005 schedule [GCC 12/20/05 Submittal 58] and resequence all slot work on a sequential basis.”

**B. Claim 2: Upstream Stoplog Guiderail.**

1. GCC’s Claim.

GCC contracted to fabricate and install steel rails on either side of Slot B into which upstream steel stoplogs were to be placed. CP 2246; CP 5378. GCC testified through its CR 30(b)(6) designee that GCC’s Claim 2: Upstream Stoplog Guiderail Interference consists of three subparts: 2.1 Installation of Guiderail; 2.2 Concrete Bulge; and 2.3 Guiderail Support:

Q: And there are listed three subparts to the upstream stoplog guiderails claim; “Installation of Guiderail”, “Concrete Bulge”, and “Guiderail Support”. Do you see that?

A: Yes.

Q: And is that an accurate listing of the three subparts that make up GCC’s Claim 2?

A: Yes. CP 4880.

2. GCC’s Testimony and Records.

GCC testified through its CR 30(b)(6) designee that GCC seeks neither money nor time for subparts 2.1 and 2.3 of its Claim 2:

Q: For 2.1 “Installation of Guiderail,” what is the dollar amount that GCC claims for that?

A: Zero.

...

Q: Then with regard to the dates for which GCC claims a time extension for 2.1, what are those dates?

A: None. CP 4912.

...

Q: And for the “Guiderail Support” claim, what is the amount that it claims?

A: Zero.

...

Q: And what is the number of days that GCC is claiming entitlement to for its “Guiderail Support” claim?

A: None. CP 4912-4913.

As to subpart 2.2 of Claim 2, “Concrete Bulge,” GCC testified through its CR 30(b)(6) designee that GCC both expected and knew that irregularities (bulges) existed in the concrete on the face of Wanapum Dam:

Q: So you would expect some irregularities, correct?

A: Yes.

Q: And what order of magnitude would you expect the irregularities on the face of the dam, given that it’s a dam that had been constructed in ... approximately 1960?

A: At the time, I don’t think we really tried to come up with a number. CP 4874.

In both GCC’s July 2005 Contract Administration Plan and its 8/28/06 update to that plan, the engineer whom GCC later designated as its CR 30(b)(6) designee, James Durnford, memorialized the risk that GCC took by not surveying the existing concrete of future unit 11 before

fabricating steel components that the contract required it to fabricate and install:

The risk is that the existing structure may not conform to the as-built drawings ...

3.2.2 No physical survey was made to confirm condition or geometry ... Misalignment of the existing concrete may prevent installation. ... CP 2633.

The GCC-PUD contract specified:

*CONTRACTOR SHALL VERIFY THE SIZE AND LOCATION OF ALL EXISTING ITEMS AFFECTING THIS WORK PRIOR TO FABRICATION. ... IT IS THE CONTRACTOR'S RESPONSIBILITY TO ENSURE THAT ALL INTERFERENCES ARE RESOLVED AS REQUIRED FOR PROPER OPERATION OF EACH EQUIPMENT ITEM. (Drawing G 06, Note 2) CP 4862 (Italics in original).*

In its 2/25/07 internal Weekly Report, GCC admitted that its decision not to verify the condition of the existing concrete before fabricating the steel stoplog guiderails made the concrete bulge interference (i.e., GCC's Claim 2.2) its own responsibility:

Existing concrete in the B slot interferes with installation of the stoplog guiderails. ... The problem was not identified until the guiderail alignment started. ... The General Notes require us to verify all existing conditions prior to fab, **making this our problem.** CP 4899 (emphasis added).<sup>8</sup>

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<sup>8</sup> After the PUD's 8/27/10 motion to dismiss GCC's Claim 2, GCC for the first time listed in its third (9/7/10) privilege log the 2/25/07 Weekly Report that GCC had delivered to the PUD twice (10/9/09; 1/20/10) and that it had not listed in its 9/16/09 or 1/20/10 privilege logs. CP 5793. On 7/23/12, the trial court denied GCC's Motion to Return documents:

- "The Court cannot find that GCC's disclosure of the documents ... was inadvertent in the sense that ER 502 contemplates it."
- "The Court cannot find that GCC took reasonable steps to prevent disclosure." CP 11215-11216.

By 8/27/10 motion, the PUD sought dismissal of the three subparts of GCC's Claim 2 for multiple reasons. CP 4819-4846. GCC did not oppose dismissal of subparts 2.1 and 2.3. CP 5274-5300. Over two years later, on 12/7/12, the trial court signed GCC's order denying dismissal of all three subparts.<sup>9</sup> CP 9937-9938. By 1/31/14 order on the PUD's 12/14/12 Motion for Reconsideration, the trial court dismissed subpart 2.1, but not subparts 2.2 or 2.3, of GCC's Claim 2. CP 11015-11017.

**C. Claims 7 and 16 – Unsigned District Instructions.**

1. GCC's Claim.

During the project, GCC submitted to PUD engineers certain requests for information ("RFIs"). GC-14 authorized a District Instruction ("DI") as a response for items that did "not involve any additional cost" and that did "not require an extension of the Contract completion date."

CP 104. GC-14 specified that for DIs:

Contractor's compliance therewith shall constitute its acknowledgment that such changes will not result in any claim for additional payment or extension of the Contract completion date. If the Contractor believes the instruction will result in additional costs or time extensions, Contractor shall promptly notify the District of the same and not proceed with the changes. CP 104.

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<sup>9</sup> The 12/7/12 Order recited that the court "heard argument of counsel on July 23, 2009, November 9, 2009, June 24, 2010" -- three dates that preceded the filing of the motion. CP 9984. The 7/23/09 hearing dealt solely with discovery. CP 14136-14137; CP 18005-18214.

Each of the 28 DIs that makes up GCC's Claims 7 and 16 recited:

DO NOT PROCEED with this Instruction if you believe that this Instruction will provide the basis of a claim or increase in the Contract Price or time for completion of the work. By following this Instruction, Contractor hereby agrees that as a result thereof, there will be no change in Contract Price or time of completion and waives any claim relating thereto.

CP 4961, 4981, 4995, 5002, 5008, 5014, 5021, 5036, 5044, 5052, 5061, 5070, 5077, 5086, 5094, 5104-5105, 5113, 5118, 5126, 5146, 5152, 5162, 5170, 5184, 5192, 5202, 5210, 5218 (all-caps in originals).

GCC's 10/16/09 Supplemental Response to Interrogatory 6 identified fifteen DIs as its Claim 7:

PUD changed the work by issuing a series of District Instructions ("DI"). GCC proceeded with the directed changes and is entitled to be compensated for the cost and additional time necessary to perform the directed, changed work. PUD directed changes to the contract via ... CP 5233.

... DI 151, 174, 176, 188, 191, 196, 200, 220, 229, 231, 234, 257, 258, 260 & 263. CP 5239.

GCC's Fourth Supplemental Response to Interrogatory 6 listed thirteen DIs as making up its Claim 16: DI 47, 75, 76, 138, 141, 168, 182, 230, 241, 243, 254, 255, and 262.<sup>10</sup> CP 5259.

2. GC-14; G-15; GC-10; GC-18.

GC-14 spelled out GCC's obligation if it disputed any DI:

If the Contractor believes the instruction will result in

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<sup>10</sup> On 7/23/09, the trial court had ordered GCC to "provide a complete responsive answer to [Interrogatory No. 6]." CP 24. GCC's 10/16/09 Fourth Supplemental Responses identified 28 individual DIs as making up its Claims 7 and 16. CP 5239; CP 5253.

additional costs or time extensions, Contractor shall promptly notify the District of the same and not proceed with the changes. CP 210.

It specified the consequence of GCC's compliance with a DI:

Contractor's compliance therewith shall constitute its acknowledgment that such changes will not result in any claim for additional payment or extension of the Contract completion date. CP 210.

