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KING COUNTY
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM
PUBLIC FACILITIES DISTRICT and THE BASEBALL CLUB OF
SEATTLE, L.P.,

Appellants,

vs.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION; HUNT
CONSTRUCTION GROUP, INC., and KIEWIT CONSTRUCTION
COMPANY,

Respondents/Cross-Appellants,

vs.

LONG PAINTING, INC. and HERRICK STEEL, INC.,

Cross-Respondents

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CROSS-APPELLANT HUNT KIEWIT'S REPLY BRIEF

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I. ARGUMENT

Huber, Hunt & Nichols-Kiewit Construction (“Hunt Kiewit”) hired subcontractor Herrick Corporation (“Herrick”) to manufacture and prime the structural steel for Safeco Field, and subcontractor Long Painting Inc. (“Long Painting”) to prime, paint, and encapsulate the steel with a fireproofing intumescent layer. Seven years after substantial completion, the Mariners (as assignee of the PFD’s claims) brought this suit against Hunt Kiewit, squarely implicating the work performed by these two subcontractors.

The trial court properly dismissed the Plaintiffs’ case pursuant to RCW 4.16.310 and/or RCW 4.16.326(1)(g). However, Herrick and Long Painting (collectively, “the Subcontractors”) contend that even if this Court reinstates Plaintiffs’ action, Hunt Kiewit’s third party claims against them should remain dismissed.¹ Such a result is unsupported by the law and wholly inequitable.

Prime Contractors on public projects are often required by law (as Hunt Kiewit was here) to have a significant portion of the work performed

¹ Hunt Kiewit and the Subcontractors agree that if the Court upholds the trial court’s dismissal of the Mariners’ claims, the Court need not reach Hunt Kiewit’s conditional cross-appeal.

by subcontractors.² Prime Contractors must likewise be allowed to transfer the risk of extended liability through subcontract flow down clauses. Alternatively, Prime Contractors must be allowed to invoke the “benefit of the state” exemption to the statute of limitations to recover what is owed to the state as a result of their subcontractors’ contractual breaches. Any other outcome renders Prime Contractors subject to a significant liability gap, which is entirely inequitable given the requirements in Washington law for subcontracting on public works projects. Moreover, this liability gap does not serve the public interest, as it will inevitably be passed along to the state through higher bids for public works.

A. Flow-down provisions in the Subcontracts bind the Subcontractors to Hunt Kiewit to the same extent that Hunt Kiewit is bound to the PFD.

Through flow down provisions both broad and specific within the two subcontracts, both Herrick and Long Painting agreed to be bound to Hunt Kiewit to the same extent that Hunt Kiewit was bound to the PFD.

² Under Washington law, Hunt Kiewit was required to subcontract at least 70 % of the work. See RCW 39.10.390 (“The value of subcontract work performed and equipment and materials supplied by the general contractor/construction manager may not exceed thirty percent of the negotiated maximum allowable construction cost.”). In addition, Paragraph 10.3.6 of the Prime Contract states: “Other than for Work of the Bid Specified General Conditions and Work performed pursuant to the procedures set forth in Subparagraph 10.3.2 above or as otherwise expressly approved herein, minor pick-up and coordination type work, and subject to modifications as described in Article 14, the Contractor is prohibited from self-performance of the Work on this Project.” (emphasis added) CPs 1880 - 1881.

Per the Supreme Court’s earlier ruling in this matter, Hunt Kiewit remains bound to the PFD by virtue of the *nullum tempus* doctrine. There should be no difficulty in applying the plain language of the flow down provisions: if Hunt Kiewit remains liable to the PFD, Herrick and Long Painting remain liable to Hunt Kiewit to the same extent.

