

70432-0

No. 92744-8

70432-0

No. 70432-0-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

KING COUNTY,

Respondent/Cross-Appellant,

v.

VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/  
FRONTIER-KEMPER, JV, a Washington joint venture;  
TRAVELERS CASUALTY AND SURETY COMPANY OF  
AMERICA, a Connecticut corporation; LIBERTY MUTUAL  
INSURANCE COMPANY, a Massachusetts corporation;  
FEDERAL INSURANCE COMPANY, an Indiana corporation;  
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a  
Maryland corporation; and ZURICH AMERICAN INSURANCE  
COMPANY, a New York corporation,

Appellants/Cross-Respondents.

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF APPELLANT VINCI CONSTRUCTION GRANDS  
PROJETS/PARSONS RCI/FRONTIER-KEMPER, JV

OLES MORRISON RINKER &  
BAKER, LLP  
By: Peter N. Ralston  
WSBA No. 8545  
Thomas R. Krider  
WSBA No. 29490  
701 Pike Street, Suite 1700  
Seattle, WA 98101  
(206) 623-3427

HORVITZ & LEVY LLP  
By: Frederic D. Cohen  
*Pro Hac Vice*  
Mitchell C. Tilner  
*Pro Hac Vice*  
15760 Ventura Boulevard,  
18th Floor  
Encino, CA 91436-3000  
(818) 995-0800

Attorneys for Appellant Vinci Construction Grands Projets/  
Parsons RCI/Frontier Kemper, JV

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STATE OF WASHINGTON  
DIVISION I

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## I. INTRODUCTION

Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV (VPFK) appeals from a \$155 million judgment in these cross-actions arising from a construction contract with respondent King County. The trial court's erroneous legal rulings undermined VPFK's claims against the County and hamstrung its defense to the County's breach of contract action.

King County awarded VPFK the contract to build two sections of a four-section, 13-mile tunnel connecting the Brightwater wastewater treatment facility to Puget Sound ("Central Contract" or "Contract"). The two sections VPFK contracted to build, called BT-2 and BT-3, comprised the middle six miles of the tunnel.

The Contract, which the County wrote, required VPFK to excavate the tunnels using two slurry tunnel boring machines (STBMs), massive machines two stories high and almost as long as a football field. An STBM uses slurry, a pressurized mixture of water and a form of clay called bentonite, to prevent water from entering the tunnel during excavation and to prevent the soil in the excavated tunnel from becoming unstable or even collapsing. The slurry is also used to transport the excavated soil through pipes back to the surface 200 to 300 feet above.

An STBM can be operated efficiently only if the nature of the soil to be excavated can be identified in advance. Because the project's plans and specifications, developed by the County after years of studying the soil conditions, *required* VPFK to use an STBM, VPFK understood the soil conditions would be reasonably predictable.

That turned out not to be the case. The soil conditions changed frequently and unpredictably and, as a result, VPFK fell behind its projected work schedule. VPFK invoked the change order clauses of the Contract to request additional time and money to complete the job. Without considering VPFK's principal extension requests, the County declared VPFK in default. VPFK ultimately completed the BT-2 tunnel, but the County hired another contractor to excavate the second half of the BT-3 tunnel (about two miles) using a tunneling machine the County's Contract prohibited VPFK from using.

In its breach of contract action, the County sought (1) the extra expenses it incurred because the project was not completed on time, and (2) its extra payments to the replacement contractor who completed the BT-3 tunnel with a different machine. VPFK cross-claimed, seeking the additional expenses it incurred performing its work under conditions different from those indicated by the Contract. VPFK also alleged the County breached the Contract by refusing to

grant VPFK's requests for change orders for more time and money to complete its work. VPFK alleged that, had the extensions been granted, the County would not have had grounds to declare VPFK in default, and VPFK would not have been liable for the extra costs and expenses the County incurred to complete the project.

The jury's verdict—for all the damages the County sought—was tainted by two erroneous summary judgment rulings that effectively eviscerated VPFK's claims and defenses.

In the first ruling, the trial court granted the County's motion for summary judgment on VPFK's differing site condition claims based on the frequency of transitions between different types of soil. Under Washington law and the Contract's differing site condition clause, VPFK was entitled to additional time and money if actual soil conditions proved to be materially different from those indicated by the Contract. VPFK opposed the County's motion by presenting evidence that it encountered far more frequent and abrupt soil transitions than the Contract indicated, and each additional transition cost VPFK time and money. VPFK's evidence raised a triable issue of material fact. The court erred by granting summary judgment on VPFK's differing site condition claims and removing the issue from the case.

In the second ruling, the court granted the County's motion for partial summary judgment on VPFK's cause of action for defective specifications. Under Washington law and persuasive federal law, the government agency impliedly warrants that, if the contractor follows the agency's plans and specifications, the contractor will achieve the desired result and will be able to finish the work by the specified deadline. VPFK opposed the County's motion by presenting evidence that by following the County's plans and specifications, VPFK could not achieve the desired result and could not complete the work by the Contract deadline. This evidence raised a triable issue of material fact, and the court erred by granting partial summary judgment and removing from the case a significant part of VPFK's cause of action for defective specifications.

The court's erroneous summary judgment rulings prevented VPFK from showing the jury that (1) the problems VPFK faced were largely attributable to the frequently changing and unpredictable soil, which differed materially from the conditions that reasonably could be inferred from the Contract, and (2) the County prevented VPFK from solving these problems by improperly refusing to issue change orders that would have given VPFK additional time and money to perform the work in a manner appropriate to the ground conditions rather

than the manner specified in the Contract, which proved to be inadequate and dangerous. Frequent soil transitions and defective specifications were the two grounds upon which VPFK pursued its most important Requests for Change Orders. By depriving VPFK of the right to pursue those theories at trial (an error the court aggravated when it repeatedly allowed the County to inform the jury that the court had already ruled VPFK's theories lacked merit), the court denied VPFK a fair trial and improperly hindered VPFK in its ability to defend itself against the County's breach of contract claim.

Other errors also require reversal.

First, the court erred by refusing to instruct the jury that the County impliedly warranted that the tunnel could be successfully completed in the manner prescribed by the County's plans and specifications and that, if that warranty was breached, VPFK was entitled to extra compensation.

Next, the court erred by refusing to enforce the Contract's provision that if VPFK did not finish its work on time, the County's damages would be measured by specified liquidated sums. That error paved the way for the jury to award delay damages three times greater than the amount the County would have recovered had the court enforced the Contract's liquidated damage provision.

Finally, the court committed prejudicial error by excluding highly relevant evidence of concurrent delays, which the County belatedly produced during trial. The County claimed that VPFK delayed the project for 18 months, causing the County \$40 million in damages. Shortly before trial, VPFK learned that problems with another contractor's work on the BT-1 tunnel had concurrently delayed the project during the same 18-month period, a fact that imperiled the County's effort to hold VPFK solely responsible for the claimed delay damages. The court ordered the County to produce additional evidence, which confirmed the concurrent delay. The court then wrongly prohibited VPFK from introducing this new evidence at trial. As a result, VPFK was denied a fair opportunity to rebut the County's delay claim, which amounted to almost a third of the County's total claimed damages.

## **II. ASSIGNMENTS OF ERROR**

A. The trial court erred by entering its August 7, 2012 order granting King County's motion for summary judgment on VPFK's counterclaim for differing site conditions based on the frequency and abruptness of soil transitions VPFK encountered while performing the work. (CP 1082-83.) As a result of this error, the court also erred by giving Instruction Number 10, which informed the jury that the court

had decided VPFK's "frequent soil changes" claim lacked merit. (CP 9102; *see* RP 5675-76.)

B. The trial court erred by entering its August 7, 2012 order granting King County's motion for partial summary judgment on VPFK's counterclaim arising from King County's specification of the slurry tunneling boring machine and the County's prescriptions for performing the work with that machine, i.e., the breach of implied warranty/defective specifications claim. (CP 1082-83.) As a result of this error, the court also erred by giving Instruction Number 10, which informed the jury that the court had decided VPFK's "defective specifications" claim lacked merit. (CP 9102; *see* RP 5675-76.)

C. The trial court erred by refusing to give VPFK's proposed instruction captioned "Owner Furnished Plans and Specifications," which would have informed the jury that the County impliedly warranted its plans and specifications were adequate to accomplish the work within the prescribed time. (CP 7818; RP 6237-54, 6302-72, 6712.)

D. The trial court erred by entering its August 7, 2012 order denying VPFK's motion for summary judgment to limit its liability for any delay damages to the liquidated sums specified in the Contract. (CP 1082-83.)

E. The trial court erred by excluding VPFK's evidence of concurrent delays by another contractor. (RP 5041-52.)

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

A. Whether the trial court erred by ruling that there was no triable issue of fact whether the frequency and abruptness of soil transitions VPFK encountered were materially different from those reasonably indicated by the Contract.

B. Whether the trial court erred by ruling that there was no triable issue of fact whether the County's plans and specifications were defective, even though VPFK submitted evidence on summary judgment that the work could not be completed within the budget and time allowed by using the required machine in the manner mandated by the plans and specifications.

C. Whether the trial court erred by refusing to instruct the jury that a government agency impliedly warrants that, if a contractor follows the agency's plans and specifications, the contractor will be able to complete the required work in a timely and proper manner.

D. Whether the trial court misconstrued the County's Contract and erred by allowing the County to recover delay damages exceeding the amount recoverable under the Contract's liquidated damages provisions.

E. Whether the trial court erred by excluding evidence that would have eliminated or reduced VPFK's liability for the County's delay damages claim because another contractor was concurrently responsible for the delays.

#### IV. STATEMENT OF THE CASE<sup>1</sup>

##### A. Statement Of Facts.

##### 1. King County designs Brightwater.

In 1999, after years of study, King County embarked on the first expansion of the County's wastewater treatment system since the 1960s. (RP 568.) The Brightwater project would consist of 13 miles of tunnels, hundreds of feet underground, connecting a treatment plant near the King/Snohomish County border with Puget Sound. (RP 803, 2034; CP 4; *see ex. 4019*, at 2.) Excavation work would be divided

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<sup>1</sup> The facts discussed in this section are drawn from the evidence introduced at trial and are relevant in analyzing the instructional and evidentiary errors discussed in Argument sections C. and E. below. *Diaz v. State*, 175 Wn.2d 457, 472, 285 P.3d 873, 881 (2012) (evidentiary error not prejudicial "unless it affects, or presumptively affects, the outcome of the trial"); *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097, 1102 (1983) (same rule for instructional error). In reviewing the court's refusal to give an instruction, the evidence should be viewed in the light most favorable to VPFK. (*State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150, 1154 (2000).) Arguments A., B., and D. below challenge summary judgment rulings and rely solely on the evidence submitted in connection with the summary judgment motions, which is separately addressed in those Argument sections. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754-55, 162 P.3d 1153, 1160 (2007) ("It is our task to review a ruling on a motion for summary judgment based on the precise record considered by the trial court").

among three contracts: one for BT-1, the east tunnel; one for BT-2 and BT-3, the central tunnels; and one for BT-4, the west tunnel. (RP 570.)

In 2002, the County's engineers and geotechnical experts began designing Brightwater. (RP 2648-49.) The elevations where the tunnels were to be built were well below the water table, and the water pressure along the entire route was expected to be high. (Ex. 1143, at KCo059099, KCo059101; *see* RP 3574-76.) In a February 2004 report, the engineers concluded that, because of these conditions, the tunnels would have to be excavated with machines that apply constant pressure against the tunnel face, the ground directly in front of the machine, to prevent water from intruding and the ground from collapsing. (Ex. 1143, at KCo059110; *see* RP 1078, 3575-76.)