G-15 required GCC to submit to the PUD a timely written claim for a time extension if it claimed delay because of a DI and further specified that GCC waived any claim for a time extension by not timely so doing. CP 4997. For any claim, GC-10 required GCC to submit a written claim "no later than ten calendar days after the beginning of the event or occurrence giving rise to the claim." CP 4945. GC-10 specified waiver as the consequence of nonsubmittal of a timely written claim. CP 4945. For any DI that it disputed, GC-18 required GCC to file, within 10 days of the DI's issuance, a written protest stating "clearly and in detail" the basis of GCC's protest. CP 4946. *See* Appendix D. GC-18 spelled out that not timely filing such a written protest resulted in the DI's being final:

All such ... instructions of the Engineer will be final unless the Contractor shall file with the Engineer a written protest, stating clearly and in detail the basis thereof, within ten (10) calendar days after the Engineer notifies the Contractor of such ... instruction.  
*Id.*

### 3. GCC's Noncompliance.

Twenty-eight DIs make up GCC's Claims 7 and 16. CP 5239; CP 5259. For two of the 28 DIs (DIs 75 and 76), GCC provided no notification until its response to interrogatories. CP 4941. For nineteen of the 28 DIs (DI 176, 191, 196, 200, 220, 229, 231, 234, 257, 258, 260, 263 (Claim 7); 182, 230, 241, 243, 254, 255, 262 (Claim 16)), GCC provided no notification until after it had left the project in May 2008. CP 4940-4942; CP 4949-5221. For DI 47, GCC did not comply with G-15 and GC-14 and did not timely comply with GC-10 and GC-18. CP 4941; CP 5103-5109. GCC never protested the Engineer's GC-18 determination that GCC's claims for DIs 151 and 174 had no merit, with the result that GC-18 rendered those two determinations final. CP 4940. GCC's protests of DIs 138, 141, and 168 gave no detail, let alone "stating clearly and in detail the basis thereof," with the result that those four instructions became final. CP 5129-5130; CP 5148; CP 5157. GCC's 9/13/10 Opposition to the motion to dismiss Claims 7 and 16 conceded that GCC had not timely provided the notifications that the contract required for ten of the 28 DIs that make up its Claims 7 and 16:

GCC must concede that its notice was late for the following ...: ... DIs 257, 260 and 263 ... and ... DI 47 ... DIs 75 and 76; ... DI 241; ... DIs 243 and 255; ... DI 262. CP 5411; *see also* CP 5424 and CP 5430.

GCC further represented:

GCC is not pursuing any additional time or money for  
DI ... 257. CP 5424.

This left one DI for which GCC, arguably, partially complied with G-15, GC-10 and GC-18: DI 188 (Claim 7). On 12/7/12, the trial court signed GCC's order, denying in its entirety the PUD's 8/27/10 motion to dismiss.<sup>11</sup> CP 9983-9985.

**D. Claim 10: Coffer Cell Flooding.**

1. GCC's Claim.

In its 5/20/09 Supplemental Response to Interrogatories, GCC identified its Claim 10: Coffer Cell Flooding as a claim for extra money and extra time because its coffer cell flooded:

GCC seeks an equitable adjustment ... for direct costs incurred resulting from flooding of the coffer cell, a second dewatering of the cell, and completing the added work in the flow spreader prior to final cell flooding. In addition, GCC seeks additional contract time ... CP 89.

2. GCC's Coffer Cell.

Construction of the fish bypass through future unit 11 of Wanapum Dam necessitated a temporary coffer cell (coffer dam) on the downstream side of the dam (tailrace) to enable GCC to perform certain activity "in the dry." CP 99. The GCC-PUD contract allocated to GCC sole responsibility

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<sup>11</sup> The GCC Order stated that the court had "heard argument of counsel on July 23, 2009, November 9, 2009, June 24, 2010," three dates preceding the PUD's 8/27/10 filing of the motion. CP 9984.

for design, fabrication, installation and operation of its coffer cell:

- E. The Contractor shall be solely responsible for proper design, fabrication, installation, operation, maintenance, abandonment procedures, and any failure of any component of the dewatering system(s). CP 100.

The contract cautioned: “The Contractor may encounter ... high tailrace levels (tailrace elevation 500.0) during the course of the work,” specifying that “no time extensions or extra compensation will be given by the District based on river conditions.” CP 101. On 5/31/05,<sup>12</sup> before GCC and its coffer cell engineering consultant, Ben C. Gerwick, Inc., began design of GCC’s coffer cell, GCC requested historical records of the tailrace levels at Wanapum Dam. CP 57-58. On 6/2/05, records of the Wanapum tailrace levels from 1995 to 2003 were emailed to GCC. CP 58-75. Maximum tailrace elevations between 1995 and 2003 at Wanapum Dam for January through July exceeded 500’ (high 510.45; low 501.35) and exceeded or equaled 496.5’ in August, November, and December. CP 58. On 9/8/05, GCC’s coffer cell engineer, Liang Shen of Gerwick, emailed GCC questioning GCC’s decision “after a quick meeting ... to design the coffer dam to elevation 497’ ”:

Based on the river current information you sent to me on 8/29, the average water elevation during the current measurements is 496.5’. There will be only half feet free board during the high flow if the top of cofferdam

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<sup>12</sup> GCC signed the contract to construct the Wanapum Fish Bypass on 5/31/05. CP 219.

at 497'. Is this acceptable? CP 80.

GCC responded: "Yes." *Id.* With the knowledge just outlined, GCC chose to design its coffer cell to a height of 497' MSL, and construct it with openings in the steel sheets that comprised its walls at 496.5'. CP 115-116. GCC's 10/12/06 Submittal 104E to the PUD engineer proposed its coffer cell with a maximum elevation of 497' MSL. CP 15159. The engineer's 10/19/06 response cautioned:

However, during the period of time that the coffer cell is expected to be in service, the tailwater elevation could exceed 497 feet for extended periods of time. *Id.*

In 2007, while GCC had its coffer cell in place, the elevation of the Columbia River in the Wanapum Dam tailrace exceeded 496.5' on four days: 496.7'-3/29/07; 497.09'-4/2/07; 497.05'-5/8/07; and 496.59'-7/8/07. CP 2806. On those four days, GCC's coffer cell flooded.<sup>13</sup> In its 4/5/07 letter, titled "High River Flows and Flooding of Cofferdam Cell," GCC asserted:

We consider all the work to dewater, repair, and re-dewater the coffer cell to be a change of conditions in accordance with the Specification Section GC-14 "Changes to the Work." We need an Executed Change Order by the District before we can proceed with the changed work outlined in this letter when water levels and river flows allow. CP 15163.

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<sup>13</sup> T-11 3.04 of the GCC-PUD contract required that GCC "Provide complete standby equipment, installed and available, for immediate operation as may be required to adequately maintain dewatering on a continuous basis in the event that all or part of the system may become inadequate ..." CP 2185.

In compliance with GC-18, the engineer issued the 4/12/07 determination that GCC's coffer cell flooding claim had no merit and explained the basis for that determination:

The District ... finds the claim to be without merit. Contract Section SR-11 B states in part "The Contractor may encounter ... high tailrace levels (tailrace elevation 500.0) during the course of the work. Notwithstanding Section GC-10, no time extensions or extra compensation will be given by the District based on river conditions." General Construction Co. still elected to design their coffer cell with a maximum elevation of 497'. GCC was further notified in District letter ... that " ... during the period of time that the coffer cell is expected to be in service, the tailwater elevation could exceed elevation 497 feet for extended periods of time." CP 15165.

GC-18 specified that the engineer's determination became final unless GCC timely filed a detailed written protest:

All such determination ... of the Engineer will be final unless the Contractor shall file with the Engineer a written protest, stating clearly and in detail the basis thereof, within ten (10) calendar days after the Engineer notifies the Contractor of such determination ... CP 4946.