1. Herrick remains liable to Hunt Kiewit.

Herrick’s contract incorporates by reference the Prime Contract between Hunt Kiewit and the PFD. Specifically, “the Subcontractor agrees to be bound to the Contractor by the terms and provisions of” the Prime Contract “so far as they apply to the Work hereinafter described”. CP 1789, § 1(b). The Prime Contract is defined to include “all the general, supplementary and special conditions ... and all other documents forming or by reference made a part of the contract between the Contractor and Owner.” *Id.*, § 1(a). In addition, the Herrick Subcontract includes the following provisions:

[T]he Subcontractor warrants and guarantees the Work covered by this Subcontract and agrees to make good, at its own expense, any defect in materials or workmanship which may occur or develop *prior to the Contractor's release from responsibility to the Owner* therefor;

CP 1804, Section 11 (e) (emphasis added).

[T]he Subcontractor assumes toward the Contractor *all obligations and responsibilities that the Contractor assumes toward the Owner and others*, as set forth in the Prime Contract, insofar as applicable, *generally or*

specifically, to Subcontractor's Work.

Id., Section 11 (f) (emphasis added).

Herrick argues that the incorporation of the Prime Contract by reference in the Herrick Subcontract was limited to the provisions regarding Herrick's work (e.g., plans, specifications relating to Herrick's work), and does not apply to "procedural" aspects of the Prime Contract such as the accrual language of Article 13.7. For this proposition, Herrick relies upon *3A Industries, Inc. v. Turner Construction Co.*, 71 Wn. App. 407, 869 P.2d 65 (1993), review denied 124 Wn.2d 1006 (1994).

However, the incorporation of the Prime Contract in Herrick's Subcontract was *not merely limited to Herrick's work*. The Incorporation Clause in *3A Industries* read "The Subcontractor shall perform and furnish all the work ... in strict accordance with ... the terms and provisions of the General Contract." *3A Industries, Inc.*, 71 Wn. App. at 409-410. The only reference to the General Contract was to describe the work performance required by the subcontractor. In contrast, Herrick's Subcontract reads, "all of the aforesaid Prime Contract documents shall be considered a part of the Subcontract by reference thereto and the Subcontractor agrees to be bound to the Contractor by the terms and provisions thereof." CP 1789. This language is much more similar to the language in *Sime Constr. Co. v. Wash. Pub. Power Sys.*, 28 Wn. App. 10, 15, 621 P.2d 1299 (1980), where

the Court found that the procedural provisions of the Prime Contract applied to the Subcontract.³

The subsequent clause in §1(b), “so far as they apply to the Work hereafter described,” does not *limit* the incorporation of the Prime Contract to merely the details of the work performed, as in *3A Industries*. To the contrary, it indicates that in the performance of the work described, *all* the provisions of the Prime Contract (including “all the general, supplementary and special conditions,” CP 1789) apply to Herrick’s work. This is consistent with the Court’s holding in a case cited by Herrick, *Plum Creek Wastewater Authority v. Aqua-Aerobic Systems, Inc.*, 597 F.Supp. 2d 1228 (D. Colo. 2009). In *Plum Creek*, a supplier “agree[d] to abide by *all applicable terms and conditions*” of the Prime Contract. *Id.* at 1231. After a detailed review of much of the case law cited here by Herrick, the *Plum Creek* Court held that the flow down clause was not limited to details of performance, and that the forum selection clause of the Prime Contract flowed down to the supplier.⁴

³ Courts in other jurisdictions also utilize flow-down provisions to enforce obligations stemming from the contractor-owner relationship against subcontractors – much broader than provisions regarding “the work.” *E.g. Indus. Indem. Co. v. Wick Constr. Co.*, 680 P.2d 1100 (Alaska 1984) (liquidated damages provisions); *L&B Constr. Co. v. Ragan Enter., Inc.*, 482 S.E.2d 279 (Ga. 1997) (contractual bar to delay damages).

