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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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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 MIDDGAUGH

REPLY AND CROSS-RESPONDENT'S BRIEF OF APPELLANT
AND CROSS-RESPONDENT VINCI CONSTRUCTION GRANDS
PROJETS/PARSONS RCI/FRONTIER-KEMPER, JV

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I. INTRODUCTION

VPFK's opening brief demonstrated that the trial court erroneously granted summary judgment on two of VPFK's most important claims. First, the differing site condition claims that sought compensation for the added time and expense VPFK incurred when soil in the tunnel changed between a plastic and non-plastic condition more frequently than the contract documents indicated it would. Second, the defective specifications claim, in which VPFK alleged that defects in the plans and specifications, including the absence of provisions for exploratory bore holes and safe havens, caused VPFK to incur additional time and costs.

The County challenges both the legal underpinnings and the facts on which these claims are based. The County's arguments are unavailing. As we explain below, both the differing site condition theory and the defective specification theory are grounded in well-established state and federal case law. And VPFK's causes of action were fully supported by material facts. The County's brief either ignores this evidence or flouts the cardinal rule that a court should "consider all disputed facts in the light most favorable to the nonmoving party" *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466,

296 P.3d 800, 804 (2013). Had the trial court applied this rule, it should have denied the County's motions.

The trial court also committed three other significant errors: (1) it refused to instruct the jury that the County impliedly warranted that its plans and specifications would work; (2) it refused to enforce the contract's liquidated damages provision; and (3) it excluded evidence of concurrent delays that could have eliminated the County's damages award. The County's defense of these rulings, addressed below, also lacks merit.

Finally, in its cross-appeal, the County argues that the trial court should have granted its motion for judgment as a matter of law on VPFK's claim that it encountered differing site conditions at the locations where the BT-2 and BT-3 rim bars were repaired. The jury's verdict was fully supported by evidence of four differing site conditions in those locations: the absence of natural safe havens; pressure exceeding 75 psi, the maximum pressure VPFK was supposed to encounter for interventions; two aquifers near the BT-2 tunneling machine that did not appear on the contract documents; and the inability of full-face teal to support the tunnel face for a full 24 hours. The combined effect of these conditions transformed what should

have been a short repair job into a marathon nine-month effort that fully justified the jury's verdict for VPFK.

Since none of VPFK's arguments on appeal challenge the judgment on substantial evidence grounds, the County's lengthy discussion of alleged management problems, floods at the treatment plant, conflicts among joint venture partners, and the so-called "dead weight" strategy is irrelevant. A few points in the County's statement of facts should nevertheless be corrected. The County states that delays in the work were caused by flooding at the slurry treatment plant, a claim it highlights with photos attached to its brief. However, VPFK kept detailed contemporaneous logs that described on an hourly basis everything that occurred on the job, including flooding or other breakdowns at the slurry plant. (RP 3631, 3674; ex. 1515, at VPFK_EM_00140549-51 (report on activities during the 24-hour period of October 8, 2008).) Cumulatively, over more than two years, these reports show that flooding at the slurry plant delayed VPFK's work by only 26 hours. (RP 3674.)

The County also blames delays on mismanagement by on-site supervisors from Vinci, one of the joint venturers. (RB 10-11.) But there is no evidence these alleged management issues caused any delays. Further, it is undisputed that the complaints about

management ceased after Vinci employee Thierry Portafaix took charge of the project in March 2009. (RP 753-54, 1843-44, 2666.) The alleged earlier mismanagement had nothing to do with the project falling behind schedule.

Last, VPFK presented evidence that its so-called “dead weight” strategy referred simply to the decision not to take undue risks when the rim bars broke, “to think carefully about what we should do before doing anything, because again, we had not many options” (RP 1683). In any event, VPFK’s response to the unique and complex problems created by the rim bar damage became moot two months after the damage occurred, when the expert panel recommended a solution—dewatering and creating safe havens—to fix the rim bars. VPFK worked diligently to implement that solution. (RP 1984-87, 5088-92; ex. 130.)

Finally, and most importantly, the reason for the delays was hotly disputed. Because the court granted summary judgment on one of VPFK’s central differing site condition claims, granted summary judgment on its defective specifications claim, and refused to instruct on its implied warranty claims, the jury was not given all the facts or instructions necessary to decide which party was responsible for the delays. The County’s statement of facts therefore is not only irrelevant

to the issues raised on appeal, it ignores that VPFK was severely prejudiced by the court’s pretrial rulings. The rulings prevented VPFK from arguing that its delays in performing the work were largely attributable to its dismissed differing site conditions and defective specifications claims. Had the jury assigned the blame for the delays where it belonged—on the differing site conditions and defective specifications—the County’s default claim, which ended in a \$150 million damages award, might well have been rejected.

II. LEGAL ARGUMENT

A. The Trial Court Committed Prejudicial Error By Granting Summary Judgment On VPFK’s Frequent Soil Transitions Claim.

1. The County misstates the key elements of VPFK’s claim.

The County argues that the trial court properly granted summary judgment on VPFK’s frequent soil transitions claim because “VPFK had *no evidence* to support key elements of” that claim. (RB 2.)

The County, however, misstates those key elements.¹

¹ The County identifies what it claims are four elements of a differing site condition claim, but cites no authority supporting these elements. (See RB 24-25.) *Brechan Enterprises, Inc. v. United States*, 12 Cl. Ct. 545, 551 (1987) correctly identifies the four elements of the claim, which differ from the County’s list: “(1) actual conditions at the site differed materially from those indicated in the contract documents; (2) the differing site conditions could not have been ascertained by a reasonable site investigation and a pre-bid (continued...)”

To satisfy the first element of the claim, the County argues that VPFK had to introduce evidence that the Contract affirmatively “represented” how frequently the soil would transition between plastic and non-plastic. (RB 24.) Because the Central Contract did not *expressly* represent what type of soil would be found between bore holes, the County argues that VPFK’s differing site condition claim fails at the first step. (*See* RB 26-28.)

Neither the Contract nor case law requires an express representation about ground conditions before a contractor can pursue a differing site condition claim. The Contract provides that a Type I differing site condition claim arises if there are “[s]ubsurface or latent physical conditions at the site which differ materially from those *indicated* in the Contract Documents.” (CT 274 (emphasis added).) Courts use the same terminology. *See, e.g., Bignold v. King County*, 65 Wn.2d 817, 821-22, 399 P.2d 611, 614 (1965) (where contract permits contractor to recover costs caused by ground conditions “differing materially from those *indicated* in the contract,” recovery is permitted “when the condition complained of could not have reasonably been anticipated by either party to the contract”) (emphasis added).

(...continued)

review of contract documents; (3) [the contractor] relied on its interpretation of the contract documents; and (4) it was damaged.”