The engineers advised the County it could use one of two types of machines: (1) an earth pressure balance (EPB) machine, in which a screw controls the amount of soil in the excavation chamber at the front of the machine, and the excavated soil in turn exerts pressure to support the face (RP 3585, 4322; ex. 4033, at 16); or (2) a slurry tunnel boring machine (STBM), which uses a pressurized slurry fluid consisting primarily of water and bentonite to continually infuse the tunnel face, making it impermeable and preventing it from collapsing. (RP 3590-91; *see* RP 1106, 2780; ex. 4033, at 17, 19-20.) The two types

of machines also transport the excavated soil in different ways. An EPB machine transports soil to the surface by small rail cars or conveyer belts (RP 2279); an STBM mixes the excavated soil with slurry and transports it through a closed pipe system to a factory-sized plant located on the surface, where the slurry is separated from the soil and then reused (RP 1236; ex. 1143, at KC0059112-13). The predesign engineers' report observed that, in order to separate the slurry from the soil, "it is important to have detailed knowledge of the anticipated ground conditions to optimize the separation plant specifications and properly plan the muck [i.e., excavated soil] disposal procedures." (Ex. 1143, at KC0059112; see RP 3414 (same).) In other words, an STBM can be operated efficiently only if the soil conditions are reasonably predictable and consistent.

**2. The County decides to require contractors to use STBMs to excavate the central tunnels.**

In 2005, following extensive internal debate, the County's construction management team prepared a draft report recommending that the central tunnels be built with EPB machines. (RP 4372, 4375, 4378-79 ("on the basis of the soil types likely to be encountered, an EPB is overwhelmingly more suitable than a slurry TBM"); cf. ex. 1245, at CH2M000426, CH2M000433.) Before the managers prepared a final recommendation, the County instead

decided to require that the two central tunnels—BT-2 and BT-3—be excavated with STBMs, based on the County’s expectation that the underground water pressure would be higher than the pressure in which EPB machines had previously worked. (RP 2040, 2215, 2777-78; ex. 6, at KCo001022; ex. 1611, at KC\_EM\_0050757.) The County incorporated that requirement into the Contract it drafted for the BT-2 and BT-3 tunnels. (Ex. 6, at KCo001022 (“Slurry TBM *is required*”) (emphasis added); ex. 1275, at KC\_EM\_0021455.) The County’s contracts for the BT-1 and BT-4 tunnels, by contrast, gave contractors a choice of machines. (See RP 1589-90.) The contractors who successfully bid on those contracts opted to use EPB machines. (RP 4836).

**3. The County prepares data and baseline reports on soil conditions, critical information for contractors submitting bids.**

Because Brightwater was a public works project, the County was required to award each contract to the lowest responsible bidder. (RCW 36.32.250; RP 578-79.) To enable bidders to estimate their costs and prepare bids, the County provided bidders with the plans and specifications it had prepared, and with two reports reflecting the County’s conclusions about ground conditions, both of which were incorporated into the Central Contract. (RP 2648-49.)

The Geotechnical Data Report (GDR) contained data about soil conditions (RP 1064, 2925) from more than 200 bore holes with an average depth of 265 feet that the County had drilled every 300 to 400 feet along the tunnel route (RP 717, 1081). The GDR included boring logs, photos of core samples, and the results of laboratory tests on the soil. (RP 1064.) The County also prepared a Geotechnical Baseline Report (GBR) interpreting the data in the GDR. The GBR stated its purpose was “(1) to set baselines for geotechnical conditions to be encountered during construction, (2) to provide a basis for bidding, and (3) to provide a basis for resolution of any claims of differing site condition (DSC).” (Ex. 7, at KC0001781; ex. 1402, at KC0085011.)

The GBR identified four dominant soil types along the tunnel route, described their characteristics, and identified the percentage of various combinations of these dominant soils that would be found along the route, for example, 16-23 percent full-face teal (i.e., fine-grained sticky soil) on the BT-2 route. (Ex. 7, at KC0001785, KC0001789-91, KC0001820-21.) Section 1036 of the Contract invited contractors to draw their own conclusions about soil conditions so long as they did not contradict the County’s baseline figures in the GBR. (Ex. 6, at KC0000740.) Section 02310 of the contract indicated that the contractor would be able to draw conclusions about expected

ground and groundwater conditions along the entire tunnel route. (Ex. 6, at KC0001029.)

The Contract also addressed “interventions,” the regular and necessary inspections and maintenance of the cutterhead, the large rotating disk on the front of the STBM that housed the soil-cutting tools. (RP 577, 2320, 2792-93, 3094-95; ex. 6, at KC0001032-33; ex. 4033, at 9 (picture of cutterhead).) Interventions could be dangerous. Workers would need to exit the protected environment of the STBM and advance through airlocks into the excavation chamber behind the cutterhead. (RP 1232-33, 2793.) If the STBM was exerting air pressure against the tunnel face to prevent it from collapsing, workers in the chamber, like deep sea divers, would be subject to high pressure (hyperbaric conditions) and would have only a limited time to work. (RP 920, 2683.) Also, if the STBM supervisor did not know the true nature of the ground conditions around the cutterhead, information needed to establish the correct slurry mix and pressure, the tunnel face could collapse and trap or even kill workers. (RP 1745, 2229-30, 2682-83.)

The Contract assured bidders that in 30 percent of the planned intervention locations along the tunnel route, atmospheric pressures would prevail, making it unnecessary for the STBM to exert

countervailing air pressure to keep water out and to prevent the face from collapsing during interventions. (See RP 737-39.) Workers at those locations could safely enter the excavation chamber in an unpressurized environment, and the interventions would be far less expensive and time-consuming to perform. (RP 523-24; ex. 6, at KCO001033; ex. 7, at KCO001793.) The Contract also indicated that, during interventions in areas with pressure above atmospheric conditions, the tunnel face could be supported solely with slurry and compressed air. (Ex. 6, at KCO001030.)

**4. Relying on the GDR, GBR and other contract documents, VPFK successfully bids on the Central Contract.**

As part of its pre-bid analysis, VPFK hired two civil engineering experts to study the GDR and GBR and to prepare reports about the soil conditions. (CP 7657; RP 1721.) Joseph Guertin, a specialist in soil mechanics, authored one of the reports. (CP 7653-54, 7657; ex. 1364, at 1.) Guertin recognized that the soil conditions were complex, but concluded, based on the information in the GBR, that it was possible to predict the “dominant soil types likely to be encountered” along the BT-2 and BT-3 routes. (CP 7661-62, 7676-77, 7688 (the dominant soil would control tunneling behavior); ex. 1364, at 1, 6.) In a follow-up

report, he prepared color-coded charts identifying the dominant soil at each location along the route. (CP 7687; ex. 1364, at 8 and following).

VPFK also obtained a report from civil engineer Jean Launay. (RP 2920-21, 2969; ex. 1048.) Using the GDR and the GBR, Launay, like Guertin, identified the dominant soils VPFK would likely encounter along sections of the tunnel, estimates that he believed would be accurate within 30 feet. (RP 2954, 2966; ex. 1048, at KC0090924-27.) In drawing his conclusions, Launay considered the topography of the land (RP 2954) and made the “usual assumption in the geotechnical world” (*id.*) that if the same type of soil is found at two adjacent bore holes, similar soil will be found between the bore holes (RP 2954-55). This “usual assumption” is called “interpolation.” (*Id.*)

In estimating its costs and preparing its winning \$209 million bid, VPFK relied on the two experts’ reports. VPFK also relied on its own interpretation of the GBR and other Contract indications, including the County’s representation, based on its multi-year study of the soil data (RP 2925-26, 3478), that atmospheric conditions would exist in 30 percent of the intervention locations (RP 2648; ex. 1611, at KC\_EM\_0050757).

In June 2006, VPFK and the County executed the Central Contract to construct the BT-2 and BT-3 tunnels. (RP 2649, 2655; exs. 6, 1380.) Under the Contract, VPFK had until November 14, 2010, to complete its work. (RP 679, 5374; ex. 6, at KC0000600.)

**5. VPFK encounters unexpected soil conditions and falls behind schedule.**

Soon after it began work, VPFK encountered ground conditions different from those indicated in the Contract documents, conditions that persisted as it continued its work:

- The Contract assured VPFK it would not experience water pressure above 75 pounds per square inch (psi). (Ex. 6, at KC0001033.) VPFK submitted a change order request for pressure above that level four months after it began working. The County eventually agreed to issue a change order compensating VPFK for its added costs. (RP 871; ex. 1611, at KC\_EM\_0050757.)

- While installing a shaft at the North Kenmore Portal, VPFK ran into clay at locations not shown on the GBR. (RP 2658.) STBMs are not well suited to digging clay. (Ex. 1611, at KC\_EM\_0050757.) The County compensated VPFK for its extra costs. (*Id.* at KC\_EM\_0050758.)

- After digging 50 feet along the BT-2 route, VPFK encountered clay at locations not shown on the GBR. (RP 2658;

ex. 1439; ex. 1611, at KC\_EM\_0050758.) The County deferred ruling on VPFK's request for a change order until the tunnel was complete and soil conditions over the tunnel's full length could be assessed. (Ex. 1442, at RH\_001054.)

- Though the County had represented in the GBR that 30 percent of the interventions could be performed in locations with atmospheric pressure (RP 737-38, 859-60), after excavating for a year VPFK had yet to encounter atmospheric pressure in the tunnel. Because all work had to be performed under hyperbaric conditions, the time and cost of interventions proved to be substantially greater than planned. (RP 4178; *see* RP 922 (County agrees that hyperbaric interventions take more time and money).)

VPFK also found that, contrary to its predictions, the changes between dominant soil types were abrupt and unpredictable, which caused problems and delays. (RP 3800-07, 4172.) An STBM supervisor and project engineer need to know the type of soil in which the machine is operating in order to choose the proper slurry and pressure to support the tunnel face during excavations and interventions, and in order to transport excavated soil to the ground-level slurry treatment plant. (RP 1278, 3510, 3596.) Advance knowledge of soil conditions is also essential for correct operation of

the slurry treatment plant, which employs different filtering systems and processes to remove different types of soil. (RP 3510.)

Because STBMs pump excavated soil to the treatment plant in closed pipes that further mix the soil in transit, VPFK had difficulty determining the type of soil in which the STBM was operating. (RP 924-25, 3597-98.) Consequently, VPFK had to rely largely on its interpretations of the GBR and the GDR and on the other Contract indications to make educated guesses about the conditions in which it was mining and the type of slurry and filtering equipment needed for the work. (RP 3598.) When these predictions turned out to be inaccurate, the work was disrupted. It took more time and became more expensive. (See RP 2791, 3805-07, 4183-84, 4308-09, 4826.) The work was further delayed when VPFK had to modify settings and change filters at the slurry treatment plant to separate the slurry from the unpredictable and frequently changing soil. (RP 912, 1549, 4428; ex. 35, at KCo090564 (VPFK submits change order request because “sediments were passing the screens . . . because the face conditions change too quickly”).)

The conditions also made the interventions more dangerous. When VPFK had to work under hyperbaric conditions with a slurry designed for a type of soil different from what it actually encountered,

the tunnel face became unstable, endangering workers and delaying inspection and repair work. (RP 3722 (instabilities, referred to as anomalies, occurred at more than half of the locations where VPFK performed interventions); RP 3738 (when a face became unstable, the intervention had to be abandoned and the STBM moved to a safe location).) Because the soil types were unpredictable and frequently changed, VPFK was effectively reduced to operating a state-of-the-art machine by guesswork.

**6. VPFK submits requests for change orders based on differing site conditions and defective specifications.**

A year after it began working, VPFK submitted to the County two omnibus change order requests seeking additional time and money because of the ongoing problems with tunnel excavations and interventions. (Exs. 68, 1514.)

In Request for Change Order (RCO) 65, VPFK gave notice that it was experiencing “increased cost and time to perform the inspection and maintenance works under hyperbaric conditions on this Project.” (Ex. 1514, at VPFK\_E\_00210022.) In the Contract, the County had represented that VPFK would be able to perform 30 percent of its interventions at atmospheric pressure, 20 percent at pressure less than 50 psi, and 50 percent at pressure between 50 psi and 75 psi.

(Ex. 6, at KC0001033.) VPFK found no atmospheric pressures, and the pressures it actually encountered turned out to be materially higher than those described in the Contract. (Ex. 1514, at VPFK\_E\_000210023.)