GCC filed no timely protest of the engineer's determination as GC-18 required. CP 15156.

**E. Claim 11: Flow Fairing Changes.**

1. GCC's Claim.

GCC contracted to fabricate and install three steel flow fairings on the upstream face of Wanapum Dam. CP 6035-6041. Flow fairings

smooth the flow of river water into the fish bypass. GCC identified four subparts as making up its Claim 11: Flow Fairing Changes:

1. Pre-fit. “Modules 1 and 2 ... PUD added a requirement that the mating sections be pre-fit before assembly.”<sup>14</sup> CP 6089.
2. Shrink wrap: “GCC was required to procure and install shrink wrap to close the open sides of Module 3 before installation.” *Id.*
3. Concrete Removal. CP 6102.
4. Installation Tolerance. *Id.*

The PUD’s 10/5/10 motion requested dismissal of all four subparts for multiple reasons. CP 5996-6030. On 12/7/12, the court signed GCC’s order denying dismissal of all four subparts.<sup>15</sup> CP 10030-10032. On 1/31/14, the court signed GCC’s order granting the PUD’s 12/14/12 Motion for Reconsideration (CP 10124-10141) in part, dismissing subparts 3 and 4, but denying dismissal of subparts 1 and 2. CP 11015-11017.

a. *Pre-fit.* GCC’s second onsite project manager (11/28/05-7/17/06), on behalf of GCC, requested redesign of the flow fairing assembly to bolt together the eight sections of modules 1 and 2 in two groups, one of three and one of five. CP 6031. The design engineer on 3/10/06 reissued the flow fairing module drawings to accommodate GCC’s request. CP 6031-6032. GCC had its flow fairings supplier,

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<sup>14</sup> GCC pre-fit Module 2 only. It performed no pre-fit of Module 1. CP 6032.

<sup>15</sup> GCC’s order stated that the court had “heard argument of counsel on July 23, 2009, November 9, 2009, June 24, 2010,” three dates preceding the PUD’s 10/5/10 filing of the motion. CP 10031.

Selway Corporation, manufacture the flow fairings accordingly. CP 6032.

One year later, in its 3/1/07 RFI 227, GCC, under its fourth on-site project manager (10/31/06-9/24/07), requested to change the 3-5 configuration to a 4-4 configuration:

Would the engineers design support a relocation sequence of module sections? Is it acceptable to swap module sections mark# 1C and 2C downward with module mark# 1B and 2B? ... This would provide a 4 piece top section in lieu of the original 3 piece top section. Please confirm. CP 6043.

The Engineer responded on 3/5/07 with DI 8:

The proposed revision to the module section locations was reviewed and is considered acceptable. **The contractor shall assure that the bolting between the module sections will still fit-up with the revised module section locations.** CP 6045 (emphasis added).

GCC's onsite project manager signed DI 8 beneath the following:

DO NOT PROCEED with this Instruction if you believe that this Instruction will provide the basis for a claim or increase in the Contract Price or time for a completion of the work. **By following this Instruction, Contractor hereby agrees that as a result thereof, there will be no change in Contract Price or time of completion and waives any claim relating thereto.** CP 6045-6046 (emphasis added).

GCC performed a pre-fit on Module 2 on 3/28/07. CP 6032.

GCC's 4/2/07 letter 0346 to the PUD's engineer for the first time contended that the pre-fit that GCC had performed the week before was "compensable for both money and time in accordance with Specification

Section GC-14”:

GCC contends that the items described above and all subsequent impacts are compensable for both money and time in accordance with Specification Section GC-14, Changes In Work. CP 6047-6048.

b. *Shrink wrap*. On 3/5/07, GCC forwarded its Submittal 188

“Flow Fairings Erection Plan,” paragraph 25 of which stated:

25. If required to protect fish during the time of fish runs, Modules #1, #2, and #3 will be shrink wrapped before setting the units in the water. ... This plan is designed to keep fish from getting inside the modules during final placement into water. CP 6050-6051.

Paragraph 26 of GCC’s 3/15/07 Submittal 188A reiterated the same language. CP 6052-6053. On 4/2/07, GCC forwarded its Submittal 188D

“Revisions to the Flow Fairing Erection Plan” in which it stated:

Item 28 was added per PUD recommendation and is being removed from erection plan per verbal direction of the PUD. CP 6054-6055.

The engineer responded two days later:

d. Item 28. We recommend that this item be restored to the list because the module installation schedule may result in module placement very near time fish migration is anticipated. CP 6059-6060.

On 4/7/07 GCC placed shrink wrap on Module 3. CP 6032. However, wind damaged the shrink wrap, and on 4/9/07 GCC installed Module 3 without any shrink wrap. CP 6032-6033. On 4/10/07, GCC’s president in

Poulsbo, R. Morford, forwarded an email to GCC personnel that purported to memorialize a phone conversation that he had that morning with the PUD assistant manager, Joe Lukas.

I told Joe that General considered the installation of “shrink wrap” to be a change to our contract and that we would not be able to proceed with this changed work without an executed change order approved by the PUD Commission, in accordance with their contract. CP 6389.

The email indicates that Mr. Lukas forwarded it to a PUD engineer. *Id.* GCC shrink-wrapped no module after the 4/10/07 email.

#### IV. ARGUMENT

##### A. Standard of Review.

“A trial court’s denial of summary judgment is reviewed de novo, with the appellate court engaging in the same inquiry as the trial court.” *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 407, 282 P.3d 1069 (2012). “Interpretation of an unambiguous contract is a question of law” and subject to summary judgment. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006).

A defendant may move for summary judgment by “pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case.” *Seybold v. Neu*, 105 Wn. App. 666, 677, 19 P.3d 1068 (2001) (citing *Young v. Key Pharm.*, 112 Wn.2d 216, 225 n. 1, 770 P.2d

182 (1989)). That initial showing requires nothing more than pointing out the absence of evidence to support plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (cited by *Young*, 112 Wn.2d at 225 n. 1). The burden then shifts, and if plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” the court should grant the motion. *Celotex*, 477 U.S. at 322; see also *Evergreen Moneysource Mort. Co. v. Shannon*, 167 Wn. App. 242, 250, 274 P.3d 375 (2012). Unsupported conclusory allegations, argumentative assertions, ultimate facts, and conclusions of fact will not defeat summary judgment. CR 56(e); *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 142, 890 P.2d 1071 (1995); see also *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988); *Snohomish Cnty. v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002).

**B. The Court’s Matter of Law Rulings Contravene Washington Law.**

**1. Error No. 1.**

The trial court denied dismissal of GCC Claims 1, 2.2, 7, 11.1, 11.2, and 16, because of its “matter of law ruling”:

As a matter of law, a contractor’s noncompliance with the mandatory notification and claim submittal requirements of its contract does not bar its claims

based on allegations of breach of contract. CP 10904;  
*see also* 10845; 10858; 10870; 10892.

This ruling misstates Washington law. In Washington, a contractor's noncompliance with the notification and claim submittal requirements of its contract results in summary judgment dismissal of the contractor's claim. *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 770, 174 P.3d 54 (2007) ("failure to comply with contractual procedures bars relief"); *see also Mike M. Johnson v. Cnty. of Spokane*, 150 Wn.2d 375, 386, 78 P.3d 161 (2003); *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 3, 277, P.3d 679, *review denied*, 175 Wn.2d 1015 (2012); *Absher*, 77 Wn. App. at 142.