The distinction between what a contract “represents” and what it “indicates” is significant. As the Court of Claims explained in *Foster Constr. C. A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 881 (Ct. Cl. 1970), “[a]n ‘indication’ may be proven . . . by inferences and implications which need not meet the test for a ‘misrepresentation’ or ‘representation,’ concepts which have a long common law history associated with fraud.” Contract indications give rise to differing site condition claims if “they provide sufficient grounds by which the contractor can justify his ‘expectation of latent conditions materially different from those encountered.” *Neal & Co., Inc. v. United States*, 36 Fed. Cl. 600, 617 (1996) (quoting *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984)).

Thus, the key issues in a differing site condition case are (1) whether the contractor’s interpretation of the contract was reasonable, and (2) whether the ground conditions differed materially from the contractor’s expectations. These are issues of fact. See *Bignold*, 65 Wn.2d at 822 (“[t]he critical question is whether the contractor should have discovered or anticipated the [condition complained of]. *This is a question of fact*”) (emphasis added); *V. C. Edwards Contracting Co. v. Port of Tacoma*, 83 Wn.2d 7, 13, 514 P.2d 1381, 1386 (1973) (“[t]he critical factor in application of the doctrine is

whether the contractor should have discovered or anticipated the changed condition. *This is a question of fact*") (emphasis added).

2. VPFK submitted evidence demonstrating that its interpretation of the Contract was reasonable.

VPFK submitted evidence that it was reasonable to conclude that, if two adjacent bore holes revealed the same type of soil, there would be relatively few transitions in the types of soil between the bore holes, and therefore relatively few transitions along the tunnel route as a whole. (CP 877-79, CP 533 (Mr. Debaire testifies it is necessary to extrapolate information between bore holes and to infer that the changes between dominant soil groups will be gradual and manageable); CP 476 (Mr. Heuer says "[c]areful study of changes between different TSG [tunnel soil groups] at tunnel level from boring to boring would permit an estimate of number of face changes between plastic TSG Teal clay and non-plastic TSGs Purple silt"); CP 843, 847, 852, 852-57, 885-86 (pre-bid expert reports identify the expected location of transitions between soils with different tunneling characteristics); CP 472 (report by Professor Anagnostou states that the interpretation of soil conditions by VPFK fell within the reasonable limits of engineering judgment).

VPFK's conclusion that the soil along the tunnel route would not undergo frequent, abrupt changes is not only supported by expert testimony, it is the only logical conclusion a contractor could draw. The purpose of differing site condition clauses is to assure the contractor it can confidently rely on the contract's indications of ground conditions, and offer the owner a price based on those contract indications. If a contractor had to assume that soil changes between bore holes are completely unpredictable and chaotic, the contractor would have no choice but to increase its bid accordingly, which would defeat the purpose of differing site condition clauses. *See Foster*, 435 F.2d at 887 (by including differing site conditions clauses in contracts, "[t]he Government benefits from more accurate bidding, without inflation for risks which may not eventuate").

The County argues that several factors indicated there would be frequent soil transitions between bore holes. The factors it cites do not support that conclusion. Even if they did, they simply raised a triable issue of fact.

a. The Contract documents. The County claims several pages in the GBR report indicated that soil conditions would be highly variable and, as a result, there would be frequent transitions. (RB 28.) The pages it cites simply identify the major soil groups VPFK would

encounter and their tunneling characteristics. They refer to the soil as “complicated” but do not say how frequently the soil will change from plastic to non-plastic. (CP 404-06.)

The County also cites three diagrams it claims show “considerable [horizontal] variability” in the soil. (RB 28.) These diagrams are indecipherable without expert testimony to explain them, and none is cited. (*See* CP 430-32.) Moreover, VPFK’s experts testified they reviewed the GBR and concluded VPFK would encounter relatively few transitions between bore holes that contained similar soil. Whether these experts’ conclusions were reasonable in light of the charts the County cites was an issue of fact.

In contrast to the pages of the GBR the County cites, GBR section 5.2.7 states “[i]n addition to the general variability of the subsurface profile along the alignment of both tunnel sections there are slight but discrete changes that can occur.” (AOB 38; CP 410.) This language supported VPFK’s understanding that the changes in the soil would be gradual. The County’s contention that VPFK did not rely on section 5.2.7 below is without merit. VPFK relied on the provision in its opposition to summary judgment. (*See* CP 832-33.)

Finally, there is no merit to the County’s position that the Contract expressly insulated it from responsibility for ground

conditions that differed from those indicated in the contract. (RB 33-34.) The County’s argument rests on section 1036, which provides “[t]he Contractor may make its own interpretations, evaluations, and conclusions as to the nature of the geotechnical materials . . . and shall accept full responsibility for making assumptions that differ from the baselines set forth in the GBR.” (CP 845.) The County argues that the Supreme Court interpreted similar language as an “express disclaimer of any representation concerning the subsurface.” (RB 34, quoting *Dravo Corp. v. Municipality of Metropolitan Seattle*, 79 Wn.2d 214, 219, 484 P.2d 339, 403 (1971).)

Dravo did not hold that contract provisions like section 1036 immunize owners from responsibility when ground conditions differ materially from those indicated in the contract. On the contrary, the court in *Dravo* held the owner was immune from liability for two different reasons that have no relevance here. First, unlike VPFK’s contract, the contract in *Dravo* expressly provided that the contractor would receive “[n]o extra payment” if the ground conditions differed from those described in the contract.² *Dravo*, 79 Wn.2d at 218-19.

² “No extra payment will be made over and above the contract price on account of any difference between the information relating to soil and foundation conditions provided by the Municipality and the conditions
(continued...) ”

Second, the contract in *Dravo* did not include a differing site condition clause, and the court recognized that the result would have been entirely different if it had:

Dravo cites a number of cases involving federal contracts which contain a ‘changed conditions’ clause. Where such a clause is contained in a contract, the owner expressly agrees to adjust the contractor’s compensation if unexpected conditions are encountered. . . . *Since the contract before us did not contain such a clause, but instead contained a clause placing the risk of such changed or unexpected conditions upon the contractor, the cases cited are not in point.*

Dravo, 79 Wn.2d at 219-20 (emphasis added).

The contract in the present case of course *does* contain a differing site condition clause. The County’s position that section 1036 renders this clause inoperative is without merit.

b. Alleged inconsistent statements by VPFK’s experts. The County argues there were no factual issues to resolve because VPFK’s own experts recognized that the soil was complex and would change frequently. (RB 29.) The County quotes the report Guertin prepared for VPFK, which says that “the soil conditions are very complex and at

(...continued)
disclosed at the site of the work during the progress of the contract.” *Dravo*, 79 Wn.2d at 216.

times erratic” and that predicting the soil “with an accuracy of say 50- to 100-ft along the alignment will at best be approximate.” (*Id.*) The County also cites Guertin’s deposition testimony that “soil types would change . . . frequently” (*id.*) and it was not possible to determine soil conditions “foot-by-foot between boreholes” (RB 42.)