In RCO 66, VPFK gave notice of its defective specification and differing site condition claims. (Ex. 68.) In its defective specification claim, VPFK asserted: “[T]he plans and specification prepared for this project were defective, with regard to the ability of the prescribed method of construction to complete the project, in the ground conditions actually encountered in the tunneling alignment, within the timeframes specified in the contract.” (*Id.* at KC0090657.)

VPFK’s differing site condition claim was not the first claim it submitted relating to the unpredictable ground conditions. Months earlier, in RCO 56, VPFK gave notice that face conditions “abruptly change more often than [sic] expected . . . .” (Ex. 35, at KC0090564; ex. 40 (RCO 56 relates to the abruptness of changes in the soil, not the frequency of changes); ex. 1541 (identifying three differing site condition RCOs).) The RCO 66 notice listed three additional ways in which ground conditions differed from those described in, or which could reasonably be inferred from, the GBR: (1) the soil changed from one type to another more frequently than expected; (2) the percentage

of each soil differed from the global amounts described in the GBR; and (3) the number of hyperbaric interventions was greater than expected. (Ex. 68, at KC0090655.)

**7. VPFK supports its change order requests with expert reports endorsing the method it used to predict ground conditions from the soil data in the County's GDR.**

Two expert reports VPFK submitted to the County to support RCOs 65 and 66 concluded that VPFK had acted reasonably and consistently with industry practices in interpolating the soil conditions between adjacent bore holes, and that no contractor could have prepared a bid or performed the work without interpolating. (Ex. 110, at KC0090859, KC0090865, KC0090866, KC0090879 (VPFK's interpretation "presupposes a certain degree of continuity of the soil types between the boreholes. This assumption is common practice and absolutely reasonable".) Because the County's GBR provided no information about soil conditions at locations other than bore holes or about the frequency of transitions between dominant soil types (ex. 110, at KC0090864, KC0090909), VPFK asserted that its interpretation of the GBR was the appropriate baseline for evaluating its differing site condition claims (*id.* at KC0090860).

The County agreed that VPFK had to draw its own inferences about ground conditions along the tunnel route in order to bid, plan,

and execute the job. (Ex. 1628, at KC0009413.) However, it rejected VPFK's position that VPFK's interpretation of the soil conditions should be the baseline for evaluating its differing site condition claims. (*Id.* at KC0009414.) The County deferred ruling on VPFK's change order requests until further information about the soil could be collected. (Ex. 128, at KC\_EM\_0000501.)

**8. Damage to both STBMs brings the work to a halt. An expert panel convened to investigate the damage recommends changes to the County's prescribed manner of drilling.**

In May and June 2009, VPFK discovered that the back sides of the rim bars—structural circular steel rings on the circumference of the cutterhead—were damaged on both the BT-2 and BT-3 STBMs. (RP 754-55, 1624-25; *see* ex. 141, at KC0091631; ex. 4038, at 1 (picture of cutterhead and rim bar).) According to the manufacturer, no STBM anywhere had ever suffered such damage in the same manner. (RP 1640, 1748-49, 2799, 3750; ex. 1626, at KC0000891.) VPFK believed the damage was caused by the unexpectedly unstable soil it had encountered. (Ex. 141, at KC0091630-31.)

When the rim bar damage was discovered, both STBMs were about 330 feet underground, under pressures that exceeded the Contract ceiling of 75 psi. (RP 2690-91, 2807; ex. 1620, at 1.) When VPFK attempted to inspect the BT-2 machine, the tunnel face proved

to be unstable and dangerous, as it had been on many previous occasions when interventions were attempted at high pressure. (RP 2790-91, 3105, 3722, 3727-28.) VPFK tried digging forward to a safer location, but moving the STBM further damaged the rim bar and threatened the structural integrity of the cutterhead. (RP 2688-89; ex. 141, at KC0091630.)

To determine a procedure to fix the rim bars, and to consider more broadly the problems caused by unpredictable soil, VPFK and the County convened a jointly selected panel of international experts, including representatives from the County's Brightwater design team. (RP 780, 3482-83; ex. 126, at 3; ex. 128, at KC\_EM\_0000499; ex. 1635, at KC\_EM\_0061197; ex. 1649, at 2.) Following three days of meetings, the expert panel made two recommendations relevant to this appeal.

First, the panel endorsed VPFK's proposal to eliminate or reduce the pressure at the disabled STBMs by pumping water from the ground through surface wells (dewatering). (RP 781-83, 972, 3112; ex. 1649, at 6.) With the County's authorization and following the panel's recommendation, VPFK completed the repair of the BT-2

STBM in February 2010<sup>2</sup> (RP 1357-60, 2211, 3159; ex. 138, at VPFK\_EM00016151) and built a safe haven, i.e., a low-pressure workspace, to repair the BT-3 STBM (RP 1970, 3201; ex. 128, at KC\_EM\_0000499-501).

The expert panel's second recommendation was to perform all future interventions under atmospheric conditions (artificial safe havens), because of the dangers posed by interventions under high pressure in unpredictable ground conditions. (RP 974, 3109, 3113-14, 4470; ex. 1626, at HK0000891; ex. 1649, at 11 (intervention without dewatering and depressurization "is not an option").) The panel recommended that bore holes to test soil conditions be drilled every 200 or 300 feet and that safe havens be created every 1,000 feet by pumping water from the ground. (RP 633, 784, 787, 974, 2647; ex. 1649, at 13-14.)

The County initially agreed with this recommendation. The County committed to review specific locations where VPFK recommended that exploratory bore holes be drilled and safe havens

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<sup>2</sup> The repair took nine months because the BT-2 STBM was located between aquifers, i.e., areas of subterranean water (RP 5107-08), that were not shown on the County's GBR, and because removing the unexpected additional water in that location proved to be more expensive and time consuming than anyone expected (RP 991, 1965, 5101, 5107, 5136).

created, and to take the lead on getting the necessary permits. (RP 631; ex. 130.) But when VPFK submitted change order requests for time and money to implement the bore hole and safe haven regimen (exs. 1667, 1673), the County denied the requests, claiming the procedures constituted part of VPFK's "means and methods" for which the County would not pay (RP 1162, 2752; ex. 1690, at KC009442; ex. 1696; *see also* ex. 1686). Without any engineering or expert support, the County also for the first time disputed the expert panel's conclusion that conducting interventions outside of safe havens was dangerous. (RP 634-35; ex. 1690, at KC009442; *see* ex. 1686, at KC0009437; ex. 1687.)

**9. After the BT-4 tunnel contractor offers to complete the BT-3 tunnel using an EPB machine, the County declares VPFK in default and later deducts the remainder of the BT-3 excavation work from its Contract.**

In July 2009, while VPFK was finalizing the plan to fix the broken STBMs, the contractor excavating the BT-4 tunnel eastward from Puget Sound, JDC, told the County it would be open to using its EPB machine—a machine the County had prohibited VPFK from

using—to complete the excavation of the BT-3 tunnel.<sup>3</sup> (RP 2098.) The County believed JDC’s machine would be better suited than an STBM for the remaining excavation work on the BT-3 tunnel. (RP 942-43; ex. 1611, at KC\_EM\_0050757.) Into the fall of 2009, JDC and the County’s engineers continued to explore the possibility of JDC using its EPB machine to complete the BT-3 tunnel excavation. (RP 2099-2100.)

By agreed change order, the County gave VPFK until October 30, 2009 to submit additional documentation supporting its entitlement to RCOs 65 and 66, the change order requests it had submitted a year earlier seeking extra time and money to complete the tunnels because of the unpredictable nature of the soils and the defective specifications. (RP 1987-88; ex. 138, at VPFK\_EM 00016155-56.) However, two days before the October 30 deadline, the County declared VPFK in default under the Contract, alleging VPFK had failed “to prosecute the Work or any portion thereof with sufficient diligence to ensure Substantial Completion of the Work within the Contract Time.” (RP 2102-03, 2109-10; ex. 6,

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<sup>3</sup> JCT was the contractor on the BT-4 tunnel contract. (RP 2271-72, 2286.) When the BT-4 tunnel was completed, the contractor was renamed JDC. (RP 2286.) We refer to it as JDC.

at KC0000491; ex. 142 (default notice).) The County asserted that VPFK's pending change order requests did not relieve VPFK of its obligation to complete the work by the existing deadline, November 14, 2010. The County gave VPFK 16 days to submit a corrective action plan and to explain how its default will be "cured in a timely fashion." (Ex. 6, at KC0000491; ex. 142, at VPFK\_EM\_00171390.)

VPFK timely complied with the County's demand to submit a corrective action plan, but strongly disagreed with the County's assertion that it was in default. (Ex. 145, at KC\_EM\_0003145, KC\_EM\_0003172.) Consistent with the expert panel's conclusion, VPFK reiterated that it was essential to drill exploratory bore holes and create safe havens to safely complete the work with an STBM. (*Id.* at KC\_EM\_0003163.) If the County took the lead in obtaining the permits and easements necessary to create safe havens, as it originally agreed to do, VPFK represented it would complete the tunnels by December 22, 2011. (RP 1993; ex. 130, at KC\_P\_0000089; ex. 145, at KC\_EM\_0003166, KC\_EM\_0003171.)

The County rejected VPFK's corrective action plan on the ground VPFK proposed a completion date later than the existing Contract deadline. (Ex. 1730, at KC0132984.) The County refused to extend the Contract deadline so that VPFK could build safe havens for

its workers, and the County refused to assist VPFK by obtaining the permits or easements necessary to build safe havens. (*Id.* at KC0132982.)

Having rejected VPFK's corrective action plan, the County could have terminated its Contract with VPFK. (Ex. 6, at KC0000491.) But the County chose not to terminate. Instead, it proposed that the parties mediate their disputes. (Ex. 1733, at KC\_EM\_0003947.) As part of the mediation, the County requested that VPFK "[c]onsider[ ] whether [it] is willing to subcontract to the Brightwater West Contractor [JDC] to assist in completing BT 3 from the west." (*Id.* at KC\_EM\_0003948.) VPFK raised the issue with JDC, but JDC said it had no interest in working as a subcontractor for VPFK. (RP 4480.)

The mediation proceeded. In February 2010, the County and VPFK entered into an Interim Agreement that memorialized the County's decision to negotiate an agreement with JDC to complete the BT-3 tunnel excavation and to deduct that work from VPFK's contract. (Ex. 152, at KC0010115.) The County and VPFK reserved their rights against each other:

[King County] has the right to pursue a claim against VPFK based on the allegation that VPFK is in default and that King County's costs to complete the BT-3 tunnel that exceeds \$16,487,552 million were caused by that default . . . . If King County pursues such a claim,

VPFK reserves its right to assert such default claim was improper.

(CP 585.)

Two weeks after signing the Interim Agreement, the County hired JDC to begin working on the BT-3 tunnel with its EPB machine. (Exs. 1765, 1783.) The County agreed to reimburse JDC for its costs, then estimated to be \$68 million, and to pay a flat \$4.5 million in profits, \$8.8 million for keeping its equipment on the job, and an incentive bonus for meeting milestone dates, which amounted to \$4 million. (RP 2214, 2293-94, 2451, 2455.)

**10. VPFK completes the BT-2 tunnel. Thirteen months later, JDC completes the BT-3 tunnel.**

On February 25, 2010, VPFK and the County executed a second mediated agreement providing that VPFK would receive incentive payments of up to \$5 million if it completed the excavation of the BT-2 tunnel by specified milestone dates. (Ex. 155, at KC\_E\_1192610.) Using bore holes and safe havens—the cost of which roughly equaled the \$5 million incentive payment—VPFK completed the BT-2 tunnel without further problems in June 2010 and received the full incentive payment. (RP 1974, 2008, 2013-14, 2044, 2218, 3259, 3264-65, 4872-73.)

Using its EPB machine, JDC finished excavating the BT-3 tunnel in July 2011. (RP 2052-53.) After JDC connected the two excavated segments of BT-3 (RP 2327-28), VPFK completed all remaining work on both BT-2 and BT-3 (RP 4362-66). On October 29, 2012, the Brightwater treatment plant began operating. (RP 5528.)