In *Absher*, Division I affirmed the trial court's summary judgment dismissal of the contractor's claims because the contractor had not followed the "clearly mandatory" contractual claim submittal requirements. *Absher*, 77 Wn. App. at 145, 146. Likewise, in *Mike M. Johnson*, the Washington Supreme Court reversed Division III, reinstating the trial court's summary judgment dismissal of the contractor's claims because the contractor had not followed the notification and claim submittal requirements of its contract: "We hold that 'actual notice' is not an exception to compliance with mandatory contractual protest and claim provisions." *Mike M. Johnson*, 150 Wn.2d at 377. The Court explained:

This court, as well as the state's appellate courts, have historically upheld the principle that **procedural contract requirements must be enforced** absent either a waiver by the benefiting party or an agreement between the parties to modify the contract.<sup>16</sup>

*Id.* at 386-87 (emphasis added).

In *American Safety Casualty*, the Washington Supreme Court reversed Division II, reinstating the trial court's summary judgment dismissal of the contractor's claims, because the contractor, as in *Absher* and *Mike M. Johnson*, had not complied with the notification and claim submittal requirements of its contract: "[S]ince American Safety admittedly did not comply with the contractual provisions and thus waived its claim to additional compensation, the trial court was correct in granting summary judgment to the City." *American Safety Casualty*, 162 Wn.2d at 773. In *Realm*, the appellate court affirmed the trial court's summary judgment dismissal of the contractor's claims, explaining: "Realm waived the right to sue by failing to comply with notice provisions that were, by contract, a precondition to litigation by Realm against the City." *Realm*, 168 Wn. App. at 3. Washington law is clear. A contractor's noncompliance with notification and claim submittal requirements of its

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<sup>16</sup> Nowhere does there exist any agreement between GCC and the PUD to modify the notification and claim submittal requirements of the GCC-PUD contract. Moreover, the trial court's 2/19/10 letter ruling properly rejected GCC's waiver argument: "Here, the parties agreed when they entered into their contract that Mr. Jeske had no authority to modify the contract or approve extra work. There is no evidence before me that Defendant as principal did anything to lead Plaintiff to any other conclusion." CP 28.

contract necessitates summary judgment dismissal of the contractor's claims for extra money and extra time.

In compliance with GC-12 of the GCC-PUD contract, GCC, in writing, designated Ben Hugel as its on-site project manager during the time of all concrete pours that make up GCC's Claim 1: Slot Claim. CP 10495. GCC authorized Mr. Hugel, among other things, "to act for the contractor on all contract issues and contract phases of this project." CP 10495. GC-14, G-15, and GC-10 of the contract specified notification and claim submittal requirements, compliance with which constituted conditions precedent to GCC's pursuing a claim for extra money or extra time. CP 209-212. Mr. Hugel testified that he did not submit *any* claim for GCC's Slot Claim, let alone a claim in compliance with GC-14, G-15 and GC-10, and that he gave no notification of any such claim. CP 10482, 10488, 10490. There exists not one document, delivered by GCC to the PUD before completion of the slot B, C, and A concrete pours, notifying the PUD that GCC claimed extra money or extra time for an alleged directive "to abandon the 7/31/05 schedule and the December 2005 schedule [GCC's 12/20/05 Submittal 58] and resequence all slot work on a sequential basis." CP 8734. In its minutes of the 1/12/06 Progress Meeting at which Ben Hugel represented GCC, i.e., one week after detection of the less than .05" movement, GCC documented the opposite:

“The previously agreed construction sequence for slots A, B, & C is still acceptable.” CP 10519.

GCC’s admitted noncompliance with the notification and claim submittal requirements of the contract necessitates dismissal of GCC’s Claim 1: Slot Claim.

For GCC’s Claims 7 and 16, as section III.C, *supra*, outlines, GCC did not comply with GC-14, G-15, GC-10, or GC-18. GCC’s noncompliance necessitates dismissal of GCC’s claim for each DI for which it did not comply with the contractually specified notification and claim submittal requirements. Likewise, GCC’s providing no notification prior to the pre-fit and shrinkwrap events, which comprise subparts 1 and 2 of its Claim 11, necessitates dismissal of those claims. The trial court’s error in denying the PUD’s Motions for Summary Judgment of GCC Claims 1, 2.2, 7, 11.1, 11.2 and 16 calls for reversal.

## **2. Error No. 2.**

The trial court denied dismissal of GCC Claims 1, 2.2, 7, 11.1, 11.2, and 16 based on the following “matter of law ruling”:

As a matter of law, mandatory notification and claim submittal requirements of a contract are unenforceable unless the owner demonstrates prejudice to it as a result of the contractor’s noncompliance with the requirements.<sup>17</sup> CP 10904; *see also* 10845; 10858;

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<sup>17</sup> For this “matter of law ruling,” the trial court cited the dissent in *Mike M. Johnson*: “Justice Chambers, in his dissent in Mike M. Johnson, suggested that...conditions precedent, such as notice and claim provisions, are not enforceable unless the party asserting them can demonstrate prejudice. This court is unaware of any Washington authority deciding this question.” CP 11019.

10870, 10892-10893.

This ruling contravenes Washington law: “Washington does not require an element of prejudice to enforce contractual notice provisions.” *Absher*, 77 Wn. App. 137, 145; “We hold that ‘actual notice’ is not an exception to compliance with mandatory contractual protest and claim provisions.” *Mike M. Johnson*, 150 Wn.2d 375, 377; *see also Sime Const. Co., Inc. v. Washington Pub. Power Supply Sys.*, 28 Wn. App. 10, 16, 621 P.2d 1299 (1980). The court in *Sime Constr. Co., Inc.* discussed one reason why Washington courts require compliance with contractual notification and claim submittal requirements – the prevention of after-the-fact claims:

Had Sime given the 15-day notice required by the prime contract ... WPPSS, Marley, and Ragnar could have balanced the desirability of the design improvement against those costs in determining economic feasibility.

*Sime Const. Co., Inc.*, 28 Wn. App. at 16; *see also Realm*, 168 Wn. App. at 11 (“... contracting agencies ... would be denied the benefit of advance notice and the opportunity to resolve disputes before they devolve into litigation ...”).

GCC’s Claim 11.1 “Pre-fit” exemplifies. GCC’s 3/1/07 RFI 227 requested a modification – bolting the eight sections of the flow fairing module in a 4-4 configuration instead of the 3-5 configuration that it had requested (and the engineer had approved) one year before. CP 6043.

DI 8 approved this second GCC request with the proviso: “The Contractor shall assure that the bolting between the module sections will still fit-up with the revised module section locations.” CP 6045. The week after it had prefit module 2, GCC sent its 4/2/07 letter claiming that “pre-fit was compensable for both money and time.” CP 6032; 6047-6048. Had GCC provided the timely, contract required notification that it would claim extra money and time for the modification that it requested, the PUD could have declined GCC’s RFI 227 request, thereby avoiding a claim.

GCC’s Claim 1: Slot Claim provides another example. Not one document that GCC provided to the PUD before completion of its slots B, C, and A concrete pours so much as mentions such a claim. If GCC had complied with its GC-14, G-15 and GC-10 contractual notification and claim submittal obligations, the PUD could have contemporaneously addressed what GCC claimed after the fact, thereby eliminating GCC’s Slot Claim. The trial court’s erroneous matter of law ruling on the basis of which it denied dismissal of GCC’s Claims 1, 2.2, 7, 11.1, 11.2, and 16 requires correction. Correction of the error necessitates dismissal of each of these claims.

### **3. Errors Nos. 3 and 4.**

The trial court denied dismissal of GCC Claims 1, 7, 11.1, 11.2, and 16 based on the following “matter of law” rulings:

As a matter of law, mandatory notification and claim submittal requirements of a construction contract apply only to claims that a contractor asserts involve “additional work,” i.e., work “unforeseen by the parties but necessary to complete a construction contract to the contract’s specifications.”

...

As a matter of law, mandatory notification and claim submittal requirements of a construction contract do not apply to claims that a contractor asserts involve “extra work,” i.e., work that a contractor asserts is “beyond the scope of the contract.” CP 10904; *see also* CP 10845; CP 10846; CP 10858; CP 10859; CP 10860; CP 10870; CP 10871; CP 10872; CP 10893; CP 10894.