The County’s argument blurs the distinction between the 12 potential combinations of soil identified in the County’s GBR (*see* CP 523; CP 433-35), and the two more relevant categories of soil—plastic and non-plastic—into which VPFK’s experts grouped the soil. VPFK’s experts agreed there could be frequent changes between the 12 soil combinations described in the GBR. They explained, however, that those changes were irrelevant because the only variations in soil that affect tunneling behavior of an STBM are variations between the plastic and non-plastic soils. VPFK’s experts found there would *not* be frequent transitions between those two relevant soil categories.

These conclusions are supported by the following facts:

— Launay testified he did not attempt to identify foot-by-foot changes in soil because they would not affect the operation of the STBM. (CP 886-87.) Trying to specifically locate the 12 soil combinations identified in the GBR would be “foolish.” (CP 524.)

— Guertin identified only the transitions between the dominant types of soil (CP 852, 855-57), which were the only transitions relevant to tunneling behavior. (CP 852.)

— VPFK's lead estimator Debaire testified that the only transitions of importance to VPFK and its consultants were between plastic and non-plastic soils, and he divided the tunnel into these two soil groups. (CP 882.)

— The experts, including Debaire, concluded the transitions between plastic and non-plastic soil would be gradual and manageable. (CP 509, 534.)

In short, contrary to the County's argument, VPFK's experts reached consistent conclusions about the frequency of the *relevant* soil transitions.

c. Court of Claims opinions do not express disapproval of interpolation. The County cites two Court of Claims cases in which trial judges, following trials, ruled that the manner in which the contractors interpolated data between bore holes was not reasonable. *See Weeks Dredging & Contracting, Inc. v. United States*, 13 Cl. Ct. 193, 221 (1987), *aff'd*, 861 F.2d 728 (Fed. Cir. 1988) (Table); *Renda Marine, Inc. v. United States*, 66 Fed. Cl. 639, 652 (2005), *aff'd*, 509

F.3d 1372 (Fed. Cir. 2007). The County argues the same result should apply here. (RB 36.)

In neither *Weeks* nor *Renda Marine* did the courts hold that it was improper as a matter of principle to interpolate data between bore holes. Rather, the courts found on the specific facts before them that the contractors in those cases employed the technique improperly. In *Weeks*, the court found that the contractor acted unreasonably by relying on bore holes located far from where its work was to be performed. *Id.* at 224-25. The court found nothing wrong with the process of interpolation. On the contrary, it said “*we do not fault the plaintiff for utilizing this methodology.*” *Id.* (emphasis added).

In *Renda Marine*, 509 F.3d 1372, the contractor hired to dredge a river channel relied on two borings near the area to be dredged that reflected subsurface conditions well below the elevation of the area to be dredged, *id.* at 1374, but ignored three borings on the opposite side of the channel at the precise depth of the dredging procedure. The Court of Federal Claims, affirmed by the Court of Appeals for the Federal Circuit, concluded that, by relying solely on the first two logs and ignoring the other three, the contractor did not act as a reasonably prudent contractor. *Id.* at 1377-78. Far from suggesting that it was

improper for the contractor to draw inferences from bore hole data, the court held that the contractor used the bore hold data incorrectly.

In our case, VPFK considered all the borings available to it, along with all of the other indications provided in the contract documents. A jury could have found that VPFK reasonably concluded the soil between adjacent borings would not frequently and abruptly change several times between plastic and non-plastic conditions.

Finally, there is no merit to the County's position that the question whether a contract indicates a particular site condition is a question of contract interpretation for the court, not for a jury. The County relies on federal law that differs from Washington law on this point. Under the federal rule, "a proper technique of contract interpretation is for the court to place itself into the shoes of a reasonable and prudent contractor and decide how such a contractor would act in interpreting the contract documents." *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998); *accord, Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1274 (Fed. Cir. 2001). In Washington, on the other hand, determinations of "reasonableness" raise questions of fact. *E.g., Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 924, 296 P.3d 860, 868 (2013) ("reasonableness is typically a question of fact [but] a court may

resolve such questions as a matter of law when reasonable minds could come to only one conclusion”); see *V. C. Edwards Contracting Co.*, 83 Wn.2d at 13-14 (“the critical factor . . . whether the contractor should have discovered or anticipated the changed condition . . . is a question of fact”); accord, *Bignold*, 65 Wn.2d at 822.

VPFK presented evidence that it is customary for experts to extrapolate ground conditions between bore holes (CP 533), and that the County’s specification of an STBM itself implied that the relevant ground conditions would be predictable (CP 843). A jury should have been permitted to evaluate this and other evidence to determine whether VPFK’s interpretation of the contract was reasonable.

3. VPFK presented evidence supporting the other elements of its claim.

The County argues VPFK did not introduce evidence supporting the remaining elements of its claim: that it relied on the contract indications; that the actual conditions differed from those indicated in the contract; and that the actual conditions were not foreseeable. These arguments also lack merit.

The County's position that VPFK produced no evidence of reliance overlooks the following evidence:

— Before VPFK submitted its bid, Mr. Portafaix, one of its bid managers, asked Mr. Guertin of GZA to supplement his initial geotechnical report with a soil profile showing "the transitions between the dominant soils, which can also be counted to get a number of transitions." (CP 843.) Mr. Portafaix's request constitutes evidence that the frequency of transitions was important to VPFK and that it used this information in preparing its bid.

— Before VPFK submitted its bid, Mr. Launay, another VPFK consultant, prepared a report that divided the tunnel into zones so that VPFK could see "how many soil transitions there might be" (CP 885-86.) By "transition," he meant a change in the tunneling behavior of the soil. (*Id.* at 885.) While his report did not count the number of transitions (*see* CP 525 (cited in the County's brief)), it showed "there was sort of one general transition between each of these zones." (*Id.* at 886.)

— In his deposition, Debaire, VPFK's lead estimator, testified that, before submitting VPFK's bid, he prepared his own chart that divided the tunnel into plastic and nonplastic soils. (CP 880.) He

expected the transitions between these soils would be gradual and manageable, not chaotic. (*Id.* at 877)³

— In his declaration, Portafaix explained that, to prepare its bid, VPFK needed to “develop an understanding of the ground conditions that VPFK should reasonably expect to encounter during tunneling, *including the general frequency of transitions between plastic and non-plastic materials.*” (CP 1061 (emphasis added).)

These facts support the conclusion that, in preparing its bid, VPFK relied on its understanding that the contract indicated there would be few transitions between dominant soil types, and the transitions would be manageable.

