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NO. 66267-8-1

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COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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PACIFIC NORTHWEST EARTHWORKS, LLC, a  
Washington limited liability Company  
Plaintiff/Appellant

v.

CITY OF BELLEVUE, a municipal corporation,  
Defendant/Respondent

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**BRIEF OF RESPONDENT CITY OF BELLEVUE**

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CHERYL A. ZAKRZEWSKI  
WSBA No. 15906  
Assistant City Attorney

CITY OF BELLEVUE  
450 110<sup>th</sup> Avenue NE  
Bellevue, WA 98004  
Phone: (425) 452-6829  
Facsimile: (425) 452-7256

Attorneys for Respondent  
City of Bellevue

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## I. INTRODUCTION

The City of Bellevue (“City”) advertised for bids to construct a public work project defined as the “Cougar Mt./SE 45th Street Sanitary Sewer Extension.” Each prospective bidder was provided with a packet of information that included instructions to the bidders, special contract information, the general conditions and technical specifications applicable to the project, a geotechnical report, and detailed drawings. CP 59-60; CP 65-70.

The project entailed the excavation of soil/rock to create a trench and the installation of sanitary sewer lines and manholes in the trench. CP 68. The project was set forth in a unit price contract which was structured with nineteen separate bid items, each addressing a specific element or potential element of the project. The excavation for the sewer pipe trench was not bid separately. It was included in the price bid per linear foot for sewer pipe installation. CP 91-93.

One of the issues with the project was the extent to which rock might be encountered during excavation. The City provided a limited and disclaimed geotechnical report to the bidders which addressed the results of two boring samples taken at the project site. Both the technical specifications and the payment provisions of the contract addressed the possibility of rock excavation.



The technical specifications contained a specific section for rock excavation which provided an objective test method for determining what would actually constitute rock for purposes of the contract. CP 164-165. Rock excavation was one of the separate nineteen bid items in the City's unit price contract. It was a contingent bid item. CP 91-93. The bid item for rock excavation specifically provided for separate payment to be made for the amount of rock excavated which met the objective classification as rock.

A total of fifteen bids were received for the project. Each of the fifteen contractors bid a different dollar amount for rock excavation. The bid amounts for rock excavation varied from \$.50/cubic yard to \$250.00/cubic yard. CP 61. Pacific Northwest Earthworks, LLC. ("PNWE") bid \$2.50/cubic yard. CP 328. PNWE submitted the lowest total bid for the project and was awarded the contract. CP 60.

During work on the project, PNWE claims it encountered rock that it was unable to excavate with the excavator it owned. PNWE claims it had to rent another excavator to complete the project. CP 1-5. Upon completion of the project, PNWE made a request for additional compensation in the amount of \$55,455.87 claiming that it had encountered a changed condition on the jobsite – the presence of rock. CP 62; CP 361.

The City denied PNWE's request and offered to pay for any rock that was excavated under the specific bid item for rock excavation set forth in the contract. CP 62-63. PNWE rejected payment under the terms of the contract and instead brought a lawsuit against the City alleging the City misrepresented the site conditions and breached the terms of the contract. PNWE seeks additional compensation outside the terms of the contract. CP 1-5.

Even though PNWE had referred its lawsuit for additional compensation to mandatory arbitration, the City had a right to and did seek dismissal of PNWE's claim through summary judgment. The trial court correctly concluded that the City had not misrepresented the site conditions to PNWE and that payment for any rock excavation was contemplated by the parties in the terms of the contract. CP 515-517. The trial court correctly granted summary judgment dismissing PNWE's claim. The trial court also correctly awarded the City its attorney fees and costs as set forth by the provisions of the contract. CP 600-602.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

The City disagrees with the assignment of issues set forth by PNWE. The City believes that the sole issue of appeal is more properly stated as follows:

Whether the trial court properly dismissed PNWE's claim against the City as a matter of law on summary judgment where:

- A. PNWE presented no evidence that the City misrepresented the subsurface conditions in the contract documents;
- B. The geotechnical report provided to PNWE contemplated the possible presence of rock;
- C. The geotechnical report contained express disclaimers limiting its findings and use by contractors;
- D. The contract specifications disclaimed reliance on the geotechnical report by contractors;
- E. Both the contract specifications and the bid provisions of the contract contemplated rock excavation;
- F. Every one of the bids submitted to the City contained a separate bid for rock excavation; and
- G. PNWE excavated the rock encountered on the project site with conventional excavation equipment as contemplated by the contract.

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### III. COUNTERSTATEMENT OF THE CASE

#### A. The Project.

In April 2009, the City advertised for bids for the Cougar Mt/SE 45<sup>th</sup> Sanitary Sewer project. CP 68-70. The project involved the excavation of a trench and the installation of 510 linear feet of new 8-inch PVC sanitary sewers, 150 linear feet of new 6-inch PVC sanitary sewers, four new manholes, and appurtenances. CP 68.

Each bidder was provided with the exact same packet of information. CP 59-60. Appendix G to the bid documents was a geotechnical report prepared by GeoEngineers, Inc. (“GeoEngineers”) to assist the City in the preparation of the design and contract documents. CP 67; CP 280-307. The GeoEngineers report was provided as part of the bid documents solely for general reference by potential bidders. The entirety of the GeoEngineers report was provided to each bidder. CP 59-60.