**B. Procedural History.**

Two weeks after it hired JDC, the County filed this action against VPFK for breach of contract. (CP 1-14.) VPFK counterclaimed, alleging that the County's plans and specifications were defective and that the County breached the Contract by refusing to grant change orders and time extensions for differing site conditions. (CP 74-89.)

On the eve of trial, the court granted two of the County's motions for summary judgment and dramatically changed the course of the trial. First, the court ruled that VPFK could not pursue a differing site condition claim based on the allegation that the ground conditions changed more frequently than the Contract indicated. Second, it ruled that VPFK could not pursue a claim that the County's plans and specifications were defective in requiring VPFK to perform the work with an STBM. In a third ruling, the court denied VPFK's motion for summary judgment to limit the County's delay damages to the liquidated sums specified in the Contract. (CP 1082-83.)

The County presented two damage claims to the jury: one for the extra cost of completing Brightwater, including hiring JDC to complete the excavation of the BT-3 tunnel, and the other for roughly \$40 million in costs the County claimed it incurred because VPFK allegedly delayed Brightwater's opening by 18 months. (RP 2523-58.) Among other defenses, VPFK asserted that the contractor excavating the BT-1 tunnel delayed the project during the same 18-month period, which would have been a complete defense to the County's delay claim. (CP 1670-84.) After allowing VPFK to conduct discovery on this issue during trial, the court precluded VPFK from presenting evidence of this concurrent delay. (RP 5051-52.)

The County prevailed on both of its damage claims and recovered \$155,831,471. (CP 4537.) VPFK recovered \$26,252,949 on the change order claims that went to the jury, some of which related to the costs it incurred repairing the rim bar damage. (*Id.*; CP 4543-54.) The jury found VPFK was not entitled to any extra time to complete its work. (CP 4552-53.)

On May 7, 2013, the court entered final judgment for the County and against VPFK in the net amount of \$129,578,522.00. (CP 4536-37.) On May 31, 2013, VPFK filed a timely notice of appeal from the May 7 judgment. (CP 4533-63.)

## V. LEGAL ARGUMENT

### A. The Trial Court Committed Prejudicial Error By Granting Summary Judgment On VPFK's Claim Arising From Frequent Soil Transitions.<sup>4</sup>

1. **VPFK was entitled to additional compensation when ground conditions differed materially from those indicated in the Contract and made the work more costly to perform.**

The Central Contract provided that if VPFK encountered a “differing site condition” that made the work more difficult, it was entitled to additional compensation. (Ex. 6, at KCo000472; CP 251.) Differing site conditions included “[s]ubsurface or latent physical conditions at the site which differ materially from those indicated in the Contract Documents (Type 1) . . . .” (CP 274.)

For purposes of applying the differing site conditions clause, the Contract's indications about ground conditions did not have to be “explicit or specific.” *Renda Marine, Inc. v. United States*, 66 Fed. Cl.

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<sup>4</sup> This court reviews de novo a trial court's decision to grant summary judgment. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860, 867 (2013). “Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 27 n.15, 244 P.3d 438, 443 n.15 (2010), *rev. denied*, 171 Wn.2d 1020 (2011). All reasonable inferences are to be drawn in favor of the party opposing the summary judgment motion. *Johnson*, 159 Wn. App. at 27 n.15. Summary judgment based on an erroneous interpretation of the law will be reversed. *See Cerrillo v. Esparza*, 158 Wn.2d 194, 208, 142 P.3d 155, 161 (2006).

639, 652 (2005) (internal quotation marks omitted). “An ‘indication’ may be proven . . . by inferences and implications.” *Foster Constr. C. A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 881 (Ct. Cl. 1970). (See CP 262 (County agrees a contract indication may be “express or implied”).)<sup>5</sup>

Furthermore, a contractor may draw inferences about ground conditions not only from the information the owner provides about the soils but also from the way in which the Contract, including the plans and specifications, directs the work to be performed. In *Foster*, for example, the Court of Claims held:

the notation as to the types of concrete; the direction that “all concrete shall be placed in the dry”; the omission from the concrete provisions of the documents of any provision for a concrete seal or for a class of concrete of which seals are made; and the so-called “6 tons” note—are sufficient in themselves, without the logs, to sustain the determination that a changed condition was encountered . . . *the design features to which we have referred reasonably ‘indicate’ the type of subsurface conditions expected to be encountered.*

*Foster*, 435 F.2d at 875 (emphasis added).

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<sup>5</sup> Washington courts commonly look to federal procurement law for guidance, especially in the area of public contracting law. See, e.g., *Mottner v. Town of Mercer Island*, 75 Wn.2d 575, 452 P.2d 750 (1969); *Golf Landscaping, Inc. v. Century Constr. Co.*, 39 Wn. App. 895, 696 P.2d 590 (1984).

**2. In opposition to the County’s summary judgment motion, VPFK submitted evidence that the soil’s tunneling characteristics changed more frequently than indicated in the Contract, making the work more costly to perform.**

Relying on its reasonable interpretation of the Contract documents and the Contract’s differing site condition clause, VPFK alleged that it was entitled to additional compensation because it encountered more frequent changes between plastic (sticky) and nonplastic soils than the Contract indicated, which made tunneling more costly and time-consuming. (CP 69, 73, 76.)

The County moved for summary judgment on the ground that “the Contract Documents *did not indicate* any baselines as to the frequency or suddenness of ‘transitions’ between [tunnel soil groups],” and VPFK therefore could not demonstrate that the actual soil conditions differed from those indicated in the Contract. (CP 262.)

To defeat the County’s summary judgment motion, VPFK only had to submit evidence supporting the conclusion that the ground conditions in the BT-2 and BT-3 tunnels “differ[ed] materially from those indicated in the Contract Documents . . . .” (CP 274.) VPFK presented such evidence.

VPFK showed that, as authorized by the Contract (*see* CP 845), and as a responsible contractor would do in any event, VPFK

undertook its own analysis of the Contract documents before submitting its bid (CP 842-43) and found that they indicated that the transitions between plastic and nonplastic soils would be gradual and manageable—not frequent and chaotic.

VPFK's opposition included evidence that, as part of its analysis and review, VPFK retained two geotechnical experts to analyze the Contract documents and determine what those documents indicated about the locations and expected frequency of transitions between plastic and nonplastic soils. (CP 882.) The first expert, Jean Launay, prepared a report that identified the expected locations of the transitions between soils with differing tunneling characteristics. (CP 885-86.) VPFK also received a report from Joseph Guertin of GZA GeoEnvironmental, Inc., which included a chart showing the transitions between the dominant soil types likely to control tunneling behavior, from which the number of transitions easily could be determined. (CP 843, 847, 852, 855-57.)

Taking into account these expert reports (including their assumptions and interpolations from the Contract documents, notably the GDR and the GBR) (RP 2924-25), VPFK's chief in-house estimator Jean-Pierre Debaire prepared his own analysis showing where he believed the ground would be mostly plastic and mostly nonplastic

(CP 880-82). Debaire concluded the changes between these dominant soil types would be gradual, not chaotic, and that gradual changes were manageable. (CP 877-78.)

On October 8, 2007, VPFK submitted charts to the County showing its preconstruction expectations about soil conditions along the tunnel routes, which were consistent with its pre-bid expectations. (CP 908-11.)

VPFK's pre-bid analyses showed that the transitions between plastic and nonplastic soils would be gradual, without specifically counting the number of such transitions. However, after VPFK began tunneling, one of the County's consultants analyzed the number of transitions between plastic and nonplastic soils that could be derived from VPFK's October 8 preconstruction analysis. The consultants concluded that VPFK's chart indicated there would be 12 significant transitions on the BT-2 route and 11 on the BT-3 route. (CP 483, 913-14.) Based on the same information, the consultants concluded there would be around 32 transitions on the BT-2 route and 25 on the BT-3 route. (CP 914.)

In fact, the actual number of transitions was in the range of *seven times* the number that could be derived from VPFK's chart, and *six times* the number estimated by the County's own consultants.

(CP 483, 914.) In short, contrary to VPFK's reasonable expectations, the transitions were neither gradual nor manageable. The unexpected frequency and abruptness of the transitions between the plastic and nonplastic soils significantly delayed the tunneling work on both BT-2 and BT-3. (CP 842.)

To summarize, VPFK's evidence showed that, after reviewing the Contract documents and two expert reports analyzing the documents, VPFK's chief estimator concluded the transitions that mattered most—those between plastic and nonplastic soils—would be gradual, manageable, and not chaotic. (CP 877-78.) The ground conditions actually encountered proved to be materially different. Whether VPFK's interpretation of the Contract documents was reasonable and supported a differing site condition claim raised a factual issue that should not have been resolved by the court on summary judgment. *Serv. Chevrolet, Inc. v. Sparks*, 99 Wn.2d 199, 660 P.2d 760 (1983) (reversing summary judgment and remanding for factual determination of reasonableness of party's actions).

VPFK also introduced evidence that the GBR and GDR represented that there are "slight but discrete changes that can occur" between ground conditions found at the bore holes. (CP 410.) Based on this information, before preparing its bid, VPFK interpolated the

ground conditions likely to be found *between* the bore holes. (CP 879-80.) The jury could have found VPFK's interpolation was entirely reasonable. *See Foster*, 435 F.2d at 883 ("Both interpolation and extrapolation were reasonable. On their face, therefore, the logs give readily discernible, strong and therefore entirely reasonable indications, within the meaning of the changed conditions clause, that relatively impermeable and stable and firm materials would be encountered.").

Further, because the County *required* VPFK to use an STBM, a machine that can be operated efficiently to meet the contractual milestones only in predictable soil conditions (CP 843, 877-78), VPFK concluded before submitting its bid that "the ground would be sufficiently predictable to efficiently operate the STBM" (CP 843). Whether this inference was reasonable also was an issue for the jury, not for the court on summary judgment. *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863, 867 (1991) ("findings of fact on summary judgment are not proper").

In short, VPFK presented more than sufficient evidence to create a triable issue of fact concerning its frequent soil transitions claim.

**3. The trial court overlooked governing law and relevant facts when it granted the County's motion.**

The court nevertheless granted the County's motion, reasoning that because the County did not *affirmatively* specify the number of soils transitions, VPFK could not base a differing site conditions claim on the frequency of transitions. (CP 1083 (“there had been no representation”).) The court committed legal error.

As demonstrated above, the contractor may base a differing site condition claim on *inferences* reasonably drawn from contract documents. Indeed, the Contract here invited VPFK to draw its own inferences, so long as they did not contradict the baselines in the County's GBR. (CP 845.) Prior to submitting its bid, that is exactly what VPFK and its experts did. VPFK's conclusions about the frequency of transitions did not contradict any baselines in the GBR; there were no such baselines. Whether VPFK's conclusions were reasonable was a factual question. *Serv. Chevrolet*, 99 Wn.2d at 204-05.

The court also erred when it drew the factual conclusion that there had been no “reliance as to the frequency or number of transition.” (CP 1083.) VPFK presented evidence that it relied on its experts' reports about soil transitions when it bid, managed, and

operated the STBM. (CP 842-43.) The County’s own engineering firm, CDM, acknowledged that VPFK officials reported that “their means and methods required them to make assumptions regarding the frequency of changes in tunnel face conditions along the tunnel drives,” which is further evidence of reliance. (CP 914.)

In short, VPFK’s differing site condition claim based on the frequency of soil transitions was supported by the facts and the law. The trial court erred by granting the County’s summary judgment motion and taking the claim away from the jury.

**4. The court’s error was prejudicial.**

An order erroneously granting summary judgment on a claim is inherently prejudicial and requires reversal. *Beers v. Ross*, 137 Wn. App. 566, 569, 154 P.3d 277, 279 (2007) (“because the record reveals material issues of disputed fact, we reverse the trial court’s award of summary judgment and remand the matter for trial”). The order dismissing VPFK’s claim arising from frequent soil transitions was particularly prejudicial because of the central role that claim played in RCO 66, one of VPFK’s most important change order requests. (See ex. 68, at KCO090655.) While VPFK presented *other* differing site condition claims to the jury—including claims based on differences in water pressure, soil abrasivity, and percentage of soil types—none of

these claims encompassed VPFK's frequent soil transitions claim. As explained above, VPFK's estimated production rates for tunneling incorporated and relied on its assumptions about how frequently the tunneling characteristics of the soil would change between plastic and nonplastic conditions. The unexpectedly high frequency of soil changes—seven times greater than reasonably anticipated—affected every aspect of VPFK's operations in ways not reflected in its other differing site condition claims. Furthermore, by instructing the jury that this central claim “fail[s] as a matter of law, and [has] been dismissed from the case” (RP 6813), the court undermined VPFK's credibility with respect to its remaining claims and defenses.