The County’s last arguments essentially repeat its earlier arguments. It argues the number of transitions did not differ from VPFK’s expectations because VPFK expected the ground conditions to change frequently. (RB 43-44.) As demonstrated above (*supra* at pp. 8-10, 13-14), VPFK submitted evidence that it expected relatively few transitions between dominant soil types, not frequent and abrupt transitions along the tunnel alignment.

³ The County claims that VPFK’s opening brief cited the trial court record, not the summary judgment record, to support Debaire’s pre-bid understanding of the ground conditions. (RB 41.) In fact, at AOB 36, VPFK cites Debaire’s deposition testimony, which appears in the summary judgment record at CP 880-82 and CP 877-78.

In sum, VPFK submitted evidence supporting each element of its differing site condition claim. The trial court erred by rejecting the claim on summary judgment.

B. The Trial Court Committed Prejudicial Error By Granting Summary Judgment On VPFK’s Defective Specifications Claim Based On Frequency Of Transitions.

1. VPFK may assert a defective specification claim despite its initial belief that an STBM was the right machine for the job.

In *Huetter v. Warehouse & Realty Co.*, 81 Wash. 331, 336, 142 P. 675, 677 (1914), the Supreme Court held that “in calling for proposals to produce a specified result by following them, [the owner] may fairly be said to have warranted [its plans] adequate to produce that result.” As demonstrated in VPFK’s opening brief, because it could not achieve a successful and timely outcome by following the County’s plans and specifications, the plans and specifications were defective. (AOB 48-56.)

The County argues that VPFK is precluded from asserting a defective specification claim because the summary judgment record “showed very clearly that VPFK *preferred* an STBM over the alternative—an EPB TBM” (RB 45.) The County is wrong.

As VPFK explained in its opening brief, a contractor may assert a defective specification claim as long as the contractor did not *know*

the plans were defective, i.e., would not work. (AOB 54 and cases cited therein.) The warranty arises because the plans “were [the government’s] work; and, in calling for proposals to produce a specified result by following them, it may fairly be said to have warranted them adequate to produce that result.” *Huetter*, 81 Wash. at 336 (quoting *MacKnight-Flintic Stone Co. v. Mayor*, 160 N. Y. 72, 54 N.E. 661 (1899)). As the court explained in *Consolidated Diesel Elec. Corp.*, ASBCA No. 10486, 67-2 BCA ¶ 6669, “[t]he Government’s implied warranty of the adequacy of its specifications is based on its responsibility for the specifications rather than any presumed ‘superior knowledge’ in the sense of the greater expertise.”

Given the facts before the court on summary judgment, the County’s position that VPFK cannot assert a defective specification claim because it believed an STBM would work is also illogical. VPFK expressed a preference for an STBM before it began working on the tunnel, at a time when it reasonably believed the transitions between plastic and non-plastic soils would be relatively smooth. As Mr. Portafaix explained in a pre-bid e-mail, he preferred an STBM because “[t]he ground conditions are adapted to slurry.” (CP 221.) Mr. Portafaix also assumed that the pressurized slurry employed by an STBM would keep the face of the tunnel stable. (CP 221.) That

assumption also proved to be inaccurate. (CP 714.) The question raised by VPFK's defective specification claim is whether the STBM method prescribed by the County could produce the intended result in the ground conditions that actually existed, not whether it could have done so in the ground conditions that VPFK reasonably but inaccurately believed would exist.

Last, citing *Donald B. Murphy Contractors, Inc. v. State*, 40 Wn. App. 98, 696 P.2d 1270 (1985), the County argues that VPFK's preference for an STBM means that "VPFK cannot credibly argue that the STBM requirement was unreasonable." (RB 47 (emphasis added).) In *Donald B. Murphy Contractors*, the question whether a plan was reasonable was a factual issue decided at trial, which is how the issue should have been resolved here. Furthermore, while the government's plans must be reasonable, *Donald B. Murphy Contractors* confirms that they also must be "sufficient for the purpose in view." *Donald B. Murphy Contractors*, 40 Wn. App. at 102. Based on the evidence submitted by VPFK in opposition to summary judgment, the jury could have concluded that the County's plans were insufficient because VPFK could not build the tunnels in the prescribed manner and timeframe by following the County's plans.

2. The County impliedly warranted that VPFK would be able to complete the work on time.

The County argues that VPFK, not the County, warranted the work could be completed on time. (RB 47-48.) On the contrary, as this Division has recognized, “when an owner furnishes plans and specifications for a construction project prescribing a time for completion of the work, there exists an implied warranty 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) (emphasis added); 33 Wash. Prac., Wash. Construction Law Manual § 12:10 (2013-2014 ed.) (same); *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 964 (Ct. Cl. 1965) (“Precedent indicates that the government implicitly warrants in a construction contract that if the contractor complies with the specifications furnished he will be able to complete the project within the contemplated period; and if the specifications are so faulty as to prevent or unreasonably delay completion of the contract performance, the contractor may recover his actual damages for breach of the implied warranty”).

To support its position that VPFK guaranteed timely completion, the County relies on a carefully edited excerpt from section 3(B) of the Contract. (RB 48.) The full section makes clear that

VPFK's warranty was tied to the County's plans and specifications. It reads:

[T]he Contract Time is adequate for the performance of the Work as represented by the Contract, *site visit, and the general conditions (including but not limited to weather, site, soil) known or reasonably anticipated for the Site*

(CP 5435 (emphasis added).)

The italicized language, omitted from the County's brief, provides that VPFK merely represented that it could timely perform the Work described in the Contract documents in light of the soil conditions reasonably anticipated for the site, with the knowledge that, should different site conditions arise, it would receive extra time and/or costs. VPFK submitted evidence that following the County's plans and specifications could *not* produce the intended result in the ground conditions that actually existed (regardless of whether VPFK should have anticipated those ground conditions), thus rendering inapplicable any warranty that VPFK might have made.

The County next argues that "[o]n similar facts . . . courts have routinely held that the owner *did not* impliedly warrant timely performance." (RB 48.) The cases on which the County relies do not support that position.

In *American Ship Building Co. v. United States*, 654 F.2d 75 (Ct. Cl. 1981), the contractor claimed that the government affirmatively represented that the contract could be completed in 900 days, and it filed suit to recover the additional costs it incurred when the work was delayed. The court rejected this claim for two reasons, neither of which is relevant here. First, because each bidder had to propose its own contract deadline, the court held the contractor, not the government, provided a warranty of timely completion. *Id.* at 78. VPFK did not propose its own deadline. Second, the contractor introduced no evidence that its delay was caused by any defects in the government's plans and specifications. *Id.* at 78-79. That is a critical distinction from the present case because a contractor can assert a delay claim against the owner only when the delay was caused by defects in the plans and specifications. *J. L. Simmons Co. v. United States*, 412 F.2d 1360, 1374 (Ct. Cl. 1969).