#### B. The Geotechnical Report.

To prepare its report, GeoEngineers explored the subsurface conditions of the project site by drilling two borings (B-1 and B-2) along the approximately 510 linear feet that encompassed the project. CP 284; CP 475. These boring samples were taken with standard soil (not rock) sampling equipment. CP 476. GeoEngineers encountered four different

types of soil and bedrock material with these two borings. CP 286; CP 299-300; CP 476-477. The samples included everything from loose silty sand to Blakeley Formation sandstone and siltstone. CP 286; CP 476-477.

GeoEngineers described the Blakeley Formation in its report:

Blakely Formation bedrock is described as fresh to highly weathered medium to coarse grained sandstone and siltstone that is roughly east-west striking and north dipping approximately 25 degrees. Glacial till typically consists of a dense to very dense heterogeneous mixture of sand, gravel, cobbles and occasional boulders in a silt and clay matrix that were deposited beneath a glacier.

CP 285.

The density of each soil sample was tested and classified by driving the sampler into the soil/rock with a 140-pound hammer free falling 30 inches. The number of blows required for each 6 inches of penetration was recorded. The results varied with the depth of the soil tested. CP 296.

The blow counts for the dark gray fine sandstone/siltstone encountered by GeoEngineers at the deepest level (12-15 feet) required 100 blows with a 140-pound hammer free falling 30 inches to achieve a mere 6" of penetration by the hollow-stem auger drilling equipment. By comparison, the blow counts for soils above this layer of bedrock had blow counts of 4, 7 and 8 to achieve a penetration of 12 inches. CP 296.

This dark gray fine sandstone/siltstone bedrock had a hardness classification described as “severely weathered, friable, very soft rock hardness,” as there are five levels of rock hardness classification more dense that would describe rock such basalt, granite and other more competent rock. CP 298-300.

As testified to by Thomas A. Tobin, a geotechnical engineer, in his declaration, there is a difference between what is defined as rock and what is defined as soil by geotechnical engineers. Soil is generally loosely deposited, unconsolidated material. Rock is inherently much harder. Rock is further defined by its density. Hard rock such as granite, cannot be easily broken apart. Soft rock such as sandstone or siltstone can generally be broken and removed by use of conventional excavators. Hard rock requires systematic drilling or blasting to be removed. CP 476.

The dark gray fine sandstone/siltstone bedrock identified at the project site was a form of rock although there are obviously harder (more dense) forms of rock. This rock is defined as having a hardness which is “soft” because it is weathered and friable, meaning when it is dug, it will break apart for removal. CP 476-477. Based on its two boring samples, GeoEngineers anticipated that the earth and weathered rock present in the two samples could “be excavated with conventional excavation equipment, such as trackhoes or dozers.” CP 287. Had this dark gray fine

sandstone/siltstone been hard rock, GeoEngineers would not have been able to penetrate it with the sampling methods it had utilized. CP 477.

GeoEngineers also dedicated three entire pages in its report (labeled Appendix C to its geotechnical report) to qualify the limitations and use of its report. In those pages, GeoEngineers stated:

- that the report had been prepared for the exclusive use of the City of Bellevue;
- that the report was not intended for use by others;
- that the geotechnical study was conducted for a civil engineer or architect and may not fulfill the needs of a construction contractor;
- that its interpretation of subsurface conditions was based on field observations from widely spaced sampling at the site;
- that site exploration indentified subsurface conditions only at those points where the samples were taken;
- that actual subsurface conditions may differ, sometimes significantly, from those indicated in the report;
- that its report, conclusions and interpretations should not be construed as a warranty of subsurface conditions;
- that contractors could misinterpret the geotechnical report and that contractors should reduce the risk by having GeoEngineers participate in pre-bid and preconstruction conferences; and
- that contractors should be aware that the report was not prepared for bid development and that the report's accuracy is limited.

CP 305-307.

C. The Contract Documents and Rock Excavation.

The general conditions included in the construction contract packet also provided that a bidder should visit the actual project site before submitting a bid to ascertain the site conditions and that the bidder was bound by certain limitations:

**1-02 BID PROCEDURES AND CONDITIONS**

**1-02.1 Examination of the Work Site**

Before submitting his bid, **the bidder shall examine the site of the work and ascertain for himself all the physical conditions in relation thereto.** Failure to do this shall not relieve the bidder from entering into a contract nor excuse him from performing the work in strict accordance with the terms of the contract and specifications. **He will not be entitled to additional compensation if he subsequently finds the conditions to require other methods or equipment that he did not anticipate in his Contract Prices.**

**Any statement or representation made by an officer, agent, or employee of the Owner with respect to the physical conditions appertaining to the site of the work shall not be binding upon the Owner.** (emphasis added)

CP 108-109.

Since the two samples taken by GeoEngineers indicated that a bedrock of sandstone and siltstone was in fact present below the surface and knowing that such formations may vary in density (hardness), the City

chose to include a Rock Excavation section in the technical provisions of the contract. The Rock Excavation section was to address the possibility that contractors may need to engage in rock excavation. CP 60. The specific section dedicated to the issue of potential rock excavation was contained in the chapter or section of the contract entitled “Earthwork”:

**2-04                      ROCK EXCAVATION**

**2-04.1                  Construction Requirements**

If rock is encountered, excavation measurement and payment for such shall be in accordance with Section 7-09.3(7)B “Rock Excavation” and Section 7-09.4, “Measurement” and Section 7-09.5 “Payment of the Standard Specifications. For hardpan, hard clay, glacial till, sandstone, siltstone, shale or other sedimentary rocks, it will be the Contractor’s responsibility to demonstrate that such materials meet the definition of rock set forth in Section 7-09.3(7)B of the Standard Specifications if there is a pay item for rock excavation and payment is requested.

CP 164-165.