**B. The Trial Court Committed Reversible Error By Granting Partial Summary Judgment On VPFK's Defective Specifications Claim.<sup>6</sup>**

- 1. An owner impliedly warrants that the plans and specifications it requires the contractor to follow are adequate for the work. The owner bears the risk when the plans and specifications prove to be inadequate.**

When a project owner (such as the County) directs a contractor (such as VPFK) to follow its plans and specifications, it impliedly warrants that they are sufficient for their intended purpose: “[I]n

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<sup>6</sup> An appellate court reviews de novo a trial court's decision to grant summary judgment. *See supra* note 4.

calling for proposals to produce a specified result by them, [the owner] may fairly be said to have warranted them adequate to produce that result.” *Huetter v. Warehouse & Realty Co.*, 81 Wash. 331, 336, 142 P. 675, 677 (1914); see *Weston v. New Bethel Missionary Baptist Church*, 23 Wn. App. 747, 753-54, 598 P.2d 411, 415 (1978) (citing numerous opinions applying this rule). Four years after the Washington Supreme Court decided *Huetter*, the United States Supreme Court confirmed that this principle applies in federal contract cases. *United States v. Spearin*, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918). What has come to be known as the *Spearin* doctrine is now a basic tenet of government contracting law, as the County has conceded. (CP 189-90.)

Several principles follow from the *Huetter/Spearin* implied warranty doctrine. First, when a government agency requires a contractor to build in accordance with its plans and specifications, the agency, not the contractor, bears the risk if the plans and specifications prove to be defective, i.e., inadequate to accomplish their intended result. *Huetter*, 81 Wash. at 335. The contractor is entitled to additional compensation for the extra work required to overcome the defective plans. *Haley v. Brady*, 17 Wn.2d 775, 788-89, 137 P.2d 505, 511-12 (1943).

Second, a contract that imposes a deadline for completion of the work impliedly warrants “that the contractor will be able to complete the project timely, as designed.” *City of Seattle v. Dyad Constr., Inc.*, 17 Wn. App. 501, 517, 565 P.2d 423, 433 (1977), *rev. denied*, 91 Wn.2d 1007 (1978); *id.* at 519 (affirming contractor’s right to extension of time and damages award when faulty plans delayed completion of project by four months).

Third, the owner’s implied warranty extends to both the particular equipment and the construction process mandated by the owner’s plans and specifications. Thus, “the government is liable if specified equipment cannot be successfully used in performing the contract.” John Cibinic, Jr. et al., *Administration of Government Contracts* 282 (4th ed. 2006); *see* 3 Bruner & O’Connor, *Construction Law* § 9:96 (2013) (the owner is liable if it “specif[ies] . . . an unsuitable construction method”); *see, e.g., Tyee Constr. Co. v. Pac. Nw. Bell Tel. Co.*, 3 Wn. App. 37, 38-40, 472 P.2d 411, 412-14, *rev. denied*, 78 Wn.2d 995 (1970) (owner liable for costs contractor incurred replacing conduits damaged as the result of a construction method mandated by owner); *Teufel v. Wienir*, 68 Wn.2d 31, 33, 36, 411 P.2d 151, 153, 154-55 (1966) (owner must compensate contractor

for cost of installing a defective curtain wall where the make and model of the wall were selected by owner).

Applying principles derived from *Spearin*, the Board of Contract Appeals in *Appeal of Maitland Bros. Co.*, ASBCA No. 23849, 83-1 BCA ¶ 16,434, affirmed a hearing examiner's decision to award a contractor the extra costs it incurred when a specified model of tractor mandated by the contract proved incapable of excavating rocks that turned out to be harder than expected.<sup>7</sup>

Similarly, in *Appeal of Evergreen Engineering, Inc.*, 78-2 BCA ¶ 13,226, the Board held that "since the Government is responsible when use of the specified equipment causes unexpected cost, . . . the appellant has established entitlement to the unexpectedly added costs caused by the rutting and mushrooming from the wheels of the traveling mixer." *Id.*

Here, the County *knew* it was warranting that an STBM could successfully perform the work. While designing Brightwater, the County specifically raised concerns with its consultants that specifying an STBM "[i]ntroduces risk of Owner-implied warranty . . ." (CP 761.) The head of one of the design firms concurred. By specifying an

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<sup>7</sup> The administrative law judges on the Board of Contract Appeals resolve disputes between government agencies and contractors. (41 U.S.C. § 7105.)

STBM, he said, “there is an owner-implied warranty that a Slurry TBM can complete the drives.” (*Id.*; see RP 3482-83.)

**2. VPFK raised triable issues of fact whether the County’s plans and specifications—which required VPFK to use STBMs and prescribed the manner of performance—were defective.**

VPFK’s counterclaim alleged that the County’s plans and specifications: (i) prescribed the precise location where the work was to be performed, the sequence of the work, and the type of equipment to be used—an STBM; (ii) required that, during excavation and interventions, all support for the tunnel face come from within the tunnel; (iii) provided “no indication that additional ground improvement is necessary” for interventions; and (iv) warranted that by using an STBM in the manner prescribed by the Contract, VPFK would be able to “successfully complete the work in the ground conditions encountered in the time frame allowed.” (CP 67, 74-75.) VPFK further alleged that the plans and specifications were defective because the work could not be completed on time using an STBM *without* ground improvements, including exploratory bore holes from the surface and specially created safe havens, yet the plans and specifications did not provide for ground improvements along the tunnel alignment. (CP 68, 73, 74-75, 80, 89.)

The County filed a motion for partial summary judgment that challenged one aspect of VPFK's counterclaim: whether "King County's specification of a slurry tunnel boring machine was defective." (CP 188; *see* CP 182 ("VPFK complains that King County required use of a particular type of equipment (a slurry tunnel boring machine).").) The County argued: "There is no evidence in this case that King County's *requirement of a slurry TBM* made the work impossible or caused any damage. It follows that VPFK's claim of defective specifications, as it relates to *the slurry TBM requirement*, should be dismissed." (CP 196 (emphases added).)

In opposition to the County's motion, VPFK reminded the court that VPFK's defective specification counterclaim was not limited to the County's selection of an STBM. VPFK's counterclaim also alleged that the manner in which the County's plans and specifications required VPFK to perform the work was defective because it could not produce the intended result. By "specifying a particular construction method at a particular site, the owner warrants the adequacy *of that method* at that location." (CP 688 (emphasis added), 692 ("when the specifications mandate a particular method of performance, the owner warrants a satisfactory result if the contractor follows the specifications"), 696 ("the tunneling requirements are detailed and

several areas of the Contract indicate that the contractor would not have to perform extraordinary measures to control the pressures and stability at the face of the machine”).)

With its opposition, VPFK submitted considerable evidence that using an STBM machine and performing the work in the manner prescribed by the Contract did not produce the desired result, created difficulties and risks, and increased the time and cost of performing the work. In short, the County’s prescriptions for *using* the STBM and performing the work were defective:

- First, after the County declared VPFK in default, it hired another contractor, JDC, to complete the BT-3 tunnel using an EPB machine. (CP 176-77.) The County’s decision to allow JDC to complete the tunnel using a machine VPFK had not been permitted to use under its Contract created a triable issue whether it was economically feasible to excavate the BT-3 tunnel following the County’s prescriptions. *See Big Chief Drilling Co. v. United States*, 26 Cl. Ct. 1276, 1295-96 (1992) (finding defective drilling specification where the government refused to permit relaxation of drilling requirements on first well, but granted a blanket deviation on subsequent wells).
- Second, to operate an STBM efficiently, the project engineer must select a slurry tailored to the soil being excavated.

(CP 719.) Because it is difficult to observe the soil in which the STBM is operating (CP 720), the machine can be operated efficiently only if the changes in soil conditions are infrequent. In the case of the BT-2 and BT-3 tunnels, “the frequency of the transitions between one soil condition and another . . . far exceed[ed] what was reasonably anticipated” (CP 719) and, as a result, “the average daily production of the tunneling [was] significantly less than what should [have been] achieved” (*id.*). The evidence of higher costs, lower production, and longer time VPFK incurred operating an STBM supported the conclusion that the specification requiring VPFK to use an STBM without exploratory bore holes and ground improvements—which would have enabled VPFK to carry out the work more efficiently and conduct interventions more safely—was defective. *Maitland*, 83-1 BCA ¶ 16,434 (government agency liable if specified equipment cannot be successfully used in performing the contract).

- Third, the Contract required VPFK to perform all interventions from inside the tunnel, using slurry and compressed air to prevent the tunnel face from collapsing. The Contract did not provide for digging exploratory bore holes to determine the soil conditions before performing interventions. (CP 710, 716, 807-08.) Because the pressure at the face of the machine was frequently higher

than VPFK reasonably could have expected and the ground conditions were unknown, VPFK was forced to guess which slurry and air pressure were appropriate for the ground conditions in which the STBM was operating. As a result, the tunnel face repeatedly failed which slowed work, added costs and delays, and posed serious safety problems. (CP 703, 714-16, 719, 723.)

- Fourth, the expert panel that the parties jointly convened to assess the problems and recommend solutions concluded that VPFK could not perform interventions in the manner prescribed by the Contract. In particular, it could not perform interventions “without additional information regarding the specific locations of those interventions” and “some artificial outside means of reducing the pressure at the face of the machine.” (CP 717.) Obtaining the “additional information” would require VPFK to dig exploratory bore holes from the surface, and “reducing the pressure” would require VPFK to create artificial safe havens at the face of the STBM. Both procedures were required to safely and efficiently operate the STBM in the environment of the BT-2 and BT-3 tunnels, yet neither was provided for in the Contract. (CP 707, 714-15.) This evidence too strongly supported the conclusion that the County’s plans and

specifications, which required VPFK to use an STBM but did not authorize these procedures, were defective.

- Fifth, the difficulties resulting from the defects in the plans and specifications described above were compounded by the fact that the tunnel face often became unstable even when VPFK correctly calculated the pressure and even when interventions were performed in undisturbed soil, which the Contract described as the type of soil in which interventions could safely be performed at atmospheric pressure. (CP 716; RP 1103; ex. 7, at KCO001793.) In this respect too, the Contract specifications for performing interventions proved unworkable, i.e., defective.

The evidence on summary judgment summarized above supported the conclusion that the County's plans and specifications dictated how and where VPFK was to perform its work, that VPFK followed those plans and specifications, that the plans and specifications were unworkable and did not lead to the intended result, and that VPFK incurred damages and unavoidable delays. These facts gave rise to a triable issue whether the County's plans and specifications were defective.

At the hearing on its motion, however, the County reiterated that its motion was narrowly focused on the selection of the STBM.

“This is just about the specification of the slurry TBM. *It is limited.*”  
(7/13 RP 66 (emphasis added).)

The court granted the County’s narrow motion, with the following written explanation: “MOTION TO DISMISS VPFK’S CLAIMS ARISING FROM DESIGNATION BY KING COUNTY OF SLURRY TUNNEL METHOD, i.e. DEFECTIVE SPECIFICATIONS: Granted. *Claims that the designation of the Slurry tunnel method was a defective specification are dismissed.* There is no evidence the specifications were defective.” (CP 1083 (emphasis added); see RP 37 (court agrees it granted the motion “solely as to the machine”).)