The County's reliance on *Associated Engineers & Contractors, Inc. v. State*, 58 Haw. 187, 567 P.2d 397 (1977) is also misplaced. There, a contractor whose work was delayed by weather sued the government on the ground that it withheld information about existing weather patterns. The trial court ruled no data had been withheld, and the Hawaii Supreme Court affirmed on substantial evidence grounds.

Id. at 198-99, 567 P.2d at 406-07. The court also rejected the contractor's argument that the government guaranteed that proper weather conditions to perform the work would exist. *Id.* at 201-02, 567 P.2d at 408. Neither holding is relevant here.

The Hawaii Supreme Court, however, endorsed two principles that *are* relevant in this case: first, that “[t]he State implicitly warrants in a construction contract that if the contractor complies with the specifications furnished he will be able to complete the project within the specified time,” *id.* at 193, 567 P.2d at 404; second, where “delays in performance of building contracts . . . result from some failure or inadequacy of portions of the work which the Contractor constructed in accordance with the specifications of the contract [citation] . . . contractors have been awarded their damages” *id.* at 201, 567 P.2d at 408. Both principles support VPFK's claim for delay damages.

Finally, the County argues that *Dyad*, 17 Wn. App. 501, discussed at page 55 of VPFK's opening brief, does not support the rule that “when an owner furnishes plans and specification for a construction project prescribing a time for completion of the work, there exists an implied warranty that the contractor will be able to complete the project timely, as designed.” (RB 54.) This is a direct quote from the opinion, but the County contends VPFK has taken it

out of context.⁴ It insists that the quoted rule applies only in cases of active owner interference. (RB 55.) The County is wrong.

In *Dyad*, the trial court held that “[t]he city-caused delays from interference *and* faulty design demolished Dyad’s intended cost structure as well as its time structure.” *Dyad*, 17 Wn. App. at 506 (emphasis added), 518 (“but for the City’s erroneous plans and specifications the contractor could have completed the work on time”). The Court of Appeals held the contractor was entitled to compensation for delays resulting from *both* causes. *Id.* at 506, 519.

In opposition to summary judgment, VPFK submitted evidence that its work was delayed because of defective specifications in the County’s plans. It should have been permitted to pursue its action against the County for the resulting damages.

3. To prevail on a defective specifications claim, a contractor is not required to prove that the defect made the work impossible.

The County argues that a contractor may not recover damages on a defective specifications theory unless the “contract is impossible

⁴ The County is grasping at straws when it questions the validity of the quoted rule by observing that it is preceded in the opinion by the word “further.” (RB 54.) The word “further” merely signifies that this is the third in a list of rules that the court identifies from prior opinions. *See Dyad*, 17 Wn. App. at 517.

to perform in strict accordance with the owner's plans and specifications" (RB 53.) It cites *Huetter*, 81 Wash. 331, a case in which it was impossible to perform the contract because structural defects in the government's plans caused a portion of a wall the contractor was building to collapse. (RB 53.) The County argues the same "impossibility" requirement exists in every defective specification case.

On both legal and factual grounds, the County's arguments lack merit. In cases like *Huetter*, which involve defective structural designs, it is impossible to complete the work as planned because the defects result in foundations failing, floors buckling, and roofs collapsing. *Huetter*, however, does not hold that the implied warranty theory is *limited* to cases that involve structural defects, and it does not hold that the implied warranty is breached *only* if work proves to be impossible to perform. On the contrary, courts routinely apply the defective specifications theory in other contexts.

For example, as discussed in section 2 above, contractors are entitled to additional compensation if defective plans simply *delay* completion of the work, even if the contractor was able to complete the work. *See, e.g., Dyad*, 17 Wn. App. at 503 ("while construction was not impossible, it was impractical, dangerous and expensive");

Wunderlich, 351 F.2d at 964 (“if the specifications are so faulty as to prevent *or unreasonably delay* completion of the contract performance, the contractor may recover his actual damages for breach of the implied warranty”) (emphasis added).

In *Ordnance Research, Inc. v. United States*, 609 F.2d 462, 479-80 (Ct. Cl. 1979), the court similarly held that “[w]hen design specifications are furnished by the government, evidence that the contractor utilized the particular materials and followed the methods specified is often enough to establish performance impossibility *or impracticability* for which the government, as creator of the specifications, is responsible.” (Emphasis added).

The County argues that two cases VPFK cited in the opening brief involved contracts that proved to be impossible to perform: *Appeal of Maitland Bros. Co.*, ASBCA No. 23849, 83-1 BCA ¶ 14,982 and *Appeal of Evergreen Engineering, Inc.* (85 Interior Dec. 107 (D.O.I.) 1978 WL 27444. (RB 56 n.7.) Neither case was cited to support the proposition that delay damages may be recovered even if it is possible to complete the work. They were instead cited for the proposition that plans and specifications are defective where, as in the present case, the government requires the contractor to use unsuitable equipment and work methods that do not produce the desired result.

(AOB 44-45.) The County does not dispute the proposition for which these cases were cited.

In any event, *Appeal of Evergreen Engineering* fully supports VPFK's position that defective specification claims arise even if the contractor successfully completes the work. In *Appeal of Evergreen Engineering*, defects in the method the government prescribed for road building required the contractor to spend extra time and money cleaning and patching ruts along the entire length of the road. In language directly applicable to our case, the Board of Contract Appeals held:

The appellant performed in an adequately workman-like manner yet the use of the materials (sand and cement) and equipment (traveling mixer) produced a result which, while ultimately adequately satisfactory, caused unexpected difficulty and cost. Thus, since the Government is responsible when use of the specified equipment causes unexpected cost . . . we hold that the appellant has established entitlement to the unexpectedly added costs caused by the rutting and mushrooming from the wheels of the traveling mixer.

Appeal of Evergreen Eng'g, 85 Interior Dec. 107 (D.O.I.), 116, 1978 WL 27444, 8.

Finally, the County's contention that its plans and specifications were not defective because VPFK was able to complete the BT-2 tunnel with an STBM is inaccurate. (RB 58.) VPFK's

defective specification claim challenged both the requirement that VPFK use an STBM and the *method for excavating* the tunnel with an STBM that was mandated by the plans and specifications. (CP 75 (defective specification counterclaim alleged that “King County warranted that the STBM *method* it chose for this project could successfully complete the work in the ground conditions encountered in the time frame allowed”) (emphasis added).) VPFK was able to complete the BT-2 tunnel only by using methods not provided for in the plans and specifications but recommended by the expert panel: it dug exploratory bore holes, dewatered the ground, and prepared safe havens for interventions. (AOB 30.) These major changes to the Contract required new permits, new surface access, different procedures, and different equipment. As in *Big Chief Drilling Co. v. United States*, 26 Cl. Ct. 1276 (1992), the fact that VPFK was ultimately able to complete the BT-2 tunnel only by deviating from the Contract’s prescriptions for performing the work is compelling evidence that the County’s plans and specifications were defective.