⁴ Any other result would make no sense, because the general, supplementary, and special conditions do not detail Herrick’s “Work” obligations, but relate almost exclusively to so-called “procedural” provisions of the Prime Contract. The Court should give effect to all the provisions of the Subcontract, including the specific incorporation of the general,

The other cases cited by Herrick are readily distinguishable. *U.S. ex rel. Quality Trust, Inc. v. Cajun Contractors, Inc.*, 486 F.Supp. 2d 1255, 1263 (D. Kan. 2007) stands for the proposition that a **Subcontractor** may not invoke the provisions of a flow down clause to incorporate a Federal Regulation, where the flow down clause only imposed **obligations** upon the Subcontractor but did not grant the Subcontractor the **rights** belonging to the Contractor in the Prime Contract. In *Topro Services, Inc. v. McCarthy Western Constructors, Inc.*, 827 F.Supp. 666 (D. Colo. 1993), the Court held that incorporation of the Prime Contract was only partial, where the Subcontract only stated “Subcontractor [Topro] binds itself to McCarthy **for the performance of Subcontractor's Work** in the same manner as McCarthy is bound to the Owner **for such performance** under McCarthy's contract with the Owner.” *Id.* at 667. Here, Herrick’s Subcontract incorporates not merely performance obligations, but broadly incorporates all obligations applicable to Herrick’s work. This language is broad enough to incorporate Article 13.7. *See, e.g., Plum Creek Wastewater Authority, Supra.*

Herrick also contends that the Subcontract’s references to “obligations and responsibilities” cannot be interpreted to incorporate

special and supplementary conditions. *Wagner v. Wagner*, 95 Wn.2d 94, 101,621 P.2d 1279 (1980).

Article 13.7 of the Prime Contract's General Conditions. However, Herrick's Subcontract *specifically incorporated* the "general, supplementary and special conditions" of the Prime Contract. As the Court held in *Mountain States Const. Co. v. Tyee Elec., Inc.*, 43 Wn. App. 542,545-46, 718 P.3d 823 (1986),

the specific reference in the *Sime* sub-subcontract to incorporation of "general, supplementary, and other conditions" is more specific than the ambiguous general reference here to "all obligations and responsibilities" of the contractor.

Herrick's subcontract, like the sub-subcontract in *Sime*, is specific enough to incorporate Article 13.7 of the Prime Contract General Conditions.⁵

Herrick also claims that Hunt Kiewit is trying to "pass down" the Mariners' and the PFD's exemption to the statute of limitations. This is not accurate. The flow down provisions of the Herrick Subcontract bind Herrick to Hunt Kiewit to the same extent that Hunt Kiewit is bound to the PFD. No "pass down" is required: if Hunt Kiewit is still liable to the PFD, then by the express language of the subcontract, so is Herrick.⁶

⁵ Herrick also tries to distinguish *Martin County v. R.K. Stewart & Son, Inc.*, 306 S.E.2d 118 (N.C. Ct. App. 1983), claiming that the subcontract in issue there contained the same "rights and remedies" language similar to that in *3A Industries*. There is no suggestion, however, that this difference in language was material to the *Stewart* Court's decision.

⁶ In addition, Herrick claims that the PFD has released Hunt Kiewit from liability with respect to its work. The fact that the PFD is suing Hunt Kiewit shows the inaccuracy of this claim.

2. Long Painting remains liable to Hunt Kiewit.

Both Herrick's Subcontract and Long Painting's Subcontract contain identical provisions §11(e) and (f) (CP 525), and §1 (CP 521) in each Subcontract are substantively equivalent. For the reasons discussed above, Long Painting remains liable to Hunt Kiewit by virtue of these provisions.

However, Long Painting's Subcontract also contains the following provision:

In case of any disputes between the Subcontractor and the Contractor, ***Subcontractor agrees to be bound to Contractor to the same extent that Contractor is bound to Owner*** both by the terms of the Prime Contract and by any and all decisions or determinations made thereunder by the party or board as authorized in the Prime Contract.