In the definition section of the contract, it is made clear that the Standard Specifications reference contained in this section of the contract is to the latest edition of the W.S.D.O.T. “Standards Specifications for Road, Bridge and Municipal Construction.” CP 105. W.S.D.O.T. 7-09.3(7)B entitled Rock Excavation provides the following definition for rock:

Rock excavation shall cover the removal and disposal of rock that requires systematic drilling and blasting for its removal, and also boulders exceeding ½-cubic yard. Ledge rock, boulders, or stones shall be removed to provide a minimum clearance of 4-inches under the pipe.

Hardpan, hard clay, glacial till, sandstone, siltstone, shale, or other sedimentary rocks, which are soft, weathered, or extensively fissured will not be classified as rock excavation. Rock is defined as one that has a modulus of elasticity of more than 200,000-PSI or unconfined compressive strength at field moisture content of more than 2,000-PSI.

CP 25.

Under this W.S.D.O.T. definition, any material that was classified as hardpan, hard clay, glacial till, sandstone, siltstone, shale, or other sedimentary rocks, which are soft, weathered, or extensively fissured was generally not classified as rock. Only materials that had a modulus of elasticity of more than 200,000-PSI or unconfined compressive strength at field moisture content of more than 2,000-PSI would meet the definition of rock.

If the contractor on this project believed it had encountered rock, as set forth section 2-04 (Rock Excavation) of the technical provisions of the contract and wanted additional compensation, it was the contractor's responsibility to first demonstrate that the material met the W.S.D.O.T. definition of rock. CP 202.

D. Contingent Bid Item #3 – Rock Excavation.

If the contractor demonstrated that it had encountered rock, the contractor was entitled to additional payment as set forth in the payment section of the contract under Bid Item #3 for Rock Excavation:

**BID ITEM #3 – ROCK EXCAVATION\***

The quantities of authorized rock excavation paid for by the City shall be in accordance with the Standard Specification and computed from in-place, field measurements and estimates made by the Engineer.

**Payment for rock excavation when authorized by the Engineer shall be made at the Contract Price bid per cubic yard. The Contract Price shall include full compensation for furnishing all labor, materials, tools, equipment, and incidentals, and for completing all work involved in excavating and disposing of the rock, and placing and compacting gravel borrow (or other backfill material) as directed by the engineer.**

Only those excavated materials that meet the definition of rock per the Standard Specifications Section 7-09.3(7) B shall be paid for under this bid items.

Furnishing imported backfill materials from a Contractor-supplied source will be paid for under the specific imported backfill item set forth in the Proposal/Construction contract.

Excavated material meeting the Standard Specifications definition of rock is not expected (See Appendix G-Geotechnical Report). This

contingent bid item is included for use only if such rock is encountered. (emphasis added)

“Rock Excavation” is a contingent item of work per Section 1-09.7 of the General Conditions herein. (emphasis added)

CP 202. While, based on the technical information obtained from the two borings, rock excavation was not expected at the project site, rock excavation remained a possibility that was addressed by this contingent bid item in the contract. At no point in the contract documents or in the GeoEngineers report is it ever stated that rock, as defined by the Standard Specifications of W.S.D.O.T., would not be encountered at the project site.

This separate bid item for Rock Excavation was included in the contract to allow contractors to address the possibility of encountering rock as they deemed fit based on their available manpower and equipment. For example, if a contractor would need to rent equipment to excavate rock that could be built into that contractor’s bid price for rock excavation. On the other hand, if the contractor owned all different types of excavation equipment and had the manpower on staff to operate the equipment, that contractor could account for that advantage in a lower bid price for rock excavation. There is no way to determine why a

contractor bid a given amount on any specific bid item, such as rock excavation, simply based on the number that was bid. CP 60-61.

E. The Bids for Rock Excavation.

There were fifteen different contractors who bid on this project. The bid amounts for Rock Excavation varied from \$.50/cubic yard to \$250.00/cubic yard. PNWE bid \$2.50/cubic yard. CP 61. Ten of the fifteen contractors bid more than PNWE. The City's own engineer's estimate for rock excavation was \$100/cubic yard for an estimated 100 cubic yards. CP 461. PNWE bid a total contract amount of \$158,804.10 for the project. The next lowest bidder was \$187,692.00. The highest bidder was \$357,691.46. CP 60.

F. PNWE's Work on the Project.

PNWE began work on the project on June 22, 2009. PNWE began excavation work with a Komatsu 200 excavator with Tiger Teeth which it owned. CP 3. On or about July 7, 2009, PNWE rented another excavator – a Kobelco 215 excavator – to complete the excavation work. CP 344. PNWE completed excavation work with the Kobelco 215 excavator. CP 3. PNWE was not required to undertake systematic drilling or blasting to remove the soil/rock on the project site. PNWE completed excavation work for the trench through the use of a standard

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piece of excavation equipment. Both the Komatsu and Kobelco excavators are conventional pieces of excavation equipment. CP 462.

The City did not inform PNWE or any contract bidders as to the type of equipment that should be used on the project. It was solely PNWE's decision to ascertain what equipment it needed to bid and then complete the project. CP 62. Excavators come in a variety of horsepower ratings, with different arm lengths, bucket sizes and bucket teeth that take into account the type of work to be performed. CP 462. The type of excavator(s) chosen by PNWE for this project was solely at PNWE's discretion.