4. VPFK introduced evidence supporting its defective specification claim.

VPFK’s opening brief identified five facts in the summary judgment record that support VPFK’s defective specification claim.

(AOB 48-51.) The County argues that none of these facts support that conclusion. We address the County's arguments in turn.

(a) The County's decision to hire JDC. After the County declared VPFK in default, it hired another contractor, JDC, to complete the BT-3 tunnel with an EPB machine. (CP 176-77.) The County's decision to allow JDC to finish the tunnel using a machine that the Contract precluded VPFK itself from using constituted evidence that the STBM was the wrong machine for the job.

The County disagrees, contending it hired JDC not because the STBM was unsuitable but "because JDC's machine was the *only* reasonably available alternative to VPFK's STBM." (RB 58.)

In making this argument, the County improperly construes the facts in its own favor and ignores the following evidence, all of which supports the conclusion that the STBM tunneling method the County required VPFK to use was not best suited to completing the BT-3 tunnel, and that the County's real motive in hiring JDC to replace VPFK was to save time and money by employing a different machine:

(i) The expert panel the parties jointly convened recommended that all future maintenance work on the STBMs be performed with exploratory bore holes and artificial safe havens (CP 714-15, 717).

(ii) VPFK informed the County that it planned to complete its work on both tunnels using these changed procedures (*Id.*).

(iii) Completing the work with exploratory bore holes and safe havens required significant additional time and expense (CP 5395, 5401, 5406.)

(iv) The County believed JDC could complete work on the BT-3 tunnel with an EPB in far less time than VPFK and at a much lower cost. (CP 5401 (County states that allowing VPFK to complete the work in the manner recommended by the expert panel would be “an imprudent use of money and time”), 5408.)

(v) The County signed a contract with JDC in order to “mitigat[e] the County’s overall damages in terms of money and time.” (CP 5409.)

Moreover, before hiring JDC, the County asked VPFK to consider entering into a subcontract with JDC, in which JDC would use its EPB *under VPFK’s supervision*. (CP 4660, 4711.) This evidence supported the conclusion that the County had no problem with VPFK but only with the STBM, and that the County was prepared to remedy that problem by allowing VPFK to supervise completion of the work using an EPB machine rather than an STBM.

While different inferences can be drawn from the summary judgment record, the trial court was required to draw the inference most favorable to VPFK—that the STBM specified by the County was the wrong machine for excavating the tunnels. The trial court erred by not drawing that inference, which would have precluded summary judgment for the County.

(b) STBMs cannot operate efficiently in rapidly changing and unpredictable soil. VPFK presented evidence that STBMs operate efficiently only when changes between plastic and non-plastic soils occur infrequently. (See AOB 48-49.) Because the changes between these soils occurred frequently, VPFK could not successfully and timely perform the work using the excavation methods provided for in the plans and specifications. The plans and specifications should have included the work methods recommended by the expert panel.

The County argues this evidence gives rise only to a differing site condition claim, not a defective specifications claim. (RB 59.) To support that conclusion, it cites *Comtrol, Inc. v. United States*, 294 F.3d 1357 (Fed. Cir. 2002), in which the Court of Appeals held that a defective specification claim and a differing site condition claim “collapse into a single claim under facts such as these, where the alleged defect in the specification is the failure to disclose the alleged

differing site condition.” *Id.* at 1362. (RB 60.) The trial court agreed that VPFK’s evidence “all boils down to the soil issue” (7/13/12 RT 35, 36), not a defective specification issue (7/13/12 RT 66).

Comtrol is distinguishable. There, the *sole* basis for the contractor’s defective specification claim was the government’s “failure to disclose the presence of quicksand.” *Comtrol*, 294 F.3d at 1362. By contrast, in *M.A. DeAtley Construction, Inc. v. United States*, 71 Fed. Cl. 370 (2006), the court held that a contractor could pursue *both* a differing site condition claim, based on the government’s selection of an improper form of rock for road construction, *and* a defective specification claim, based on the government’s failure to provide a proper method *for working* with the rocks. *Id.* at 374-75.

The facts here are closer to *M.A. DeAtley Construction*. VPFK’s differing site condition claim is that the County’s contract indicated soil conditions different from those VPFK actually found at the site. VPFK’s defective specification claim is that the County’s specifications instructing VPFK *how* to perform the work were defective for the ground conditions that actually existed, even if those ground conditions should have been expected. The trial court erred when it concluded that VPFK could not pursue both of these claims.

(c) The work could not successfully be performed without exploratory bore holes, dewatering, and safe havens. The contract required VPFK to perform all interventions from inside the tunnel, using only slurry and compressed air to prevent the tunnel face from collapsing. (CP 710, 716, 4627, 4629.) The expert panel, however, concluded that VPFK 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, ex. 1699, at 3.) These facts also support the conclusion that the plans were defective.

The County again argues that this evidence at best supports a differing site condition claim based on unexpectedly high pressure. (RT 60.) On the contrary, the expert panel found fault with the *method* the County prescribed for *working* with the tunnel face under the pressures VPFK encountered. That is the essence of a defective specification claim.

Finally, the County argues that VPFK’s reliance on the findings of the expert panel is misplaced because the expert panel did not conclude that the STBM specification was defective or decide who should pay for the bore holes and safe havens it recommended. (RB 61.) But these questions were beyond the expert panel’s purview. The

factual conclusions and recommendations reached by the expert panel support VPFK's legal position that the County's plans were defective.

(d) Face instabilities occurred even when VPFK applied the correct pressure. VPFK presented evidence that even when it applied the correct pressure and slurry, it was not "able to create face stability solely from inside the tunnel for a sufficient period of time to perform safely the necessary work." (CP 716.) This fact further supports the conclusion that the County's plans and specifications were defective.

The County again argues that "[t]his is really another claim for differing site conditions" (RB 61.) On the contrary, VPFK's complaint was that the prescribed methods for performing interventions inside the tunnel could not achieve a proper result. That is a quintessential defective specification claim.

Finally, the County argues that VPFK's argument "does not concern the STBM requirement" but instead the procedures for performing interventions. (RB 61.) That is a distinction without a difference. As noted above, VPFK's defective specification claim challenges not simply the selection of an STBM but also the method for using the STBM mandated by the Contract. The STBM method includes not only the County's selection of the STBM but its directions on how excavation and interventions were to be performed.