CP 526. This additional provision erases any possible ambiguity: Long Painting unequivocally agreed to assume a correlative position to Hunt Kiewit, and to be bound to Hunt Kiewit to the same extent that Hunt Kiewit was bound to the PFD. As the Court held in *3A Industries* in the face of similarly unambiguous language,

We hold that 3A's explicit agreement to afford Turner the same remedies that the State would have against Turner effectively bound 3A to submit to arbitration should Turner demand that forum for dispute resolution.

Id. at 418-419. Similarly, here Long Painting explicitly agreed to be bound by this provision to Hunt Kiewit, to the same extent that Hunt

Kiewit was bound to the PFD. If Hunt Kiewit is exposed to a potentially perpetual obligation to the PFD, then this provision, as well as those discussed above, obligates Long Painting to assume the same perpetual obligation. This is the nature of flow down provisions, especially ones as stark as those contained in the Long Painting Subcontract.

Long Painting also argues that §11(e) has been effectively superseded by §14 of the Subcontract's Supplemental Conditions. Long Painting can only make this argument by hiding much of the text of §14. A review of this provision reveals that §11(e) has not been superseded:

Subcontractor agrees to make good on any warranty for the term of this Agreement plus one year thereafter, or for a period coextensive with any warranty from Contractor to Owner, whichever is longer.... All warranties and requirements in this clause are in addition to those required elsewhere in the Contract Documents and/or this Agreement.

CP 536. The provisions of §11(e) have not been superseded.

Further, Long Painting (like Herrick above) argues that the flow down provisions of the subcontract are limited to the manner and quality of the subcontracted work, and do not incorporate procedural provisions like Article 13.7.

Long Painting points to no additional relevant authority that would change the analysis provided above. Long Painting points to *Mountain States Const. Co., supra*, in an attempt to argue that there was only limited

incorporation of the Prime Contract into its Subcontract. As discussed above, the contract in *Mountain States* is expressly distinguished from the kind of subcontract present here, which specifically incorporated the general, supplementary and special conditions of the Prime Contract.

Moreover, *Mountain States* is distinguishable for another reason. In *Mountain States*, the Contractor attempted to impose a duty (the duty to name the Contractor as an additional insured) that did not exist in the work documents themselves. Here, Hunt Kiewit does not attempt to impose any additional duties upon Long Painting. Hunt Kiewit merely asks that Long Painting be held responsible for the work that it was required by the contract documents to perform, “*to the same extent that Contractor is bound to Owner*”. CP 526, § 19. Long Painting is expressly required to do so by the terms of the Subcontract.

H.W Caldwell & Son is also not on point. Caldwell incorporated the Prime Contract only as it related specifically to the performance of the work. In contrast, §11(f) obligates Long Painting to the terms of the Prime Contract *both generally and as it relates specifically to Long Painting’s work*.

Long Painting’s reliance on *Wick* is also off-point. *Wick* involved a subcontractor invoking a sort of reverse flow-down argument that it should gain the benefit of the contract's liquidated damages provision, to

limit its liability for delayed work. Because of the specific language of that subcontract, the Court found that the liquidated damages provision was a "protection" that flowed down to the subcontractor. The presence or absence of this particular contractual language has no bearing on whether Long Painting has agreed to be bound to Hunt Kiewit to the same extent that Hunt Kiewit is bound to the PFD. Long Painting clearly and expressly did.

Long Painting also argues that, despite the express contractual provision that binds Long Painting's liability to Hunt Kiewit's, it should nevertheless be exonerated from liability for various policy reasons. First, it argues that the flow down provisions of the contract cannot impose additional liabilities without providing fair notice to the subcontractor. However, as discussed above, Hunt Kiewit is not seeking to impose an additional duty upon Long Painting. Rather, Hunt Kiewit just seeks to have Long Painting honor the promise it made in its contract: to be bound to Hunt Kiewit to the same extent that Hunt Kiewit is bound to Long Painting.