In other words, the court ruled there was no evidence that the County’s designation of an STBM, standing alone, was a defective specification. But the court did not address VPFK’s claim in its entirety, namely that the County’s plans and specifications mandated both the machine—an STBM—and the way in which the work was to be performed, and *both* mandates together were defective. In a later order denying VPFK’s motion for interlocutory review, the Court of Appeals Commissioner confirmed that “well established” Washington law supported VPFK’s legal theory—the owner impliedly warrants the adequacy of its plans and specifications. (CP 9078.) The Commissioner also observed, however, that the trial court’s ruling was

narrow: “VPFK apparently provided no evidence that work on BT-3 could not be completed using a slurry TBM, *i.e.*, *there is no evidence that specification of the slurry TBM was defective*. This was the basis of the trial court’s ruling.” (*Id.* (emphasis added).) The Commissioner’s order, like the trial court’s order, did not consider the issues raised in VPFK’s counterclaim: whether the County’s plans and specifications for using the machine and performing the work were defective.

**3. The County’s arguments for partial summary judgment lacked merit.**

In seeking partial summary judgment, the County argued that, as a matter of law, its specification of STBMs for the BT-2 and BT-3 tunnels was not defective for two reasons: (1) when VPFK bid on the project, VPFK itself believed an STBM was the right machine for the job (7/13 RP 39-40; CP 182); and (2) VPFK presented no evidence that performing the work with an STBM was impossible (CP 187, 195-96). The court agreed with the County’s first argument. (7/13 RP 34 (“even the tunnelers agree that the slurry method would have been the preferred method and would have worked, except they ran into a soil with too much clay too often”); *see also* 7/13 RP 58; RP 5767-68 (court expresses same view).)

These defenses lacked merit. A contractor may assert a defective specification claim even if the contractor agreed with the government agency's work requirements, *Appeal of Greenbrier Industries, Inc.*, ASBCA No. 22121, 81-1 BCA ¶ 14,982, so long as the contractor did not *know* the specifications were defective, *see L. W. Foster Sportswear Co. v. United States*, 405 F.2d 1285 (Ct. Cl. 1969); 6 Government Contracts § 43.90 "Adequacy of Government Specifications." Where, as here, no evidence suggests that the contractor was aware of any problems with the government agency's prescriptions for using the machine and performing the work, the contractor is entitled to both extra time and damages when the prescriptions prove inadequate to the task. As the Board of Contract Appeals explained in *Greenbrier Industries, Inc.*, 81-BCA ¶ 14,982, "[s]ince each side appears to be an innocent party, the law of warranty permits the [contractor] to have recourse against the Government as author of the specifications, the root cause of the [contractor's] production problems." *See also Maitland*, 83-1 BCA ¶ 16,434.

And contrary to the County's argument, the *Huetter/Spearin* doctrine does not require the contractor to prove impossibility before it may recover on a defective specification claim. The contractor is entitled to extra time and compensation when defective plans make

the work more difficult. *Haley*, 17 Wn.2d at 788-89; *Dyad Constr.*, 17 Wn. App. at 503 (affirming damages on defective specification theory where contractor demonstrated that, “while construction . . . was not impossible, it was impractical, dangerous and expensive”); *Maitland*, 83-1 BCA ¶ 16,434 (contractor entitled to compensation where prescribed construction method was “not economically feasible or productive” under the ground conditions encountered).

Finally, the court reasoned that VPFK’s real complaint was that STBMs were not suited to the ground in which they were operating, and that this claim could be pursued as a differing site condition claim, not a defective specification claim. (7/13 RP 35 (“It all boils down to the soil issue”).) However, defective specification and differing site condition claims are distinct, and both may be asserted when ground conditions play a role in making the specified manner of performance defective.

In *M.A. DeAtley Construction, Inc. v. United States*, 71 Fed. Cl. 370, 374-75 (2006), for example, the court ruled that a contractor could pursue a differing site condition claim based on the government’s selection of an improper form of rock for road construction, and at the same time pursue a defective specification claim based on the government’s failure to provide a proper method

for *working* with the rocks. *See* 4A Bruner & O'Connor, Construction Law § 14:28 (2013) (analyzing numerous cases where contractors were allowed to pursue both theories). Likewise here, the actual ground conditions differed from those indicated by the Contract *and* the Contract's prescriptions prevented VPFK from effectively *dealing* with the actual ground conditions—by not permitting ground improvements. Under these facts, VPFK was entitled to pursue both a differing site condition claim *and* a defective specification claim.

In opposition to the County's motion, VPFK presented evidence that, *without* using the exploratory bore holes and specially created safe havens recommended by the expert panel, excavating a tunnel with an STBM in the manner prescribed by the Contract under the rapidly changing and unpredictable ground conditions encountered was neither economically feasible nor safe, and the work could not be completed on time. *See supra* pp. 48-51. These facts supported VPFK's defective specifications claim, and VPFK should have been allowed to submit its entire defective specification claim to the jury, including but not limited to the aspect of its claim based on the County's selection of an STBM.

**4. The court's error was prejudicial.**

The court failed to appreciate the nature and extent of VPFK's claim. Its partial summary judgment ruling removed a significant part of VPFK's defective specification claim from the case and proved to be highly prejudicial at trial. Based on the ruling, the court curtailed VPFK's right to question County witnesses about why the County selected STBMs for the BT-2 and BT-3 tunnels, and whether the County was aware there were critical problems with the prescriptions for using STBMs and performing the work in the plans and specifications. (RP 3434-35, 3493.)

Further, based on its partial summary judgment ruling, the court repeatedly allowed the County to remind the jury that the court had already found VPFK's *defective specification claim* lacked legal merit. (See RP 733-34, 1197-98, 5274-75 (witness testifies VPFK's claim in RCO 66 for defective specification was dismissed by the court).) Compounding the prejudice, the court then instructed the jury to the same effect:

You have heard evidence that VPFK requested a change order, because King County required the use of a slurry tunnel boring machine. This has been referred to as VPFK's defective specifications claim.

. . . The court has already found that these claims fail as a matter of law, and they have been dismissed from the case. You are not to consider any of these dismissed

claims in deciding any of the remaining claims in this case.

(RP 6812-13.)

VPFK's defective specifications claim was an alternative theory to its differing site condition claims and therefore was central to its case against the County. *See supra* pp. 20-22. VPFK contended that the defective specifications were the principal reason why VPFK could not finish the project by the deadline specified in the Contract. (Ex. 68, at KCo090657 (RCO 66: "The Joint Venture has and is diligently following the specifications, is using the equipment, system and process that were specified by King County . . . [T]hrough no fault of the Joint Venture, King County's prescribed tunneling method is not progressing through the materials in the tunneling alignment at a rate that will allow for completion of the work within the contract's specified duration.")) Yet the court relied on its erroneous partial summary judgment ruling to curtail VPFK's examination of witnesses, and allowed the ruling to serve as a springboard for the County to repeatedly denigrate VPFK's claim and for the court itself to instruct the jury that the claim "fail[ed] as a matter of law." (RP 6813:2.) As a result, VPFK's case was fatally impaired.

**C. The Trial Court Committed Prejudicial Error By Refusing To Instruct The Jury That The County Impliedly Warranted The Tunnel Could Be Built In The Manner Prescribed In The County's Plans And Specifications And That VPFK Was Entitled To Extra Compensation If The Warranty Was Breached.<sup>8</sup>**

**1. VPFK was entitled to a jury instruction on implied warranty.**

A party is entitled to a jury instruction on every theory or defense supported by the evidence. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 283-84, 686 P.2d 1102, 1108 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985). VPFK's breach of implied warranty theory was supported by evidence, yet the court refused VPFK's correct proposed instruction on the theory. (RP 6712.) That was error, and it was prejudicial.

As discussed in Argument B., when the trial court granted the County's motion for partial summary judgment on VPFK's defective specifications claim, it did not consider whether the County's plans and specifications were defective with respect to the prescriptions for using the machine and performing the work. If the County's

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<sup>8</sup> "Generally, we review a trial court's decision on whether to give an instruction for an abuse of discretion." *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 131, 138 P.3d 1107, 1113 (2006). However, when a trial court refuses to give a requested jury instruction based on a legal ruling, review is de novo. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997); *see Tuttle*, 134 Wn. App. at 131.

prescriptions were defective, the County would be liable for the extra costs and time VPFK incurred to overcome the inadequacies in the plans and specifications. *See supra* pp. 42-45.

At trial, VPFK presented evidence that the plans and specifications required VPFK to perform all interventions from inside the tunnel, using slurry and compressed air to prevent the tunnel face from becoming unstable, and that the Contract gave no indication ground improvements would be necessary. VPFK also presented evidence that it was neither practical nor safe to perform interventions *without* ground improvements. The evidence VPFK introduced at trial included the following:

- Section 3.02 (C) and (D) of the Contract specified that the face of the tunnel should be supported during interventions with slurry and compressed air, and the Contract made no provision for ground improvements. (Ex. 6, at KC0001030.)

- Section 3.02 (T) of the Contract provided that at the Ballinger Way Portal, a shaft located at the end of the BT-3 tunnel (RP 2634), the contractor should “[p]erform ground improvement or ground support and dewatering to the extent permitted by Section 02140 for proper ground and groundwater control at the receiving structure prior to tunnel reception.” (Ex. 6, at KC0001034.) Because

this was the Contract's only reference to ground improvements, the reasonable implication was that the Ballinger Way Portal was the only location where ground improvements would be needed or permitted.

- Ronald Heuer, a geotechnical consultant who specialized in tunnel projects and helped write the standard treatise on GBRs (RP 4735), testified that, under the industry standard for reading plans, the County's failure to indicate the need for ground improvements was, in effect, a representation that none would be required (RP 4768-69).

- Dan Adams, the president of the company that designed the tunnel work for the County and specified the use of an STBM (RP 3482-83), testified that when his company developed the specifications, the company believed the contractor would be able to control the ground with slurry alone (RP 3552-54). If ground improvements turned out to be necessary, he concluded that a change order would be justified. (RP 3554.)

- In a memo prepared for the County before the contract was put out to bid, the County's geotechnical engineers (RP 864) said the specifications did not allow dewatering for the tunneling work (ex. 1402, at KC0085020). Dewatering is one form of ground

improvement that VPFK wished to employ. (RP 2797, 4238, 5096, 5099-100, 5132-33.)

- Vittorio Guglielmetti, an international expert on mechanized tunneling with 30 years of experience (RP 4258), testified that the bidding documents indicated the tunnel could be dug without any special measures, apart from the use of slurry (RP 4264, 4335).

- In response to VPFK's request for a change order allowing it to dig core (or bore) holes from the surface, the County responded that "[t]he Contract does not contemplate the use of additional core holes as a part of performance of inspection stops." (Ex. 1686, at KCo009437.)

While the Contract indicated that ground improvements and surface access would not be necessary along the tunnel alignment, VPFK presented evidence that the tunnels could not be economically or safely dug using the required STBM *without* ground improvements and surface access. *See* facts discussed *supra* pp. 48-51. This evidence supported the conclusion that the County breached its implied warranty that the tunnels could be dug using an STBM and *without* ground improvements. It also supported the conclusion that VPFK was entitled to the extra time and money required to make the ground improvements, which the Contract warranted would not be necessary

but which in fact proved to be essential to timely and safely completing the work with an STBM.

Based on the evidence summarized above, VPFK proposed the following instruction:

You are instructed that when the County, as here, furnishes plans and specifications for a construction project to a Contractor, the County warrants that those plans are adequate to accomplish the work. This warranty applies to all plans, specifications, and subsurface information furnished by the County, regardless of whether the County actually prepared those documents or hired another firm to prepare the documents.

Where plans or specifications lead a Contractor such as VPFK reasonably to believe that conditions represented in those documents do exist and may be relied upon in bidding, the Contractor is entitled to compensation for extra expense incurred as a result of the inaccuracy of those representations.

VPFK has the burden of proving by a preponderance of the evidence that the County breached its implied warranty of specifications.

(CP 9040.)