5. The trial court's error in granting summary judgment on VPFK's defective specification claim was prejudicial.

The County's final argument is that, even if the trial court erroneously granted summary judgment on VPFK's defective specific claim, the error was not prejudicial because "VPFK cites no instances where the trial court precluded it from pursuing a defective specifications claim *unrelated* to the STBM requirement." (RB 62 (emphasis added).) Given that all of VPFK's defective specification claims related to the STBM and the prescribed methods for using it, the fact VPFK theoretically could pursue defective specification claims *unrelated* to the STBM did not mitigate the prejudice of the trial court's ruling.

The County also argues that "to the extent the contract documents were somehow defective with regard to bore holes, safe havens, face pressure and instability, and interventions generally . . . VPFK either (a) was paid before trial for work that exceeded the applicable baseline (*see* RP 1197-98, regarding extra work for interventions) or (b) was permitted to pursue those claims as differing site condition claims (which is what they are) at trial." (RB 62.)

Concerning the first point, County executive Judy Cochran, the witness whose testimony appears at RP 1197-98, did not testify that

VPFK was paid for safe haven and bore hole work that exceeded some baseline. She testified that the parties settled a claim that involved a “safe haven and core hole issue,” but provided no other details. (RP 1196-97.) Subsequent testimony clarified that those claims (RCO’s 82 and 83) involved BT-2 work that occurred after the County issued its notice of default. (RP 3285.) The record contains no other information about these claims.

The County’s second point—that VPFK “was permitted to pursue” its defective specification claim “as a differing site condition claim”—once again ignores that the two claims are different. The differing site condition claim was that “the actual ground condition differed materially from the condition indicated in the contract documents,” causing unexpected delays and expense. (CP 9120.) The defective specification claim was that, apart from any contractual indications of ground conditions, VPFK could not achieve a successful and timely result by constructing the tunnels using the equipment and methods dictated by the County. *Weston v. New Bethel Baptist Church*, 23 Wn. App. 747, 753-54, 598 P.2d 411, 414-15 (1978). Contrary to the County’s argument, VPFK was not “permitted to pursue” the latter claim.

Furthermore, the court's refusal to give the jury the defective specifications instruction prevented VPFK from pursuing its primary alternative damages theories. The jury awarded VPFK no delay damages on its differing site condition claims relating to the tunneling. But VPFK *also* could have recovered delay damages on its defective specifications theory. (CP 9040.) If the jury agreed that defects in the plans delayed VPFK's work, the jury could have awarded delay damages based on those defects, even in the absence of differing site conditions. In addition, the jury could have concluded that, because of the same delays, VPFK was not in default, and the jury could have rejected the County's default damages claim in its entirety. The court's dismissal of the defective specification claim eliminated both of these possibilities, to VPFK's prejudice.

C. The Trial Court Erroneously Refused VPFK's Implied Warranty Instruction.

For the reasons discussed in VPFK's opening brief, the trial court erred by rejecting VPFK's implied warranty instruction. (CP 9040; *see* AOB 63 (quoting the instruction).) The County responds that the court correctly refused the instruction because it misstates the law, and because there was no evidence the County's specifications were defective. Neither argument has merit.

The County criticizes the first paragraph of the instruction, which states that “[t]his warranty applies to all plans, specifications, and subsurface information furnished by the County” (RB 64; CP 9040 (emphasis added).) The Contract advised bidders that the surveys and site information were not “complete or sufficient for the Contractor’s performance of the Work.” (CP 5435.) The County argues it therefore would have been error to instruct the jury “that the subsurface information provided was ‘complete or sufficient for the Contractor’s performance of the Work.’” (RB 64.)

The proposed instruction would not have informed jurors that the contract documents provided complete or sufficient information to excavate the tunnels. It would have told the jurors—correctly—that the County guaranteed that the information it *did* provide was accurate. That qualification appears in the second paragraph of the instruction, which states that a contractor is entitled to additional compensation for expenses “incurred as a result of the *inaccuracy* of [the County’s] representations.” (CP 9040 (emphasis added).)

The County argues that this qualification itself is incorrect and that a contractor is *not* entitled to additional compensation if defects in the government’s plans cause higher costs. It cites a provision in *Dravo*, 79 Wn.2d at 221, in which the court said that the implied

warranty doctrine is, “by its terms, a defensive weapon, not a weapon of offense.”

The rule that a contractor may recover damages if it has been harmed by defects in an owner’s plans is well established. In *Haley v. Brady*, 17 Wn.2d 775, 137 P.2d 505 (1943), for example, the Supreme Court held that “[w]here the necessity for extra work results from the acts, errors, and mistakes of the architect or engineer of the owner, under whose supervision the work is to be done, the loss should fall on the owner, and the builder may recover additional compensation” *Id.* at 788-89, 137 P.2d at 511; to the same effect, see *J. L. Simmons*, 412 F.2d at 1373-74 (“the contractor is entitled to recover delay damages for defendant’s breach of its implied warranty”); *Appeal of Maitland Bros. Co.*, ASBCA No. 23849, 83-1 BCA ¶ 16,434.

Dravo does not hold otherwise. In *Dravo*, the government *agreed* its plans were defective and instructed the contractor to use a different more efficient method to complete the work. The contractor ignored this instruction, continued to use the original inefficient method, and then filed suit to recover the additional costs. *Dravo*, 79 Wn.2d at 220. In holding that the contractor could not use the implied warranty doctrine “offensively,” the court meant that the contractor

could not manufacture a damages claim by employing a method of construction that both the government and the contractor agreed was defective and then recover additional funds when the work was finished. Nothing comparable occurred in the present case.

Finally, the County argues that the implied warranty instruction was properly refused because VPFK failed to introduce evidence that the County's plans were defective because they could not produce the desired result. On the contrary, considerable evidence supported that conclusion:

— An STBM machine uses slurry and compressed air to stabilize the tunnel face (ex. 6, at KC0001019), and different slurry compositions are required for different types of soil (ex. 110, at KC0090864). When an STBM moves from non-plastic into plastic soil, “[t]ime and extra work is required to unplug the cutterhead, slurry discharge line, and the screens, and to make changes in the slurry composition at the surface slurry treatment plant so that the clay can be mined efficiently.” (*Id.*) Because an STBM can operate efficiently only in the *absence* of frequent soil changes (RP 2789-90), the jury could find that the County's requirement that VPFK use an STBM in soil that changed frequently along the tunnel alignment breached the County's warranty that by following its plans and

specifications, VPFK would be able to achieve the intended result in the prescribed period of time.