PNWE maintained Bid Item Quantity Tracking forms throughout its work on the project. In these forms, PNWE routinely entered its work data into the Rock Excavation bid item subcategory. PNWE listed a total of 284 cubic yards of rock as having been excavated from the site pursuant to Bid Item #3 of Schedule A - Rock Excavation. CP 49-58. At a bid price of \$2.50/cubic yard for rock excavation, PNWE was entitled to a maximum of \$710.00 if it could show that all 284 cubic yards of excavated material met the definition of rock set forth in the contract provisions.

After PNWE completed work on the site in July 2009, PNWE made a request for additional compensation for work claiming that it had

encountered a changed condition on the jobsite (the presence of rock) which entitled it to additional compensations outside the terms and conditions of the contract. CP 62. PNWE sought to recover all its labor and equipment costs incurred on the project site for a period of 13 days while it excavated the 284 cubic yards of alleged rock. PNWE sought to have the City convert the bid item contract into a time and materials contract. PNWE sought additional compensation from the City in the sum of \$55,455.87. CP 62.

The City denied PNWE's request and offered to compensate PNWE for any rock it excavated meeting the definition set forth under the contract provisions at the rate specifically bid by PNWE for Rock Excavation. CP 62. PNWE refused to accept compensation for rock excavation under the terms of the contract and instead brought this lawsuit alleging that the City had misrepresented the site conditions in the bid documents and seeking additional payment outside the terms of the contract. CP 1-5.

The City moved for summary judgment asking the trial court to construe the terms of the contract between the parties. After reviewing all the documents submitted by the parties, including the declaration of Paul Traverso, and hearing the argument of counsel, the trial court issued its ruling. VRP 18, 27. The trial court found that there was no factual

dispute that the contract between the parties contemplated the possibility of rock excavation and that PNWE was only entitled to payment for any rock excavation under the terms of the contract. The trial court found no evidence that the City had provided inaccurate information to bidders or misrepresented the subsurface conditions. The trial court also found that the City had effectively disclaimed reliance on any geo technical information provided that related to the subsurface conditions. For these reasons, the trial court dismissed PNWE's claim. CP 515-517.

The City then moved for an award of attorney's fees and costs. The public works contract entered into between the City and PNWE provided for an award of attorney fees and costs to the prevailing party in the event of a lawsuit:

**1-07.6 Legal Fees**

In any lawsuit between the parties with respect to the matters covered by the Agreement, the prevailing party will be entitled to receive its reasonable attorney's fees and costs incurred in the lawsuit, in addition to any other relieve it may be awarded.

CP 137. The trial awarded the City attorney's fees and costs as the prevailing party. CP 600-602.

## IV. ARGUMENT

### A. Standard of Review.

In reviewing orders on summary judgment, the court undertakes the same inquiry as the trial court, considering all the facts and reasonable inferences in the light most favorable to the nonmoving party. Kahn v. Salerno, 90 Wn. App. 110, 117, 951 P.2d 321, rev. denied, 136 Wn2d 1016, (1998). Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment cannot be defeated on speculation, conjecture, or mere possibility. Chamberlin v. Dept. of Trans., 79 Wn. App. 212, 215-16, 901 P.2d 344 (1995). The court should not consider conclusory statements made by either party. P.U.D. No. 1 v. W.P.P.S.S., 104 Wn.2d 353, 361, 705 P.2d 1195 (1985), order modified, 713 P.2d 1109 (1986).

### B. PNWE Failed to Provide Evidence of a Misrepresentation of the Site Conditions.

The crux of any negligent misrepresentation claim is the conveying of and reliance on false information. Borish v. Russell, 155 Wn. App. 892, 905, 230 P.2d 646 (2010). PNWE contends that the City's bid documents misrepresented the site conditions by affirmatively

representing that no hard rock would be encountered at the project site. The trial court correctly concluded, however, that there was no evidence presented by PNWE that indicated that the City had ever misrepresented or provided false information as to the site conditions.

PNWE has repeatedly confused terms and attempted to create a factual dispute where none exists. PNWE has created a red herring with its repeated use of the term “hard rock.” PNWE did not present any evidence defining its use of the term “hard rock.” PNWE did not present any evidence to indicate that what it excavated at the project site met any particular definition of “hard rock.” PNWE did not present any contract language wherein the City represented that “hard rock” would not be encountered on the project site. PNWE did not present any evidence indicating that the City represented that rock harder than that which was detected by GeoEngineers would not be present on the project site. PNWE did not present any evidence that the City represented that the soil/rock that might be encountered at the project site would be easily removed or excavated.

There are no material facts in dispute. It is undisputed that rock varies greatly in its density and hardness. Geotechnical engineers refer to rock in varying degrees from very soft to very hard. But it is all still rock. GeoEngineers encountered weathered sandstone/siltstone (Blakely

Formation bedrock) with its two borings on the project site. That is rock, albeit rock at the low end of rock hardness.

It is undisputed that GeoEngineers limited its findings of subsurface conditions to the sites of its two widely spaced boring samples. GeoEngineers further noted that subsurface conditions may vary significantly from those represented by the two samples.

It is undisputed that GeoEngineers did not guarantee that the two borings samples warranted the entirety of the subsurface conditions. It is undisputed that GeoEngineers offered no results on the compressive strength (PSI) of its boring samples. It is undisputed that GeoEngineers was able to obtain its boring samples with soil (and not rock) sampling equipment. It is undisputed that the further GeoEngineers penetrated the earth with its bore sampling equipment, the harder it became to make those penetrations.

It is undisputed that GeoEngineers evaluated the bedrock it encountered and determined that it did not meet the criteria of W.S.D.O.T. Standard Specification 7-09.3(7)B for Rock Excavation because the bedrock was composed of sandstone and siltstone, both of which do not require blasting for removal under this standard specification. CP 478. It is also undisputed that PNWE was able to

remove the rock it encountered with conventional excavation equipment and without blasting.