The evidence discussed above supported this instruction. The Contract, construed pursuant to industry standards, indicated construction of the tunnels would not require expensive and time consuming ground improvements and surface access. Those

representations turned out to be inaccurate. Under the implied warranty doctrine, VPFK was entitled to have the jury instructed that, if it believed VPFK's evidence, then VPFK was entitled to recover as damages the "extra expense incurred as a result of the inaccuracy of those representations." (*Id.*)

**2. The trial court erred by refusing to give the implied warranty instruction.**

The trial court initially agreed that VPFK was entitled to an instruction on breach of implied warranty. (RP 6251, 6310 ("If an expert says that you [the County] should have included these things in your specifications and you didn't, that's [a] defective specification claim."), 6342 (same).) However, the court ultimately refused to give VPFK's proposed instruction. It reasoned that the County's plans were defective only "if that condition [the need for ground improvements] was expected, or [the County] prohibited something that was required to be done . . . And I don't find anything that supports that." (RP 6712.) In other words, the court refused to give the instruction because it believed VPFK failed to introduce evidence that the County *expected* ground improvements would be required, and failed to show that the County *prohibited* VPFK from making the ground improvements.

The court erred. First, under the implied warranty doctrine, the government bears the risk that its plans will not work, whether or not

it is aware there are defects in the plans. *Greenbrier Indus., Inc.*, 81-1 BCA ¶ 14,982; *cf. House v. Thornton*, 76 Wn.2d 428, 435-436, 457 P.2d 199, 204 (1969) (implied warranty not vitiated by innocence of wrongdoing). In any event, there was evidence the County believed the soil conditions were unpredictable but failed to inform the contractors, which under the court's own theory supported VPFK's proposed instruction. (See RP 1088 (County engineer testified that he concluded prior to the bidding that "there was really no way to predict with any confidence exactly what changes would occur between borings").)

Second, no legal authority supported the court's ruling that, to qualify for the implied warranty instruction, VPFK had to present evidence that the Contract affirmatively *prohibited* the necessary ground improvements. VPFK presented evidence that the Contract indicated, and thus impliedly warranted, that the work could be performed in the manner prescribed by the plans and specifications *without* ground improvements and surface access. That was all VPFK had to show to support its proposed instruction. *Weston*, 23 Wn. App. at 753 (owner "impliedly guarantees that the plans are workable and sufficient").

**3. The court's error was prejudicial.**

The court's refusal to instruct the jury on a cause of action for damages supported by the record is prejudicial and a ground for a new trial. *Savage v. State*, 72 Wn. App. 483, 492, 864 P.2d 1009, 1014 (1994) ("an erroneous refusal to give a requested instruction is grounds for reversal if, as a result of the missing instruction, a party cannot argue its theory of the case or the instructions, when read as a whole, do not inform the jury of the applicable law"), *rev'd in part on other grounds*, 127 Wn.2d 434, 899 P.2d 1270 (1995). As a result of the court's ruling, VPFK was precluded from submitting its implied warranty theory to the jury. Had VPFK been permitted to present that theory, the jury could have compensated VPFK for the extra costs it incurred dealing with tunnel face instabilities, and the costs it incurred adjusting the STBM and slurry because the soil conditions unexpectedly and abruptly changed. The same facts also supported the conclusion that VPFK was entitled to additional time to complete its work. If the jury had agreed that VPFK was entitled to more time, it might well have rejected the County's breach of contract claim, which was premised entirely on the theory that VPFK failed to complete the work by the original Contract deadline.

**D. The Trial Court Committed Prejudicial Error By Denying VPFK's Motion For Summary Judgment On Liquidated Damages For Delay.<sup>9</sup>**

- 1. The trial court erred by refusing to enforce the parties' agreement that liquidated damages would be the County's exclusive remedy for VPFK's delay in completing the project.**

"Liquidated damages clauses are favored in Washington, and courts will uphold them if the sums involved do not amount to a penalty or are otherwise unlawful." *Watson v. Ingram*, 124 Wn.2d 845, 850, 881 P.2d 247, 249 (1994).

VPFK moved for partial summary judgment "to limit any recovery that King County may obtain to the contractually specified liquidated damages, instead of the higher alleged actual damages that King County now seeks to recover, for any and all time-related damages." (CP 543.) VPFK explained that, "despite the fact that the majority of King County's claimed damages are delay-related, King

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<sup>9</sup> Orders denying summary judgment may be reviewed on appeal "if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law." *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 799, 65 P.3d 16, 20 (2003), *rev. denied*, 151 Wn.2d 1037 (2004); *accord Washburn v. City of Fed. Way*, 178 Wn.2d 732, ¶ 23, 310 P.3d 1275, 1283 (2013). An order denying partial summary judgment is reviewed *de novo*. *Or. Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 412, 36 P.3d 1065, 1068 (2001), *rev. denied*, 146 Wn.2d 1014 (2002). This Court applies the same procedural and legal standards as the trial court, viewing the facts and inferences in a light favorable to the County, the party opposing the motion here. *Id.*

County seeks to recover all of its *actual* delay-related damages, in lieu of liquidated damages.” (*Id.*) VPFK argued that “King County’s interpretation of the contract is not supported by the contract’s unambiguous provisions.” (CP 544; *see also* CP 552 (arguing “that the contractual liquidated damages provision is King County’s exclusive remedy for delay-related costs”) (emphasis omitted).)

The trial court denied VPFK’s motion. (CP 1082.) It ruled that application of the Contract’s liquidated damages provision would hinge on how the jury resolved the factual dispute whether VPFK *defaulted*. If VPFK defaulted, then the County would not be limited to liquidated damages for delay. If VPFK did not default, then the liquidated damages limitation would apply. (*Id.*; 7/13 RP 131-36.) The court thus rejected VPFK’s core legal position—that the Contract confined the County to liquidated damages for delay, whether or not VPFK breached, defaulted, or was terminated.

The trial court erred as a matter of law by denying VPFK’s motion for summary judgment and rejecting its legal argument that the Contract restricted the County to liquidated damages for delay.

Washington courts ascertain the contracting parties’ intentions by focusing on the reasonable meaning of words in their contract, not their unexpressed subjective intentions. *Hearst Commc’ns, Inc. v.*

*Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262, 267 (2005). The goal is to “interpret the agreement in a manner that gives effect to all the contract’s provisions” and “harmonize clauses that seem to conflict.” *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265, 1268 (2007), *rev. denied*, 163 Wn.2d 1020 (2008).

Section 10.7(A) of the Contract stated that the County would be entitled to liquidated damages to redress VPFK’s delay: “liquidated damages amounts . . . will be assessed for Contractor’s failure to achieve Substantial Completion within the Contract Time or Final Acceptance.” (CP 603.) The parties “fixed and agreed upon” liquidated damages “because of the impracticability and extreme difficulty of fixing and ascertaining the actual damages the County would in such events sustain.” (*Id.*) The County did not deny that these provisions are valid and enforceable.

Moreover, liquidated damages were to be the County’s *exclusive* remedy for delays. Section 10.7(A) of the Contract stated that the specified liquidated damages would be deemed the County’s actual damages: “These [liquidated] amounts shall be construed as the actual amount of damages sustained by the County.” (CP 603-04.) By so agreeing, the parties ensured the County could never claim that its

true or actual costs and expenses arising from delays exceeded the liquidated sums.

This interpretation is consistent with Article 8 of the Contract, which addressed remedies for termination for default. Section 8.0(A)(4) enabled the County to recover actual damages in case of “the breach or termination for default”: “Contractor . . . shall be liable for all damages and costs, including but not limited to . . . special, incidental or consequential damages incurred by the County . . . .” (CP 1453.) If the County established a right to recover those species of actual damages, then any award for delay would be an award of liquidated damages, since liquidated damages would be “construed” to be the County’s actual damages by operation of section 10.7(A). (CP 603-04.) Because the County, which drafted the Contract, equated liquidated damages with actual damages, sections 10.7(A) and 8.0(A)(4) work harmoniously. Otherwise, the Contract would have been unclear whether delay damages must be limited to liquidated damages in case of termination for default, where the Article 8 remedies appear to be unconstrained. The drafters avoided this uncertainty by equating liquidated damages for delay with actual damages for delay, eliminating the need to determine whether one section of the Contract supplanted another.

This Contract interpretation does not deprive the County of actual damages for delay. The County receives the precise measure of actual damages for delay to which it agreed in the Contract—liquidated damages. Nor does this approach deprive the County of actual damages *not arising from delay*—section 10.7(A) does not speak to that question. VPFK’s reading of the Contract therefore harmonizes key provisions of the Contract and gives consistent meaning to all of them. *See Nishikawa*, 138 Wn. App. at 849 (requiring courts to harmonize contractual terms).

VPFK’s reading is also consistent with the parties’ February 2010 Interim Agreement, which preserved the County’s “right to pursue a claim against VPFK based on the allegation that VPFK is in default.” (CP 585.) The remedies for that preserved claim would be no different than the remedies provided in section 8.0(A)(4) of the Contract, which as just shown is consistent with a reading that the County’s exclusive remedy for delay is liquidated damages. The Interim Agreement also preserved the County’s right to seek liquidated damages (*id.*), which of course is fully consistent with VPFK’s position. In short, the Interim Agreement changed nothing material to the recovery of liquidated damages for delay but simply preserved the County’s rights to seek damages under the Contract.

Finally, long before any dispute arose, the County itself explained the Contract's provisions. When it solicited bids, the County told potential bidders that, under the Contract, liquidated damages would compensate the County for delay-related costs, and termination-for-default damages would compensate King County for other costs unrelated to delay. (CP 598.) The County's pre-bid explanation thus confirms VPFK's reading of the Contract provisions in question.

**2. The court's error was prejudicial.**

The court's erroneous denial of VPFK's motion for summary judgment was prejudicial because it opened the door for the County to claim and for the jury to award far greater damages than were permitted by the Contract's liquidated damages provisions.

The County claimed more than \$40 million in delay damages, roughly three times the \$13.2 million that represented its maximum possible award of liquidated damages under the Contract. (See 7/13 RP 123-25.) The jury awarded every cent the County claimed, which necessarily included the excessive delay damages. (See RP 6876 (County asks jury to award \$155,611,039 in total damages and prejudgment interest); CP 4542 (jury awards

\$155,831.471.) VPFK is therefore entitled to a new trial with a proper jury instruction on liquidated damages for delay.<sup>10</sup>

**E. The Trial Court Committed Prejudicial Error By Excluding Evidence That, Because Of Concurrent Delays, VPFK Was Not Solely Responsible For Delaying The Commissioning Of Brightwater.<sup>11</sup>**

**1. Under the concurrent delay doctrine, when multiple delays overlap, damages should be apportioned between the responsible parties.**

Under the concurrent delay doctrine, when separate delays occur at the same time, damages should be apportioned between the responsible parties. If the delays overlap so completely that it is impossible to apportion responsibility, then recovery should be denied for lack of proof of causation. *See Baldwin v. Nat'l Safe Depository Corp.*, 40 Wn. App. 69, 72-73, 697 P.2d 587, 589-90 (damages apportioned between parties responsible for delay), *rev. denied*,

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<sup>10</sup> In its motion for partial summary judgment, VPFK separately argued the County had not *sought* liquidated damages and thus had waived those damages. (*See* CP 543, 547 (“In this action, King County seeks to recover all of its actual delay damages, and has not asserted a claim for liquidated damages.”), 557 (“King County *has not* asserted a claim for liquidated damages.” (original emphasis)).) The trial court did not address this issue but will need to do so if the case is remanded for a new trial.

<sup>11</sup> A trial court’s evidentiary rulings are reviewed for abuse of discretion. *Hough v. Stockbridge*, 152 Wn. App. 328, 338, 216 P.3d 1077, 1083 (2009), *rev. denied*, 168 Wn.2d 1043 (2010). A court abuses its discretion when it “relies on unsupported facts, applies the wrong legal standard, or adopts a position no reasonable person would take.” *In re Det. of McGary*, 175 Wn. App. 328, 337, 306 P.3d 1005, 1010, *rev. denied*, 178 Wn.2d 1020 (2013).

104 Wn.2d 1002 (1985); *R.P. Wallace, Inc. v. United States*, 63 Fed. Cl. 402, 410 (2004) (“a contractor ‘generally cannot recover for concurrent delays for the simple reason that no causal link can be shown’”); *Commerce Int’l Co. v. United States*, 338 F.2d 81, 90 (Ct. Cl. 1964) (“there can be no recovery where the defendant’s delay is concurrent or intertwined with other delays”). The jury here was instructed accordingly. (CP 9115.)