Long Painting also suggests that such an interpretation of the flow down provisions of the Contract would open it up to "a game of blindman's bluff, in which the subcontractor could never be certain of what it had agreed to in its subcontract." Brief of Long Painting at 36.

There is no unfairness here. The uncertainty that Long Painting agreed to accept was no greater or less than Hunt Kiewit accepted in the Prime Contract. Long Painting presumably read the contract documents prior to signing, and was in as good a position as Hunt Kiewit to predict whether Washington courts would apply the *nullum tempus* doctrine to the work. The Subcontract properly allocated the risk of liability, and Long Painting accepted the risk.

Long Painting also argues that, under established Washington law, a contractor's claims against a subcontractor may be time-barred even though the owner's claims against the contractor are not. None of the case law relied upon by Long Painting addresses the flow down arguments raised by Hunt Kiewit, and therefore none is binding precedent on this question. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Further, there is no indication that the flow down provisions of the subcontracts involved in those cases were identical or even similar to the flow down provisions of Long Painting's Subcontract.⁷

The allocation of risk found in Long Painting's Subcontract is

⁷ Long Painting also contends that Hunt Kiewit's argument leads to the problematic conclusion that a corporation could be sued long after dissolution. This is absurd. A dissolved corporation, much like a dead person, no longer exists as a legal person after the statutorily mandated period of time, and cannot be sued. Long Painting is a legal person under the law, and can be sued to live up to its plain contractual obligations.

broad and unequivocal: Long Painting agreed to be bound to Hunt Kiewit to the same extent that Hunt Kiewit is bound to the PFD. Long Painting received the benefit of its bargain with Hunt Kiewit, and was paid handsomely. It should be called to live up to its obligations under the plain meaning of its Subcontract.

B. The subcontractors are equitably estopped from invoking any limitation upon Hunt Kiewit's action.

Hunt Kiewit explained in its opening brief how the subcontractors are equitably estopped from seeking to avoid their obligations to Hunt Kiewit to "make good...any defect in materials or workmanship which may develop or occur prior to the Contractor's release from responsibility to the Owner therefore," and to assume toward the Contractor "all obligations and responsibilities that the Contractor assumes toward the Owner." Despite this unequivocal contract language, Herrick and Long Painting now seek to avoid their obligations to Hunt Kiewit through application of the statute of repose, even though such application is entirely inconsistent with their subcontract promises to Hunt Kiewit.

In an attempt to avoid a proper application of equitable estoppel, Herrick attempts to justify its inconsistent positions as follows:

Herrick's reliance on the statute of repose defense is not inconsistent with the "flow down" clauses in the Subcontract because Herrick never contemplated that the "flow down" clauses would preclude the application of the statute of repose and

potentially subject Herrick to unlimited liability. Put another way, Herrick never represented that it would not seek to rely on the statute of repose if that statute became applicable.

Herrick misses the point entirely. Whether Herrick ever contemplated the full effect of the flow down clauses has no bearing on whether Herrick is estopped from seeking to avoid its obligations to Hunt Kiewit. Rather, Herrick said it would stand behind its work and “make good” any defects therein until “the Contractor’s release from responsibility to the Owner.” By the plain language of this agreement, until such time as Hunt Kiewit it’s released from responsibility to the Owner, the subcontractors are also “on the hook.”

The same holds true for Long Painting. Long Painting agreed to guarantee its work for as long as Hunt Kiewit remained liable to the PFD. Hunt Kiewit is still liable to the PFD, yet Long Painting is trying to wriggle out from under its guarantee obligations under the contract. Yet Hunt Kiewit relied upon those representations in awarding Long Painting the contract. The principles of equitable estoppel prevent Long Painting from repudiating its unequivocal representations to guarantee its work and “make good.”

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C. To the extent that the PFD’s claims are brought “for benefit of the state,” Hunt Kiewit’s resultant claims against the subcontractors are as well.