No one other than Paul Traverso of PNWE ever characterized the rock excavated from the site as “hard rock.” However, Paul Traverso is neither a geologist nor a geotechnical engineer. CP 468-469. He has no applicable education or training that would qualify him to label the qualities or density of rock.

It appears that Mr. Traverso labeled the material he excavated as “hard rock” only because some of the rock excavated had a PSI of over 2000, thus meeting the definition of rock under the W.S.D.O.T. Standard Specification 7-09.3(7)B based on its compressive strength. At the same time, Mr. Traverso admitted in his deposition testimony that the W.S.D.O.T. Standard Specification defining “rock” as having more than 2000 PSI was simply an arbitrary number used by W.S.D.O.T. and did not translate into a particular level of rock hardness. CP 473.

It appears that PNWE’s claim of misrepresentation is based on erroneous assumptions. PNWE assumed it would not have to excavate *any rock*. As he clearly testified in his deposition, Mr. Traverso based his bid of \$2.50 on his belief that there would not be any rock at the project site. CP 470. However, it was always clear that, at the very least, a bedrock of sandstone and siltstone was present at the site.

PNWE also assumed that whatever rock it encountered could be “easily” removed. However, there are no documents in which the City nor GeoEngineers ever represented that the bedrock could be “easily” removed. All that was represented is that the bedrock at the site could be removed by conventional excavation equipment. Conventional excavation equipment comes in a wide variety. Neither the City nor GeoEngineers indicated what type of excavation equipment might be necessary. PNWE made the assumption that it could undertake the excavation work with a small excavator that it owned. Mr. Traverso even admitted the excavator he rented to complete the work was a piece of conventional excavation equipment. CP 470.

PNWE asserts that the low Rock Excavation bid numbers provided by three other bidders is proof that the City somehow misrepresented the site conditions. This is an unfounded conclusion reached by PNWE. As testified to by City engineer Scott Taylor, a unit price contract allows bidders to bid separately on each bid items of the contract. CP 60-61. Why a contractor may bid high or low on any particular bid item is contingent on a variety of factors, and it would be pure speculation to conclude why a contractor bid a specific number on a particular bid item without more specific information. For example, a contractor could have bid low on the Bid Item #3 – Rock Excavation

because the contractor owned a variety of excavators and was capable of removing almost any type of rock encountered on the site.

PNWE has not cited a single Washington case which supports its claim of misrepresentation under facts similar to this case. Furthermore, the cases cited by PNWE reinforce the principle that where the factual information provided by the government to the contractor is accurate, then there is no material misrepresentation and thus the risk lies with the contractor should any deviation in conditions occur See Robert E. McKee, Inc. v. City of Atlanta, 414 F. Supp. 957 (N.D. Ga. 1976); P.J. Maffei Building Wrecking Corp., v. United States, 732 F.2d 913 (Fed. Cir. 1984); McCormick Construction Company, Inc. v. United States, 12 Cl. Ct. 496 (1987); Maryland Casualty Co. v. City of Seattle, 9 Wn.2d 666, 116 P.2d 280 (1941).

The trial court correctly concluded that PNWE presented no evidence from which the court could conclude that the City misrepresented the site conditions. The trial court correctly concluded that there was no inaccurate information provided to PNWE.

C. It is Undisputed that the Contract Anticipated the Possibility of Encountering Rock.

A central tenet of contract interpretation is that the whole document must be examined. “[I]n construing the contract...the

intention of the parties thereto is to be gathered from the whole instrument, and each part, if possible, should be construed so that all the parts thereof may have some effect.” Hollingsworth v. Robe Lumber Co., 182 Wash. 74, 78-79, 45 P.2d 614, (1935). If the four corners of the contract unambiguously contemplate the changes complained of, then a claim related to the changes is properly dismissed as there is no question of fact to be submitted to the jury. Hensel Phelps Construction Co. v. King County, 57 Wn. App. 170, 787 P.2d 58 (1990).

There is no ambiguity in the contract language between PNWE and the City. Thus, there is no question of fact that precluded summary judgment. Rock excavation was anticipated as set forth in two major parts of the contract documents – the specifications and the bid items.

The contract specifically provides that if rock excavation is encountered, such excavation was to be paid pursuant to Bid Item #3 – Rock Excavation. The presence of this specific bid item for Rock Excavation in the contract can lead to only one reasonable conclusion – rock excavation was contemplated by both parties as a possibility. Paul Traverso of PNWE understood that fact as he testified in his deposition that he understood that if he encountered rock during the project, he would be paid under the terms of the Rock Excavation bid item in the contract. CP 471. PNWE’s claim that it is entitled to additional

compensation outside the terms of the contract would render the entire Bid Item #3 – Rock Excavation superfluous.

PNWE's actions demonstrate that it understood the fact that it could encounter rock at the site. PNWE executed a contract which included a specific provision for rock excavation. The contract also had a separate bid item just for rock excavation. PNWE calculated and submitted a separate bid price for that rock excavation. PNWE then excavated, pursuant to its contractual obligation, that rock.

Consistent with an understanding that this rock excavation was included in the contract price it bid, PNWE kept Bid Item Quantity Tracking sheets for the Project, where it kept an ongoing tally of all the rock it excavated from the site pursuant to Bid Item #3 (Rock Excavation) under the contract. CP 49-58. If PNWE believed that its excavation of rock was all outside the terms of the contract provisions, PNWE should have listed its rock excavation as additional work in the "Change Orders/Additional Work" item section of each of its Daily Job Reports. PNWE did not do so.