Such is not Washington law. *Mike M. Johnson* illustrates. There, the owner awarded contracts for two sewer projects. *Mike M. Johnson*, 150 Wn. 2d at 378. After the award, the owner learned of a redesign of a street in one of the projects and notified the contractor. *Id.* at 378. “This substantially changed the scope of the original work.” *Id.* at 394 (Chambers, J., dissenting). Later the contractor encountered buried telephone lines that brought construction to a halt. *Id.* at 379. At contract award, neither the owner nor the contractor foresaw or had a meeting of the minds on these events that “substantially changed the scope of the original work.” *Id.* The dissent pointed out that the majority holding covered “work outside the scope of the original contract,” i.e., work “beyond the scope of the contract”:

Under the majority's holding today, **an owner can demand additional work outside the scope of the**

**original contract** ... and yet deny fair compensation for services rendered if, within 15 days ... the contractor fails to submit a written request for additional time ...

*Id.* at 393 (Chambers, J., dissenting) (emphasis added). Nevertheless, the majority held that the contractor's noncompliance with the contract's notification and claim submittal requirements necessitated dismissal of the contractor's claims. *Id.* at 392-393.

In *Absher Constr. Co. v. Kent Sch. Dist.*,<sup>18</sup> Absher's subcontractor claimed that "deficiencies in the plans entitled it to off-contract remedies." *Absher*, 79 Wn. App. 137, 146. At contract signing, no party expected "extra work caused by deficient plans and specifications." *Id.* Nevertheless, the court held that noncompliance with the notification and claim submittal requirements of the contract necessitated dismissal of claims for "off-contract recovery." *Id.* at 146-47.

*Realm Inc. v. City of Olympia* addressed a contractor's claim to entitlement to "extra compensation" for work on a fish passage tunnel. *Realm*, 168 Wn. App. at 3. Division II affirmed the trial court's summary judgment dismissal of the contractor's claim, holding that Washington law required dismissal because the contractor had not complied with the notification and claim submittal requirements of its contract. *Id.* at 12.

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<sup>18</sup> In *Mike M. Johnson*, the Washington Supreme Court extensively quoted *Absher* with approval.

The court rejected the contractor's argument distinguishing *Mike M. Johnson*, labeling it an attempted "end run around" the contract's notification and claim submittal requirements. *Id.* Here, the trial court's holding that GC-14, G-15, GC-10 and GC-18 apply only to that work "upon which there was a meeting of the minds" "at the time the contract was executed" (CP 9806) likewise constitutes an "end run around" the GCC-PUD contract requirements that proves unsupportable in law.

*Hensel Phelps Constr. v. King County*, 57 Wn. App. 170, 183, 787 P.2d 58 (1990) affirmed the trial court's matter of law dismissal of the subcontractor's claims for off-contract recovery. The subcontractor's argument that it encountered job site conditions that it did not anticipate and that caused it "huge cost overruns" was insufficient as a matter of law to permit the subcontractor to proceed with either *quantum meruit* or cardinal change claims. Rather, the subcontractor's choosing not "to follow the contractual provisions for redress" when "remedial provisions" of the contract "cover the kind of contingencies ... encountered" necessitated matter of law dismissal of claims for off-contract remedies.

In sum, the trial court's matter of law ruling directly contravenes Washington law. Restricting the applicability of the notification and claim submittal requirements of a fixed-price construction contract to claims for "additional work" and not for "extra work," as the trial court defined those

words, effectively nullifies such requirements, something that Washington courts have repeatedly rejected. *See Mike M. Johnson*, 150 Wn.2d at 391 (excusing contractor from mandatory notification and claim requirements renders such requirements nullities); *see also Realm*, 168 Wn. App. at 11 (“*Realm* attempts an end run around ... but such an interpretation, in addition to being inconsistent with *Mike M. Johnson*, would render section 1-04.5 a nullity.”). The trial court’s misstatement of Washington law requires correction and reversal of its denial of dismissal.

#### **4. Error No. 5.**

The trial court denied dismissal of subpart 3 of GCC’s Claim 2, Guiderail Support, based on its “matter of law ruling”:

As a matter of law, the testimony of a contractor’s CR 30(b)(6) designee that the contractor seeks neither additional money nor additional time for an item for which it claims does not preclude the contractor from proceeding with a legally viable claim for that item. CP 10904; *see also* 10860.

This ruling does not comport with Washington law.

As a threshold matter, “CR 30(b)(6) testimony is binding” but “is not a judicial admission.” *Casper v. Esteb Enter., Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004) (quoting *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp.2d 786, 791 (N.D. Ill. 2000) (corporations “are bound by the testimony given by their designated representative during [a] Rule 30(b)(6) deposition.”). Accordingly, the testimony of GCC’s CR 30(b)(6)

designee binds GCC.

In Washington, to state a claim for breach of contract a party must establish duty, breach of duty, and damages proximately resulting from the breach. *Nw. Indep. Forest Mfrs. v. Dept. of Labor and Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). A claim of contract breach without damages fails as a matter of law. *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 227, 317 P.3d 543 (2014) (citing *Ketchum v. Albertson Bulb Gardens, Inc.*, 142 Wash. 134, 139, 252 P. 523 (1927)).

GCC testified through its CR 30(b)(6) designee that GCC seeks neither money nor time for subparts 1 and 3 of its Claim 2. CP 4912-4913. Furthermore, GCC conceded that it is “not pursuing any additional time or money” for DI 257 of its Claim 7. CP 5424. Washington law renders erroneous the trial court’s “matter of law ruling” that GCC’s Claim 2.1 and 2.3 and its claim for DI 257 remain “legally viable” even though GCC admits that it seeks neither money nor time for them. Such necessitates dismissal.

## 5. Error No. 6.

Based on the following “matter of law ruling,” the trial court denied dismissal of GCC Claim 2, subpart 2 (concrete bulge), and Claim 10: Coffe Cell Flooding:

As a matter of law, the testimony of a contractor’s CR 30(b)(6) designee, that the item for which the contractor claims money and time over the original contract price, fell within the scope of the contractor’s original contract obligation does not preclude the contractor’s claim for additional money and time for that item. CP 10904; *see also* 10860-10861.

The Washington Supreme Court has repeatedly articulated and upheld the rule of law – the *Spearin* Doctrine – that renders the trial court’s “matter of law ruling” erroneous:

Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.<sup>19</sup>

*Md. Cas. Co. v. City of Seattle*, 9 Wn.2d 666, 675, 116 P.2d 280 (1941) (quoting *United States v. Spearin*, 248 U.S. 132, 136, 39 S. Ct. 59, 63 L. Ed. 166 (1918)). “Extra compensation is not allowable for doing work

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<sup>19</sup> Because of the *Spearin* Doctrine, the only time extensions to which GCC could legitimately claim entitlement were those that the GCC-PUD contract authorized. G-15 authorized time extensions for “unforeseeable causes beyond the control of the Contractor,” provided GCC complied with the notification and claim submittal requirements of G-15. CP 212. As a matter of law, GCC had no entitlement to a time extension for anything foreseeable or within its control. The rising of the Columbia River in the tailrace of Wanapum Dam, as a matter of law, was foreseeable (*see Donald B. Murphy*, 40 Wn. App. 98, 103-04, 696 P.2d 1270 (1985)), and the height to which GCC designed and constructed its coffer cell was within GCC’s control with the result that, as matter of law, GCC stated no claim for a time extension for its Claim 10: Coffe Cell Flooding.

covered by the contract notwithstanding it proves to be greater than anticipated when the contract was made.” *Dravo Corp. v. Mun. of Metro. Seattle*, 79 Wn.2d 214, 221, 484 P.2d 399 (1971).

A contractor may not recover additional amounts when the condition complained of could “reasonably have been anticipated by either party to the contract.” *Basin Paving Co. v. Mike M. Johnson, Inc.*, 107 Wn. App. 61, 65, 27 P.3d 609 (2001).