**2. During trial, the court granted VPFK permission to conduct discovery, which confirmed there were concurrent delays on the BT-1 tunnel.**

Shortly after trial began, VPFK informed the court that information had just come to light that VPFK’s delays ran concurrently with delays caused by defective pipes on BT-1, the section of the tunnel east of BT-2 that connected to the main treatment plant. VPFK cited a June 30, 2012 quarterly report issued by Brightwater’s Oversight Monitoring Consultant (OMC). (CP 7425-47.) The OMC reported a “delay due to East Tunnel [BT-1] defect repair” (CP 7425) that “could impact schedule” (*id.*). The East Tunnel (BT-1) was on “the critical path to Conveyance System commissioning” (CP 7427), and “completion of these repairs will delay Conveyance System commissioning” (*id.*). In other words, Brightwater could not begin operating until the East Tunnel (BT-1) was repaired. (*See* RP 1900.)

The repairs, including “grout port weld defects will require more time than previously scheduled.” (CP 7436.) “[T]his is an emerging issue and schedule specifics are expected to change.” (*Id.*)

VPFK also cited the County’s April 2012 invitation to interested parties to submit bids to fix leaking joints, cracked welds, and repair coating systems in 2.5 miles of the 66- and 84-inch pipes in the East Tunnel (BT-1). (CP 7452.)

When it learned this information, VPFK moved for a continuance so it could conduct further discovery into the issue of concurrent delays. (CP 1670-84.) VPFK asserted the County had known about delays on the East Tunnel (BT-1) for at least six months but had failed to supplement its responses to discovery inquiring about the issue, as it had agreed to do. (CP 1673, 1675, 1682:20-23, 1690:10-15.) Once the facts surfaced, VPFK needed time to investigate whether the County would have been “delayed anyway because of BT-1, so that our delay then becomes concurrent and, therefore, not claimable by the County.” (RP 762.) The court denied a continuance but granted VPFK’s request for additional discovery. “I am going to require you [the County] to provide them . . . with the documents that show what the delay is that’s been caused on the east tunnel.” (RP 770; CP 7649 (County must “provide [VPFK] with documents that

document delays on the East Tunnel [BT-1]” and VPFK may “update its damages and damages report”).)

A month later, following VPFK’s complaint that the County had disclosed documents only for the period after March 2012, the court expanded its discovery order: “I don’t know the dates, I didn’t make it date specific, I made it issue specific. So if the scope of the issue is 2006, then you have to provide it to them in 2006 . . . assuming they asked for it and you didn’t provide it to them previously.” (RP 3327.)

After analyzing the newly discovered information, VPFK’s scheduling expert concluded that the delays on the East Tunnel (BT-1) ran concurrently with VPFK’s delays. (CP 9161-62, 9168, 9172, 9177-78.) VPFK’s expert found that the County first notified the BT-1 contractor in December 2010 about problems with the grout ports in the 66- and 84-inch pipes and required they be repaired. (CP 9147, 9159.) Additional problems were identified in June 2011, July 2011, and August 2012, which coincided with the end of the 18-month period during which the County alleged VPFK delayed the project and for which the County sought delay damages from VPFK. (CP 9147-48, 9150-51.)

In short, VPFK’s expert concluded that “the Central Tunnel [BT-2 and BT-3] delays were 100% concurrent with the East Tunnel

[BT-1] delay” (CP 9161) and “contrary to the County’s contention, the Central Tunnel delay did not delay the overall Project.” (CP 9162.)

In addition, the expert’s report discussed delays to another part of the Brightwater project, the influent pump station, which he said were also concurrent with VPFK’s delays and closely related to the delays on the East Tunnel (BT-1). (*E.g.*, CP 9154, 9160-61, 9166-67.)

**3. The trial court abused its discretion by excluding the evidence of concurrent delays.**

The County objected to admission of VPFK’s new concurrent delay evidence on the ground that VPFK’s investigation exceeded the scope of the court’s recent discovery order by analyzing delays not only on the East Tunnel (BT-1) but also on the influent pump station. (RP 5039; CP 3951.) The County argued that VPFK could have learned about delays on the influent pump station during pretrial discovery. (RP 5040.) The court sustained the County’s objection and excluded virtually the entire expert report. (RP 5051-52.) Despite its original ruling allowing VPFK to conduct discovery into events dating back to 2006, the court now ruled that the *only* delays VPFK could address at trial were delays on the East Tunnel (BT-1) between September and October 2012. (RP 5051.) VPFK pointed out that it completed its work in September 2012 and thus delays by other contractors *after* that date by definition could not be “concurrent” with VPFK’s work. (*Id.*) The

court nevertheless stood by its ruling. As a result, VPFK was barred from presenting any expert evidence to prove concurrent delays and to rebut the County's position that VPFK alone was responsible for an 18-month delay in the commissioning of Brightwater. (RP 2476-77.)

Though a trial court has broad discretion to exclude evidence, *Hough*, 152 Wn. App. at 338, the court abuses its discretion when it "relies on unsupported facts, applies the wrong legal standard, or adopts a position no reasonable person would take." *McGary*, 175 Wn. App. at 337; *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 583, 220 P.3d 191, 197 (2009).

The trial court here abused its discretion in two ways: first, it reached a decision unsupported by the facts; second, it excluded evidence for a reason inconsistent with its own rationale for allowing additional discovery on the concurrent delay issue.

The County objected to VPFK's expert witness report because it addressed delays not only on the East Tunnel (BT-1) but also on the influent pump station. The County contended these issues were inextricably combined. (RP 5039, 5043-44.) The County's contention had no factual basis. Whether or not the issues overlapped in the report prepared by VPFK's expert, VPFK was not offering the report itself into evidence. (See RP 5419 (parties agreed expert reports not

admissible).) There was no reason, and the County offered none, why VPFK's expert could not have limited his *testimony* to the delays on the East Tunnel (BT-1) and their impact on the critical path to completion. To the extent the court's exclusionary ruling rested on the ground asserted by the County—that VPFK could not limit its expert's evidence to East Tunnel (BT-1) delays—the court's ruling lacked support in the record.

The court's second ground for excluding the new evidence—that VPFK could have learned about delays on the East Tunnel (BT-1) during pretrial discovery—also lacked record support. (RP 5048.) At the pretrial deposition of the County's scheduling expert, VPFK *did* explore the issue, asking whether delays other than VPFK's delays could have affected the critical path. The County's scheduling expert said there were no other delays. (CP 1742-43.) In her deposition, Judy Cochran, the County employee in charge of Brightwater, said the same thing. So did Ron Maus, the County's damages expert. (CP 1744-45.) Maus explained that there had once been an 80-day delay on the East Tunnel "but they actually made it back up." He repeated that testimony at trial. (CP 1747; RP 2572.) In violation of its express commitment to supplement its responses to interrogatories with new documents relating to the critical path and construction schedule, the

County never produced the relevant documents that VPFK learned about only on the eve of trial through the other sources discussed at pages 74-75 above. (CP 7409, 7418, 7459.)

Thus, the record discloses that during pretrial discovery, VPFK *did* explore the concurrent delay issue, and the County told VPFK that there were *no* delays on the East Tunnel (BT-1). Only as trial was about to commence did new evidence come to light indicating that the problems on the East Tunnel (BT-1) were more extensive than VPFK had been told. That is why the court reopened discovery in the first place. It was not rational for the court then to deny VPFK the fruits of the new discovery on the ground it could have obtained the information earlier.

The court apparently faulted VPFK for accepting the County's word during discovery that no other delays affected the critical path. (*See* RP 5043.) The court's reasoning was illogical. The County alone knew which of their separate contractors was delaying the project. Until the new evidence came to light, VPFK had no reason *not* to accept the County's original word on the issue, particularly since the County had committed to supplement its 2010 discovery response about concurrent delays, but never did so. VPFK should not be faulted

for assuming that the County's original discovery responses were truthful and remained so.

Finally, the court's ruling was "manifestly unreasonable." *Magana*, 167 Wn.2d at 582-83. A concurrent delay in the present case would be a delay that ran simultaneously with VPFK's delays—from March 2011 through September 2012. The court ruled that VPFK was entitled to reopen discovery to determine whether any of the delays on the East Tunnel (BT-1) occurred during that same period. When VPFK discovered that there were such concurrent delays, the court then ruled that it would admit evidence of only those delays that occurred on the East Tunnel (BT-1) *after* September 2012. (RP 5050-52.) This ruling ignored the rationale for the new discovery.

**4. The court's error was prejudicial.**

An erroneous exclusion of evidence is prejudicial when it "entirely prevent[s] the defendant from rebutting the plaintiff's evidence . . . ." *Aubin v. Barton*, 123 Wn. App. 592, 610, 98 P.3d 126, 135 (2004). The court's exclusionary ruling was highly prejudicial because it left VPFK unable to mount an important defense to the County's \$40 million delay claim. Consequently, the jury was left with an incomplete and inaccurate picture of the damage allegedly caused by VPFK's delays. The court's ruling had no logical foundation, it was

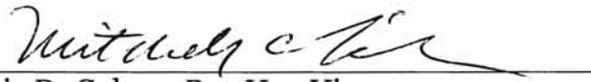
an abuse of discretion, and it constitutes a ground for granting VPFK a new trial.

## VI. CONCLUSION

For any or all of the foregoing reasons, the judgment should be reversed and VPFK should be granted a new trial.

DATED this 7th day of January 2014.

HORVITZ & LEVY LLP  
OLES MORRISON RINKER & BAKER LLP

By:   
Frederic D. Cohen, *Pro Hac Vice*  
Mitchell C. Tilner, *Pro Hac Vice*  
Peter N. Ralston, WSBA No. 8545  
Thomas R. Krider, WSBA No. 29490  
Attorneys for  
Appellants and Cross-Respondents  
**Vinci Construction Grands Projets/  
Parsons RCI/Frontier Kemper, JV**

**DECLARATION OF SERVICE**

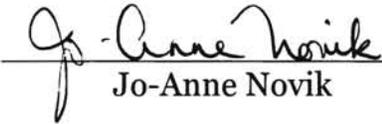
The undersigned declares under penalty of perjury , under the laws of the State of Washington, that the following is true and correct:

That on January 7, 2014, I arranged for service of the foregoing Brief of Appellant Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	_____ Facsimile _____ Messenger <u>  X  </u> U.S. Mail _____ E-Mail
Catherine W. Smith Howard M. Goodfriend Smith Goodfriend, P.S. 1619 8 <sup>th</sup> Avenue North Seattle, WA 98109	_____ Facsimile _____ Messenger <u>  X  </u> U.S. Mail <u>  X  </u> E-Mail
Thomas R. Krider Peter Ralston Oles Morrison Rinker & Baker LLP 701 Pike St., Suite 1700 Seattle, WA 98101-3930	_____ Facsimile _____ Messenger <u>  X  </u> U.S. Mail <u>  X  </u> E-Mail
David R. Goodnight Karle E. Oles Leonard Feldman Hunter Ferguson Stoel Rives LLP 600 University St., Suite 3690 Seattle, WA 98101-4109	_____ Facsimile _____ Messenger <u>  X  </u> U.S. Mail <u>  X  </u> E-Mail  (with CD of VRPs)

Mary DeVuono Englund <b>Office of the Prosecuting Attorney</b> 900 King County Administration Building 500 Fourth Avenue Seattle, WA 98104	<table> <tr> <td><input type="checkbox"/></td> <td>Facsimile</td> </tr> <tr> <td><input type="checkbox"/></td> <td>Messenger</td> </tr> <tr> <td><input checked="" type="checkbox"/></td> <td>U.S. Mail</td> </tr> <tr> <td><input checked="" type="checkbox"/></td> <td>E-Mail</td> </tr> </table> <p><i>(with CD of VRPs)</i></p>	<input type="checkbox"/>	Facsimile	<input type="checkbox"/>	Messenger	<input checked="" type="checkbox"/>	U.S. Mail	<input checked="" type="checkbox"/>	E-Mail
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DATED at Encino, California, this 7th day of January 2014.

  
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 Jo-Anne Novik