The evidence is uncontroverted that the contract contained a specific section addressing the possibility of rock excavation. The evidence is uncontroverted that Bid Item #3 of the contract provided for the payment of the very rock PNWE claims it encountered at the project

site. PNWE simply no longer wants to be bound by the number it bid to perform the work. PNWE's request for additional compensation for the very work it contracted to perform under Bid Item #3 should be denied.

D. The Contract Placed Any Uncertainty as to the Presence of Rock on PNWE.

Where a municipal corporation soliciting contractor bids for an excavation project provides to contractors a geotechnical report of subsurface conditions and *disclaims* legal liability for information contained in those reports, a contractor cannot subsequently recover on a claim based on information contained in those reports. Reliance on disclaimed geotechnical reports is *unreasonable as a matter of law*. Nelson Construction v. Port of Bremerton, 20 Wn. App. 321, 325, 582 P.2d 511, review denied, 91 Wn.2d 1002 (1978); Basin Paving Co. v. Mike M. Johnson, Inc., 107 Wn. App. 61, 67, 27 P.3d 609 (2001).

To support its contention that the City did not effectively disclaim the information provided in the contract, PNWE must first produce evidence that the City made positive statements of material fact that were false. As discussed above, the City did not present any data showing that hard rock would not be present at the project site. All the City and GeoEngineers presented to potential bidders was information about the two boring samples and their expectation that excavated material meeting

the definition of rock under the W.S.D.O.T Standard Specifications was not expected. No positive statements were ever made affirmatively indicating that hard rock would not be encountered.

The report of GeoEngineers specifically limits and disclaims the use of the factual information contained within the report. CP 305-307. The City's contract with PNWE then specifically disclaims any reliance on GeoEngineer's report. Section 1-02.1 (Examination of the Work Site) of the contract specifically limits the City's liability against:

Any statement or representation made by an officer, **agent or employee** of the Owner with respect **to the physical conditions** appertaining to the site of the work **shall not be binding upon the Owner.** (emphasis added)

CP 108. As GeoEngineers, a third party agent of the City, prepared the report, section 1-02.1 of the actual contract shields the City (the Owner) from any findings expressed in the geotechnical report. This clause specifically insulates the City from any claim arising out of GeoEngineers's representations regarding the excavation site's physical characteristics. The disclaimer deliberately addresses potential bidders, such as PNWE.

PNWE erroneously claims that because the City did not provide each contract bidder with a letter disclaiming the report's accuracy, the City is somehow foreclosed from now relying on the limitations and

qualifications specifically set forth in the geotechnical report. This argument is fallacious for a number of reasons.

First, it is incongruent for PNWE to rely on the information in the geotechnical report as the basis of its claim of misrepresentation while arguing that it is not bound by the liability limiting disclaimers in the same report. PNWE cannot “pick and choose” which information in the report constitutes a transmittal of information that is applicable to its claim. If PNWE asserts that it relied on representations in the report, then it is bound by its limiting disclaimers, as well. “An interpretation is not reasonable if it leads to a strained construction.” Allstate Ins. Co. v. Hammonds, 72 Wn. App. 664, 667-68, 865 P.2d 560, review denied, 124 Wn.2d 1010, 879 P.2d 292 (1994).

Secondly, the City did not write a letter to contractors disclaiming the GeoEngineer’s report because it included “Appendix C” of the geotechnical report with bid documents. “Appendix C” contains the three pages of limitations and qualifications provided by GeoEngineers as part of its report. Had the City omitted “Appendix C” of the geotechnical report from the contract documents, it would have included such a letter. However, because any reasonable contractor would read Appendix C of the geotechnical report as to disclaim GeoEngineers’s findings to any entity, PNWE’s attempt to evade “Appendix C” is unreasonable.

However, should this Court determine that the disclaimers contained in the geotechnical report do not render unreasonable PNWE's reliance on the report findings, the contract disclaimer at 1-02.1, "Examination of the Work Site" does:

Before submitting his bid, the bidder shall examine the site of the work and ascertain for himself all the physical conditions in relation thereto. Failure to do this shall not relieve the bidder from entering into a contract nor excuse him from performing the work in strict accordance with the terms of the contract and specifications. He will not be entitled to additional compensation if he subsequently finds the conditions require other methods or equipment that he did not anticipate in making his Contract Prices.

The City clearly disclaimed and limited PNWE's reliance on site information provided by others.

The City did not make any false statements misleading PNWE. The contract between the parties does not contain any warranty as to the subsurface conditions. Consequently, the disclaimers in the contract placed all risk of subsurface conditions with PNWE.

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E. The City Prevails on Summary Judgment Even if the Facts are Viewed as Presenting a Changed Condition.

The contract at issue here lacks a “changed condition” provision. The Washington Supreme Court in Dravo Corporation v. Municipality of Metro Seattle, 79 Wn.2d 214, 484 P.2d 399 (1971) held that when the municipality did not warrant the correctness of its soil investigation, the contractor bore all the risk of the work and was not entitled to extra compensation because of unexpected soil conditions. The Washington Supreme Court in Dravo noted that parties can expressly address the possibility of encountering unexpected conditions through a “changed condition” clause. See also Bingold v. King County, 65 Wn.2d 817, 399 P.2d 611 (1965).

Since the possibility of encountering rock was addressed head on with specific provisions in the contract advising bidders to examine the site to ascertain all relevant physical conditions they might encounter, providing a method for determining what qualified as rock excavation, and requesting a specific bid item for the excavation of rock, there would have been no point to a “changed condition” clause in this contract.