The contractor in *Dravo* claimed entitlement to extra money because it encountered excess hardpan in excavating to install a municipal sewer line. *Dravo*, 79 Wn.2d at 216-17. The trial court awarded the contractor extra money because of the hardpan encountered. *Id.* at 217. The Washington Supreme Court reversed, holding that the owner-contractor contract encompassed the work that the excess hardpan necessitated:

The work for which extra compensation was allowed by the court was work directly called for by the contract .... The fact that some added expense may have been incurred beyond that which the contractor had anticipated does make the work ‘extra’ as that term is used in a construction contract.

*Id.* at 222.

Washington Courts have repeatedly recognized this rule of law. *See, e.g., Donald B. Murphy Contractors, Inc. v. State*, 40 Wn. App. 98, 103-04, 696 P.2d 1270 (1985) (“changes in site conditions caused by weather

occurring after work on a project has started do not constitute ‘changed conditions’”); *Modern Builders v. Manke*, 27 Wn. App. 86, 94, 615 P.2d 1332 (1980) (no recovery of amounts in excess of contract price for reasonably anticipatable extra leveling necessary to perform the contract); The same analysis applies to *quantum meruit* claims. *Hensel Phelps Const. Co. v. King County*, 57 Wn. App. 170, 174-76 (1990) (*quantum meruit* available only when condition claimed was not foreseeable and not contemplated by the contract).

Here, GCC, through its CR 30(b)(6) designee, testified that GCC “expected” the concrete irregularity (bulge) that makes up subpart 2 of GCC’s Claim 2 “just due to the nature that we’re doing remodel rather than new construction.” CP 4876-4877. Likewise, the following render legally non-sustainable any assertion that GCC did not anticipate that the tailrace of Wanapum Dam may reach elevation 497.09’: (1) the statement in GCC’s contract: “The Contractor may encounter high tailrace levels (elevation 500’) during the course of its work” (CP 101); (2) the historical records of the maximum tailwater elevations at Wanapum Dam (January through July – high 510.45; low 501.35) that GCC received before it designed its coffer cell (CP 57-65); (3) the 9/8/05 warning to GCC from its own coffer cell design engineer that the “average water elevation during the current measurements is 496.5” (CP 80); and (4) the 10/12/06

written warning to GCC by the PUD's engineer: "[D]uring the period of time that the coffer cell is expected to be in service, the tailwater elevation could exceed 497 feet for extended periods of time." CP 15159. The trial court erred in ruling that GCC may seek extra money and time for that which fell within the scope of its contract. Correction of this error necessitates dismissal of subpart 2 of Claim 2 (concrete bulge) and Claim 10: Cofferdam Flooding.

**6. Error No. 7.**

GCC titled its 4/5/07 letter, that is, the letter that it claims provided the contractually required notification of its Claim 10: Cofferdam Flooding, "High River Flows and Flooding of Cofferdam." CP 15162. Based on the following "matter of law ruling," the trial court denied dismissal of GCC Claim 10:

As a matter of law, for a fixed price contract, a contractor states a viable claim for money in addition to the contract price and time in addition to what the contract specifies, for an item that does not, as a matter of law, qualify as a changed condition. CP 10904; *see also* CP 10881.

The trial court's matter of law ruling misstates Washington law. In *Donald B. Murphy*, 40 Wn. App. 98, the contractor claimed entitlement to extra money to deal with "heavy rain and the melting of snow" that resulted in a "tremendous flow of water" in East Issaquah Creek, that

flooded culverts and damaged its construction site.<sup>20</sup> *Id.* at 101. The trial court denied entitlement. *Id.* at 100. Division II affirmed, based on the “well-established principle” that “changes in site conditions caused by weather occurring after work on a project has started do not constitute ‘changed conditions’.” *Id.* at 103-04, (citing *Arundel Corp. v. United States*, 103 Ct. Cl. 688 (1945), *cert. denied*, 326 U.S. 752, 66 S. Ct. 90, 90 L. Ed. 451 (1962)). The contractor next argued that “heavy rainfall combined with the inadequate culverts” constituted a changed condition, citing *Phillips Const. Co. v. United States*, 394 F.2d 834 (Ct. Cl. 1968).<sup>21</sup> Division II affirmed dismissal of this claim holding that the culverts were “adequately designed for reasonably anticipated conditions,” the high flows in the East Issaquah Creek due to heavy rains were not “changed conditions,” and, therefore, the contractor was not entitled to extra compensation. *Id.* at 104-105.

Here, GCC’s 4/5/07 letter identified the “changed condition” that GCC asserts: “High River Flows.” CP 15162. (“On March 29, we were informed that river flows would increase.”). As *Donald B. Murphy* recognized, rain and the melting of snow determine the amount of water

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<sup>20</sup> “The flow of water in the creek during these two days peaked at the highest volume ever recorded.” *Donald B. Murphy*, 40 Wn. App. at 101.

<sup>21</sup> In *Phillips*, the contractor recovered under a changed conditions clause because the project had flooded numerous times due to a government-owned drainage system that was inadequate to handle even normal rainfall. *Phillips*, 394 F.2d at 837-38.

that flows in a creek or river. *See Donald B. Murphy*, 40 Wn. App. at 103-04. Unlike *Phillips*, no inadequately designed PUD structure caused GCC's coffer cell to flood. CP 2806. Rather, GCC's coffer cell, that GCC and its engineering consultant, Ben C. Gerwick, Inc., had designed and that GCC had been repeatedly warned was inadequate to handle reasonably anticipatable river levels, flooded when the level of the Columbia River at the Wanapum Dam tailrace exceeded 496.5' on four days. CP 2806. The trial court's allowing GCC to proceed with a claim for extra money and time for anticipated and reasonably anticipatable "high river flows" of the Columbia River constitutes error necessitating reversal.

**7. Error No. 8.**

The trial court denied dismissal of Claim 10: Coffe Cell Flooding based on its "matter of law ruling":

As a matter of law, the following contract provision does not preclude a Contractor's claim for a time extension or extra compensation for the elevation which the tailrace (the river level on the downstream side of the dam) reached, even though the tailrace never reached 500.0 feet:

SR-11 UNFAVORABLE CONDITIONS

...

C. The Contractor may encounter ... high tailrace levels (tailrace elevation 500.0) during the course of the work. Notwithstanding Section GC-10, no time extensions or extra compensation will be given by the District based on river conditions. The

Contractor shall be responsible for the cost of protecting/sheltering of all work vulnerable to such extreme river conditions so that work can proceed on schedule. CP 10904; *see also* 10881-10882.

“Contracting parties may ordinarily allocate risks as they see fit.” *Scoccolo Const., Inc. v. City of Renton*, 102 Wn. App. 611, 614-15, 9 P.3d 886 (2000). It is a basic rule of contract law that “[c]ourts will not revise a clear and unambiguous agreement or contract for parties or impose obligations that the parties did not assume for themselves.” *Condon v. Condon*, 177 Wn.2d 150, 163, 298 P.3d 86 (2013). Here, the contract clearly and unambiguously allocated to GCC the risk of any extra time or extra money due to “high tailrace levels” (CP 101) and required GCC to “[p]rovide complete standby equipment, installed and available for immediate operation ... to adequately maintain dewatering on a continuous basis” if GCC’s system became “inadequate.” CP 2185. Application of interpretive principles to unambiguous contract language is “inappropriate.” *Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wn. App. 416, 423, 909 P.2d 1323 (1995). “This court not only should not, but it cannot, rewrite the clear agreement of the parties.” *Warner v. Design and Build Homes, Inc.*, 128 Wn. App. 34, 41, 114 P.3d 664 (2005). Thus, the trial court’s matter of law ruling that GCC may pursue a claim for extra money and extra time for that which the GCC-PUD contract

unambiguously assigned GCC the risk has no support in Washington law.