Finally, the Court should reject Herrick and Long Painting’s arguments regarding Hunt Kiewit’s ability to claim protection of the “for benefit of the state” exception set forth in RCW 4.16.160. Both Herrick and Long Painting contend that the exception is not available to Hunt Kiewit because Hunt Kiewit is a “private entity” seeking indemnification “for its own benefit” (according to Herrick) and because “the PFD has not asserted any right to subrogation against Long Painting.”

Both arguments are without merit. First, Hunt Kiewit’s status as a “private entity” does not render the protections of RCW 4.16.160 unavailable, and the *Viretta Park* case cited by Herrick is distinguishable. In *Viretta Park*, the court held that the plaintiff did not qualify for RCW 4.16.160 protection because it was “acting for its own members, not for the City.” *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 373, 940 P.2d 286 (1997). In contrast, in constructing Safeco Field, Hunt Kiewit was building a “public work” with public funds. *See* RCW 39.04.010(4) (“Public work” means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein.”). Just as the State delegated the authority to

construct Safeco Field to the PFD, so, in turn did the PFD contractually delegate the actual work of constructing Safeco Field to Hunt Kiewit. And last but not least, Hunt Kiewit contractually delegated certain portions of that work to Herrick and Long Painting. To the extent that Herrick and Long Painting breached their contractual delegated obligations on the public work that is Safeco Field, Hunt Kiewit is entitled to the protection of RCW 4.16.160 to enforce the same.⁸

Long Painting contends that Hunt Kiewit cannot claim the protections of RCW 4.16.160 simply because the PFD has not asserted a right to subrogation. However, Long Painting does not cite a single case supporting its position. And as pointed out in response to Herrick's argument regarding this issue, Hunt Kiewit is not seeking to recover any damages for itself. All funds sought from Herrick and Long Painting are strictly for any damages resulting from Hunt Kiewit's liability to the PFD.

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⁸ Herrick also contends that the protections of RCW 4.16.160 are not available to Hunt Kiewit because "the State stands to be made whole by Hunt Kiewit regardless of whether Herrick pays any monies to Hunt Kiewit." Herrick Brief at 17. There is absolutely no support in the record for Herrick's statement, nor is there any evidence regarding Hunt Kiewit's ability to "make the State whole" regardless of whether Herrick contributes to the same. This is not to say that Hunt Kiewit does not have the ability to do so; Hunt Kiewit makes no representations regarding this issue. But Herrick again misses the point – Hunt Kiewit is not seeking to recover from Herrick or Long Painting for its own independent financial benefit, but rather to pay their proper share of any damages awarded to the PFD.

II. CONCLUSION

Hunt Kiewit was required, by Washington law and the terms of the prime contract, to subcontract the majority of work on the Safeco Field project. As is standard in the construction industry, Hunt Kiewit included various risk-transfer mechanisms in its subcontracts to ensure that the responsibility and cost for construction defects would be born by the appropriate party. Herrick and Long Painting are now asking the Court to invalidate those risk-transfer mechanisms. If the Court rules agrees with Herrick and Long Painting, Hunt Kiewit faces potentially significant liability by being whipsawed between an owner whose claims are exempt from the statute of limitations, and subcontractors who have a bar to liability, despite having performed the work and being best able to control the associated risks. Such an outcome would be contrary to Washington law, and highly inequitable.

For the foregoing reasons, if the Court reverses the dismissal of the Mariner's claims against Hunt Kiewit, Hunt Kiewit respectfully requests the Court to likewise reverse the trial court's dismissal of Herrick Steel and Long Painting.

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Dated this 14th day of February, 2011.

Respectfully submitted,

GROFF MURPHY, PLLC

A handwritten signature in black ink, appearing to read 'D. Groff', written over a horizontal line.

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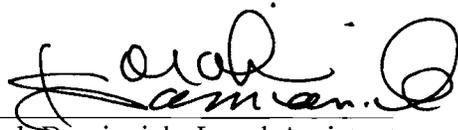
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DATED: February 14, 2011.


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