While PNWE agrees that the contract does not contain a changed condition clause, it cites numerous federal contract claim cases with changed condition clauses as its authority that the trial court erroneously

granted summary judgment. However, even analyzing the facts of this case as presenting a changed condition fails to provide PNWE's claim with any life.

To prevail on a claim based on misrepresentation of site conditions, a plaintiff must meet two criteria: "conditions actually encountered must have been *reasonably unforeseeable* based on *all* the information available to the contractor at the time of bidding" and a contractor must have "*reasonably relied on* its interpretation of the contract." (emphasis added). Stuyvesant Dredging Co. v. United States, 834 F.2d 1576, 1581(Fed.Cir.1987). Washington courts have adopted the same standard. Basin Paving Co., 107 Wn. App at 65; Clevco, Inc. v. Municipality of Metropolitan Seattle , 59 Wn. App. 536, 542-543, 799 P.2d 1183 (1990).

The evidence supports only one *conclusion* - PNWE's need to excavate rock under the contract was reasonably *foreseeable* and PNWE 's reliance on certain language in the pre-bid geotechnical report of GeoEngineers was *unreasonable*.

- 1. It was *reasonably foreseeable* that PNWE would be required to excavate the very rock for which it seeks additional compensation.**

There is language throughout the contract which affirmatively indicates that site excavation could require rock excavation. The contract

language and structure, coupled with PNWE's actions in performance of the contract, suggest that the very excavation of rock for which PNWE seeks additional compensation was clearly foreseeable. The court correctly found that the presence of subsurface rock was contemplated by the parties.

Where a contract indicates that a subsurface condition may exist, such as here, the issue of *reasonable foreseeability* may be decided as a *matter of law*. The test is whether the condition complained of could have been reasonably anticipated. See Dravo Corp., 79 Wn.2d 214 (court denied contractor claim where excavator encountered differing levels of underwater hardpan); Maryland Casualty Company, 9 Wn.2d 666 (denial of contractor claim where wet and soft soil required more expensive means of tunneling); Basin Paving Company, 107 Wn. App. 61 (court denied a changed condition claim based on the contractor's encounter of more subsurface rock that it expected based on boring results); Nelson Construction, 20 Wn. App. 321 (more and larger boulders in marina dredging operation did not support a contractor claim for additional compensation).

In Nelson Construction, the Port of Bremerton employed a soils engineering firm to conduct a study of the soils in the project area. The report contained the results of two borings in the proposed dredging area

which failed to reveal any rocks larger than two inches in diameter. The report, however, cautioned that rocks of varying sizes may be encountered during this excavation of the glacial soils. An addendum to the contract also suggested that rocks might be encountered which could not be handled by normal dredging procedures. The plaintiff sought additional compensation after it encountered rocks larger than it expected. The court summarized Nelson's claim as one where the alleged changed condition "came down to the fact that more large rocks incapable of being dredged by the hydraulic method were encountered than Marine's Mr. Youngman had anticipated." Id. at 330.

In denying the plaintiff's claim for additional compensation, the court in Nelson Construction noted that the plaintiff had been advised of the possibility of difficult soil conditions and that the representations made to the plaintiff were not inaccurate. The actual subsurface conditions were reasonably anticipated and not at variance with the contract. The court also recognized that the plaintiff's wound was really self inflicted in that the plaintiff did not take advantage of the addendum to the contract to adequately negotiate with the Port for this possibility. Id. at 330-333.

As in Nelson Construction, PNWE was not provided with any inaccurate information and was specifically alerted to the possibility of subsurface rock with the specific contract provisions and specific bid item

addressing Roc Excavation. The fact that the contractor lacked the proper equipment necessary to complete a job and had to rent equipment (as in this case as well) did not sway the court in Nelson Construction. Just as in Nelson Construction, PNWE had a mechanism to properly contract for the presence of subsurface rock with Bid Item #3. The fact that PNWE failed to bid more than \$2.50 a cubic yard for rock excavation is a wound that was self inflicted.

In Basin Paving Company, 107 Wn. App. 61, the Town of Lind requested bids for a waste water and water system project. Lind had geotechnical borings performed at 50-foot intervals along the project site. The bulk of the project was excavation work. The contract provided that all excavation was unclassified, that payment for rock excavation was not authorized, that each bidder should examine the site carefully to make their own determinations, that the boring results were included to help evaluate the costs of the excavation, and that the property owner was not responsible for accuracy of the boring results.

Basin Paving sued contending it was entitled to additional compensation for changed conditions because it encountered more subsurface rock than it anticipated. The court concluded as a matter of law that the presence of more rock was foreseeable to Basin Paving and thus not a changed condition. A changed condition is limited to when the

“condition complained of could not reasonably have been anticipated by either party to the contract.” *Id.* at 65 (citing Bingold, 65 Wn.2d 817).

The presence of rock reasonably should have been anticipated by PNWE in this instance. Like Basin Paving, the contract with PNWE provided for the excavation of whatever material was encountered on the project site, the contract referenced the possibility of rock, and the contract and bid documents limited PNWE’s reliance on the boring tests.

**2. PNWE’s reliance on the contract documents to support its misrepresentation claim is *manifestly unreasonable*.**

PNWE alleges that the April 16, 2009 report prepared by GeoEngineers for the exclusive use of the City contains information which reasonably led PNWE to conclude that it would never encounter rock at the project site. However, the trial court correctly concluded that PNWE’s interpretation of contract documents was *manifestly unreasonable*.