The engineer's 4/12/07 GC-18 determination rejected GCC's coffer cell flooding claim, citing both SR-11B ("The Contractor may encounter ... high tailrace levels ... during the course of the work") and the engineer's 10/19/06 letter to GCC ("... during the period of time that the coffer cell is expected to be in service, the tailwater elevation could exceed elevation 497 feet for extended periods of time"). CP 15165-15166. GC-18 rendered that determination "final" unless GCC filed "a written protest, stating clearly and in detail the basis thereof, within ten (10) days" of receipt of the determination. CP 4946. GCC did not timely file such a protest, resulting in that determination being final. CP 15156. The rule of law applicable to a contract that designates the engineer the arbiter in disputes between the contractor and owner follows:

The law is well established in this State that where, by the contract of the parties ... the engineer ... is made the umpire or arbiter to determine differences which may arise in the performance of the contract ... the certificate of such umpire ... is final and conclusive upon the parties in the absence of fraud, misconduct, or palpable mistake on his part.

*W&J Sloane v. State*, 161 Wash. 414, 416, 297 P. 194 (1931); *see also* 13 Am. Jur. 2d, Building and Construction Contracts, §42.

GCC's noncompliance with the protest requirements of GC-18 and GCC's not submitting any admissible evidence of fraud, misconduct, or palpable

mistake necessitate affirming the engineer's 4/12/07 determination.

## V. CONCLUSION

The holdings of the Washington Supreme Court in *Mike M. Johnson* and *American Safety Casualty* as well as the holdings of Washington appellate courts in *Realm*, *Absher Construction Co.*, and *Hensel Phelps Construction Co.*, establish governing Washington law.

When this court has once decided on a question of law, that decision, when the question arises again, is not only binding on all inferior courts in the state, but it is binding on this court until the case is overruled.

*Godfrey v. Reilly*, 146 Wash. 257, 259, 262 P. 639 (1928); *see also State v. Castillo*, 150 Wn. App. 466, 467, 208 P.3d 1201 (2009) (citing *Godfrey*).

The PUD respectfully requests the Court to correct the erroneous statements of law on the basis of which the trial court denied dismissal of GCC's Claims 1, 2 (subparts 2 and 3), 7, 11 (subparts 1 and 2), and 16 and remand to the trial court for entry of an order of dismissal of these claims.

Respectfully submitted this 13<sup>th</sup> day of November, 2014.

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

By



DAVID E. SONN, WSBA #7216

H. LEE LEWIS, WSBA #46478

Attorneys for Public Utility District No. 2 of Grant  
County

## **VI. TABLE OF APPENDICES**

**A. GC-14**

**B. G-15**

**C. GC-10**

**D. GC-18**

GC-14 CHANGES IN WORK

Without invalidating the Contract, the District may make changes by altering, adding or deducting from the work, and/or make changes in the drawings and specifications requiring changes in the work and/or materials and equipment to be furnished under this Contract; provided such additions, deductions or changes are within the general scope of the Contract. Except as provided herein, no official, employee, agent or representative of the District is authorized to approve any change in this Contract and it shall be the responsibility of the Contractor before proceeding with any change, to satisfy himself that the execution of the written Change Order has been properly authorized on behalf of the District. The District's Manager and Division Directors, under certain conditions as set forth in District Resolution No. 7687, have authority to approve Change Orders up to \$10,000.00 or less. Only the District's Board of Commissioners may approve Change Orders in excess of \$10,000.00.

Charges or credits for the work covered by the approved changes shall be determined by one or more, or a combination of the following methods, at the District's option:

- A. Unit prices specified in the Unit Prices for changes in work submitted with the Contractor's Bid Proposal, if any.
- B. An agreed lump sum.
- C. The actual cost of:
  - 1. Labor, including foreman.
  - 2. Materials entering permanently into the work.
  - 3. The Districtship or rental cost of construction plant and equipment during the time of use on the project. The equipment rental rates paid by the District shall not exceed eighty-five percent (85%) of the price given in the current W.S.D.O.T. - AGC agreement.
  - 4. Power and consumable supplies for the operation of power equipment.
  - 5. Insurance.
  - 6. Social Security and old age and unemployment contributions.
  - 7. To the sum of Items 1, 2, 4, 5, and 6 inclusive, there shall be added a fixed fee of fifteen percent (15%). The fee shall be compensation to cover the cost of supervision, overhead, bond, profit and any other general expenses.

When a change is ordered by the District, as provided herein, a Change Order shall be executed by the District and the Contractor before any Change Order work is performed. The District shall not be liable for any payment to Contractor, or claims arising therefrom, for Change Order work which is not first authorized in writing as set forth in this Section GC-14. All terms and conditions contained in the Contract Documents shall be applicable to Change Order work. Change Orders shall be issued on the form attached as Exhibit A and shall specify any change in time required for completion of the work caused by the Change Order and, to the extent applicable, the amount of any increase or decrease in the Contract Price.

If any such change or alteration in the work shall result in a decrease of the work to be performed or materials, equipment, and apparatus to be furnished, no allowance shall be made to the Contractor in computing any resulting decrease in the Contract Price for loss of anticipated profits, but if the Contractor, before receiving the District's notice of intention pursuant to this Article, shall have incurred any expense in connection with the proper performance of the

Contract which shall be rendered unnecessary by such change or alteration, such allowance shall be made therefore to the Contractor as the District shall determine to be fair and reasonable.

The Engineer may instruct the Contractor to make minor changes in the work where such changes are not inconsistent with the purposes of the Contract, do not involve any additional cost and will not require an extension of the Contract completion date. The Contractor shall make no such changes without receipt of a District Instruction, Exhibit C, setting forth the changes to be made. Contractor's compliance therewith shall constitute its acknowledgment that such changes will not result in any claim for additional payment or extension of the Contract completion date. If the Contractor believes the instruction will result in additional costs or time extensions, Contractor shall promptly notify the District of the same and not proceed with the changes. District's Instructions, when issued, will be in writing and signed by the Project Engineering Manager or by the Project Engineer on behalf of the Project Engineering Manager.

No waiver of any provision of the Contract, and no consent to departure therefrom, by either party, shall be effective unless in writing and signed by the waiving or consenting party, and no such waiver or consent shall extend beyond the particular case and purpose involved.

#### GC-15 PAYMENT/RETAINAGE

Contractor shall submit an invoice for approval and payment by District for each Bid Item as shown on Bid Form for work satisfactorily completed.

Each request for payment shall be accompanied by an executed Prevailing Wage Affidavit as required in GC-28.

Invoices shall be addressed as follows:

Attn: Chris Akers  
Contracts Officer  
Public Utility District No. 2  
of Grant County, Washington  
15655 Wanapum Village Lane SW  
Beverly, Washington 99321

The District will withhold the sum of five percent (5%) of the amount of each progress payment to the Contractor as retainage in accordance with R.C.W. Chapter 60.28 of the Revised Code of the State of Washington.

If the District is requested in writing by the Contractor, the monies reserved hereunder (retainage) shall be placed in escrow with a bank or trust company located in Grant County, State of Washington by the District and interest on such escrowed funds shall be paid to the Contractor as said interest accrues, all as more fully provided in R.C.W. Chapter 60.28. However, any payments made to the Contractor hereunder shall not relieve the Contractor from responsibility under provision of the Contract and warranties.

in such event sustain, and said amount is agreed to be the amount of damages which the District would sustain, and said amount shall be retained from time to time by the District from current periodical estimates.