To determine whether a contractor reasonably interprets documents to indicate a particular site condition, “the court [places] itself into the shoes of a reasonable and prudent contractor and decide[s] how such a contractor would act in interpreting the contract documents.” H.B. Mac, Inc., 153 F.3d 1338 (Fed. Cir. 1998) (quoting P.J. Maffei Bldg. Wrecking Corp. v. United States, 732 F.2d 913, 916 (Fed. Cir. 1984)). The plain

contract language demonstrates that PNWE *unreasonably relied* on language in the geotechnical report.

PNWE argues that the geotechnical report of GeoEngineers, which was prepared for the City to assist in the preparation of design and contract documents and only provided to potential bidders as general information with the bid documents, mislead PNWE into believing that it would not have to excavate any rock on the project. In making this argument, PNWE is asking the Court to ignore the numerous references to rock excavation found throughout the actual bid documents, the disclaimers in the contract documents which specifically release the City from legal liability from third party subsurface representations contained in the bid documents, and the numerous disclaimer clauses in the geotechnical report itself.

To support its assertions, PNWE points to language found in the report prepared by GeoEngineers which indicates that the bedrock encountered in the samples was “very soft with respect to hardness”, that this Blakely Formation bedrock did not meet the W.S.D.O.T Standard Specification for rock excavation, and that the bedrock could be excavated with conventional excavation equipment. CP 286-287. From this language, PNWE claims it reasonably concluded that it would never

encounter what it called hard rock during its excavation process. PNWE's reliance is manifestly unreasonable.

First and foremost, as discussed earlier, there is no evidence upon which PNWE can rely to support its claim that the description of the site condition was actually misrepresented to it by the City. The geotechnical report indicates that the project site was in the Blakeley formation and that the two boring samples contained bedrock. CP 285. GeoEngineer's report indicates that the rock found in the sampling, although labeled as having a "very soft rock hardness," was still in fact rock and more significantly, that in order to penetrate this rock a mere 6 inches, 100 blows with a 140-pound hammer free falling 30 inches was required. Not an easy task and certainly indicative of a rock that was difficult to penetrate. PNWE unreasonably concluded that the excavation of rock would not be necessary with this project.

Additionally, the City and GeoEngineers took great efforts in the documents to qualify the information that it provided to potential bidders. As subsurface rock formations are not always consistent, GeoEngineers repeatedly qualified its two limited findings and alerted potential readers about relying on these two limited findings as a warranty of all the subsurface conditions that might be encountered at the site. CP 305-307. PNWE could not reasonably conclude that the entire 510 linear feet of

ground that had to be excavated would be identical to the two boring samples.

There is no inaccuracy or misrepresentation in the report prepared by GeoEngineers. PNWE, at best, misread the report, and PNWE's reliance on its misreading is manifestly unreasonable. A contractor cannot recover for its own misjudgment based on information which itself is accurate.

F. PNWE Failed to Assign Error to the Amount of the Attorney's Fees Awarded by the Trial Court and That Ruling Should not be Considered in this Appeal.

As the appellant, PNWE is required in its brief to set forth a separate concise statement of each error it contends was made by the trial court." RAP 10.2(1)(4). In its brief, PNWE fails to assign error or devote any legal analysis to the nature and extent of the attorney's fees and costs awarded by the trial court. PNWE's failure in that regard renders the trial court's decision on that issue final.

Even if PNWE were to have assigned error to this issue, its failure to brief and argue the issue leaves this Court with no choice but to disregard the issue. Assignments of error that are not argued or briefed in the appellant's brief are deemed to be abandoned and will not be considered by the Court. Kent v. Whitaker, 58 Wn.2d 569, 571, 364 P.2d 556 (1961); Fowles v. Sweeney, 41 Wn.2d 182, 187, 248 P.2d 400 (1952).

Therefore, this Court should not review the trial court's order regarding the nature and amount of attorney's fees awarded to the City as the prevailing party at the trial court level.

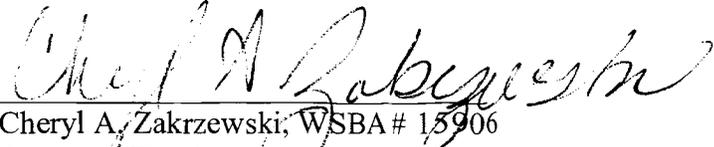
**V. CONCLUSION**

The City properly moved for summary judgment. There were no material issues of fact in dispute. The trial court properly dismissed PNWE's claim for additional compensation. The decision of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of March, 2011.

CITY OF BELLEVUE  
OFFICE OF THE CITY ATTORNEY  
Lori M. Riordan, City Attorney

By

  
Cheryl A. Zakrzewski, WSBA # 15906  
Assistant City Attorney  
For Respondent City of Bellevue

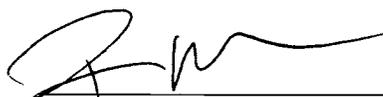
CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in King County, Washington. I am over the age of 18 years and not a party to the within-entitled action. My business address is 450 110<sup>th</sup> Avenue NE, Bellevue, WA 98004. On March 9<sup>th</sup>, 2011, I served via ABC Legal Messenger a copy of the foregoing ***Brief of Respondent*** on the following:

Bruce P. Babbitt  
Jameson Babbitt Stites & Lomard, PLLC  
999 Third Avenue, #1900  
Seattle, WA 98104

I declare under penalty or perjury under the laws of the State of Washington that the foregoing is true and correct

Dated this 9<sup>th</sup> day of March, 2011.

  
\_\_\_\_\_  
Reina McCauley  
Legal Secretary

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SUPERIOR COURT  
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