G-15 DELAYS AND EXTENSIONS OF TIME

If the Contractor is delayed at any time in the progress of work by any unforeseeable causes beyond the control of the Contractor, the Contract time shall be extended for such reasonable time as the Engineer shall determine. The Contractor agrees to complete the work within the Contract time as thus extended. Such extensions shall postpone the beginning of period for payment of liquidated damages but they and the events producing them shall not be grounds for claim by the Contractor of damages or for additional costs, expenses, overhead or profit or other compensation. Except for delays caused by the acts or omissions of the District or persons acting for it, extensions of time granted by the Engineer to the Contractor shall be the Contractor's sole and exclusive remedy for any delays due to causes beyond the control of the Contractor.

All claims for extension of time shall be made in writing to the District no more than 3 days after the Contractor knows or by reasonable diligence should know of the event causing or likely to cause the delay; otherwise, they shall be waived. In the case of a continuing cause of delay only one claim is necessary. Contractor's failure to give such notice promptly and within such time limit shall be deemed sufficient reason by the Engineer for denial of any time extension request.

Avoidable delays in the prosecution or completion of the construction, for which no time extension shall be granted, shall include all delays which in the opinion of the Engineer could have been avoided by the exercise of care, prudence, foresight and diligence on the part of the Contractor or his Subcontractors. Additionally, delays in the prosecution of parts of the construction which may in themselves be unavoidable but do not necessarily prevent or delay the prosecution of other parts of the construction nor the completion of the whole construction within the time herein specified shall constitute avoidable delays for which no time extension shall be granted.

All changes of the construction time or changes of the construction schedule shall be made by Change Orders to the Contract pursuant to Section GC-14.

G-16 ROCK EXCAVATION

No additional payment shall be made to Contractor for excavation of rock or because of subsurface conditions encountered in the performance of the work. Contractor's bid price shall include all such work.

G-17 NONCOMPLIANCE

The Contractor shall, upon receipt of written notice of noncompliance with any provision of this Contract and the action to be taken, immediately correct the conditions to which attention has been directed. Such notice, when served on the Contractor or his representative at the site of the work, shall be deemed sufficient. If the Contractor fails or refuses to comply promptly, the Engineer may issue an order to suspend all or any part of the work. When satisfactory corrective action is taken, an order to resume work will be issued. No part of the time lost due to any such suspension order shall entitle the Contractor to any extension of time for the performance of the Contract or to reimbursement for excess costs or damages.

Contractor. In the event of damages to person or property caused by or resulting from the concurrent negligence of District or its agents or employees and the Contractor or its agents or employees, the Contractor's indemnity obligation shall apply only to the extent of the Contractor's (including that of its agents and employees) negligence.

- E. Contractor acknowledges that by entering into a contract with the District, he has mutually negotiated the above indemnity provisions with the District. Contractor's indemnity and defense obligations shall survive the termination or completion of the Contract and remain in full force and effect until satisfied in full.

#### GC-9 LAWS, REGULATIONS, PERMITS

The Contractor represents that he has familiarized himself with, and will be governed by, all Federal, State and local statutes, laws, ordinances, and regulations.

Unless the Contract Documents provide otherwise, all permits and licenses necessary to the prosecution of the work shall be secured by the Contractor at his own expense, and he shall give all notices necessary and incident to the due and lawful prosecution of the work.

#### GC-10 DAMAGES

Any claims arising under the Contract by the Contractor shall be made in writing to the Engineer no later than ten calendar days after the beginning of the event or occurrence giving rise to the claim. Failure to make written claim prior to the time specified in the Contract Documents shall constitute waiver of any such claim.

#### GC-11 AUTHORITY OF ASSISTANTS AND INSPECTORS

The Engineer may appoint assistants and inspectors to assist him in determining that the work performed and materials furnished comply with contract requirements. Such assistants and inspectors shall have authority to reject defective material and suspend any work that is being done improperly, subject to the final decisions of the Engineer, or to exercise such additional authority as may be delegated to them by the Engineer. All work done and all materials furnished shall be subject to inspections by the Engineer or his inspectors at all times during construction and manufacturing.

#### GC-12 INDEPENDENT CONTRACTOR, SUPERINTENDENT, AND EMPLOYEES

It is understood and agreed that in all work covered by the Contract, the Contractor shall act as an independent contractor, maintaining complete control over his employees and all of his Subcontractors. The Contractor shall perform the work in accordance with his own methods, subject to compliance with the Contract. The Contractor shall perform the work in an orderly and workmanlike manner, enforce strict discipline and order among his employees and assure strict discipline and order by his Subcontractors, and shall not employ or permit to be employed on the work any unfit person or anyone unskilled in the work assigned to him.

The Contractor shall designate in writing before starting work a competent, authorized site representative who shall be authorized to represent and act for the Contractor in all matters relating to the Contract. The Contractor's letter designating this representative shall clearly define the scope of his authority to act for the Contractor and define any limitations of this authority. Said authorized representative shall be present at the site of the work at all times when work is in

reasonable time, take action on the Contractor's final request for payment, and on acceptance of construction. Such action shall be subject to the condition of the Performance Bond, legal rights of the District, required warranties, and correction of faulty construction discovered after final payment. The District shall have the right to retain from any payment then due the Contractor, so long as any bills or claims remain unsettled and outstanding, a sum sufficient, in the opinion of the District, to provide for the payment of the same. It is also understood and agreed that, in the case of any breach by the Contractor of the provisions hereof, the District may retain from any payment or payments which may become due hereunder, a sum sufficient, in the opinion of the District, to compensate for all damages occasioned by such breach including any such damages arising out of any delay on the part of the Contractor.

Sixty (60) days after completion of all Contract work, including Contractor's delivery of a properly completed Certificate of Completion and Release to the Engineer, retainage may be claimed by the Contractor; provided, however, that there are no claims filed of materialmen or laborers and that the District has received the certificate of the Washington State Department of Revenue of payment in full of all taxes and affidavit showing payment of prevailing wages. If any liens remain unsatisfied after final payment is made, the Contractor shall refund to the District such amounts as the District may have been compelled to pay in discharging such liens including all costs and reasonable attorney's fees.

#### GC-18 ENGINEER'S STATUS, AUTHORITY AND PROTEST PROCEDURE

The Engineer shall represent the District. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract. He shall also have authority to reject all work, equipment, and materials which do not conform to the Contract and to decide questions which arise in the execution of his work.

Approval by the Engineer signifies favorable opinion and qualified consent. It does not carry with it certification, assurance of completeness, assurance of quality, nor assurance of accuracy concerning details, dimensions, and quantities. Such approval will not relieve the Contractor from responsibility for errors or for deficiencies within his control.

All claims of the Contractor and all questions relating to the interpretation of the Contract, including all questions as to the acceptable fulfillment of the Contract on the part of the Contractor and all questions as to compensation, shall be submitted in writing to the Engineer for determination within the applicable time period specified in the Contract Documents.

All such determination and other instructions of the Engineer will be final unless the Contractor shall file with the Engineer a written protest, stating clearly and in detail the basis thereof, within ten (10) calendar days after the Engineer notifies the Contractor of such determination or instruction. The protest will be forwarded by the Engineer to the District, which will issue a decision upon each such protest within a reasonable period of time. The District's decision will be final. Pending such decision, the Contractor, if required by the Engineer, shall proceed with the work in accordance with the determination or instructions of the Engineer.

**CERTIFICATE OF SERVICE**

I, Jeannette O'Donnell, hereby certify that

1. On November 13, 2014, I electronically filed:

**BRIEF OF APPELLANT** with the Court of Appeals Division III Clerk through the court's electronic filing system.

2. I sent a copy of this document via United States Postal Service, postage prepaid, to Plaintiff's counsel addressed as follows:

Mr. John S. Stewart  
Stewart Sokol & Larkin LLC  
2300 SW First Avenue, Suite 200  
Portland, OR 97201-5047

DATED at Wenatchee, Washington this 13<sup>th</sup> day of November, 2014.

  
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JEANNETTE O'DONNELL  
Legal Assistant  
Jeffers, Danielson, Sonn & Aylward, P.S.