— VPFK introduced evidence that an STBM operator needs to be able to predict the ground conditions in front of the machine in order to apply the correct pressure and other parameters to stabilize the tunnel face during interventions and excavation. (RP 3509, 3596 (if “you don’t know the ground that you have in front of you, you don’t select a slurry TBM”).) VPFK also introduced evidence that soil conditions between bore holes were *not* predictable. (Ex. 1440, at 2.) As a result, the tunnel face collapsed more frequently than usual. (RP 3722-23.) Based on this evidence, the jury could conclude that the County breached its implied warranty that, if VPFK followed the County’s plans and specifications, it would be able to achieve the intended result.

— The expert panel concluded that the tunnel could be built safely only if VPFK used exploratory bore holes to test soil conditions, and built artificial safe havens in which interventions could be performed under atmospheric conditions. (RP 974-75, 4470; ex. 1649, at 11-12.) The plans and specifications made no provision for these methods. (Ex. 6, at KCO001030.) The absence of any provision for these methods supported VPFK’s position that the County

breached the implied warranty that VPFK could achieve a successful result simply by following the County's plans.

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). Based on the foregoing evidence, VPFK was entitled to an instruction on its breach of implied warranty theory.

D. The Trial Court Erred by Denying VPFK's Motion For Summary Judgment On Liquidated Damages.

Section 10.7(A) of the Contract provides that the County will be entitled to recover liquidated damages "for Contractor's failure to achieve Substantial Completion within the Contract Time or Final Acceptance." (CP 603.) The section further provides that "[t]hese [liquidated] amounts shall be construed as the actual amount of damages sustained by the County." (CP 603-04.) In its opening brief, VPFK demonstrated that the trial court committed prejudicial error by refusing to enforce the parties' agreement that liquidated damages would be the County's exclusive remedy if VPFK did not timely complete the project. (AOB 67-73.)

The County responds that section 10.7(A) is superseded by section 8.0(A)(4). The latter section provides that, following a default, “[t]he Contractor and its sureties shall be liable for *all* damages and costs, including but not limited to . . . any other special, incidental or consequential damages incurred by the County which results or arises from the breach or termination for default.” (CP 1453 (emphasis added).) The County argues that under section 8.0(A)(4), following a default, the County is entitled “to *greater* relief” than liquidated damages. (RB 69.) The County claims that, under VPFK’s interpretation of the Contract, following a default, “the County would be limited to liquidated damages and would not be entitled to any additional rights and remedies provided under the Contract.” (RB 70.)

The County misconstrues VPFK’s argument. VPFK has not disputed that, in the event of a default, section 8.0(A)(4) entitles the County to recover all consequential damages. However, to the extent the County’s consequential damages *include* damages for delayed completion of the work, the liquidated damages provisions of section 10.7 define those actual delay damages. Because section 10.7 defines liquidated damages as the County’s *actual* damages caused by delays, applying section 10.7 to compensate the County for its delay-related losses does not prevent the County from recouping all of its non-delay-

related losses. This gives effect to all of the contract's provisions and is the reasonable and proper way to read the parties' agreement. *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) (requiring courts to harmonize contractual terms).⁵

E. The Trial Court Committed Prejudicial Error By Excluding Evidence That VPFK Was Not The Only Party Responsible For Delaying Brightwater.

During pretrial depositions, three County witnesses testified that during the 18 months between March 2011 and September 2012, no delays affected the critical path of Brightwater other than VPFK's delays. (AOB 79-80.) However, shortly after trial began, based on new discovery the court allowed VPFK to conduct, VPFK learned that these witnesses' testimony was false. (AOB 74-76.) Based on the analysis of its expert Mr. Habashi, VPFK discovered that during the same 18-month period, repair work on the BT-1 tunnel *also* was on the critical path. (AOB 76.) This made sense. Because all the tunnels were connected, none of the tunnels could begin carrying water until they were all completed. The court nevertheless refused to allow VPFK to

⁵ If the Government, which drafted the Contract, had intended section 8.0(A)(4) to supersede the liquidated damages rules of section 10.7(A), it easily could have expressly so stated in the text of section 8.0(A)(4).

introduce evidence of the concurrent BT-1 delays on the ground VPFK should have obtained the information earlier. (AOB 77-78.) In its opening brief, VPFK demonstrated that, because the County insisted during pretrial discovery that there were no other delays, VPFK could not have uncovered these facts earlier, and the trial court's ruling was therefore an abuse of discretion. (AOB 77-81.)

The County defends the court's ruling on several grounds. First, it argues that the ruling can be affirmed based on King County local rule 26(k)(4), which provides that no witness whose identity is disclosed after the deadline designated in the Case Schedule may be called as a witness unless the court orders otherwise for good cause. (RB 73-74.) While VPFK timely disclosed Mr. Habashi's identity, the County argues that the "principle" of rule 26(k)(4) should apply when a party does not fully disclose the substance of a party's testimony by the same deadline. (RB 73.)

The County did not raise a rule 26(k)(4) objection below and cannot do so for the first time on appeal. In any event, the argument lacks merit. As the County acknowledges, the rule applies only to exclusion of a witness, not to portions of the witness's testimony. There is even less basis to apply the rule to testimony about facts first discovered after the deadline established by the rule has expired.

Turning to the merits, the County argues the trial court correctly concluded that VPFK should have investigated the concurrent delay issue during pretrial discovery. (RB 74-75, 81.) This argument lacks merit because VPFK *did* explore the issue of concurrent delay during pretrial discovery, and VPFK was told that the only delays on the critical path were those caused by VPFK. (AOB 79-80.) Until a new report by the County came to light shortly before trial, VPFK had no reason to explore the issue further.

The County next argues that Mr. Habashi's testimony would in any event have been irrelevant because it concerned delays to the BT-1 tunnel, and "the County was not asking VPFK for any damages arising from the BT-1 pipe repair work." (RB 76 (citing testimony by County employee Cochran).) On the contrary, Ms. Cochran said the County was not seeking delay damages from VPFK while repairs were made to the BT-1 pipe *between September and October 2012*. (RB 76 (citing RP 5532).) Mr. Habashi would have testified that, between December 2010 and August 2012, the very period during which the County was seeking delay damages from VPFK, the County knew that repairs were needed on BT-1. (CP 9147-49, 9150-51, 9159.) The delay in repairing BT-1, concurrent with VPFK's delays, would have undermined the

County's claim that VPFK alone was responsible for delays during that 18-month period.

Finally, the County argues VPFK was not prejudiced by the exclusion of Mr. Habashi's testimony because it was able to fully explore the concurrent delay issue at trial. (RB 81-82). It points to VPFK's cross-examination of the County's witnesses, who denied there were any concurrent delays, and Mr. Habashi's expurgated testimony, in which he simply defined the term "critical path" and offered general examples of concurrent delays, none involving the present case. (*Id.*) Cross-examining an opponent's witnesses is not a substitute for presenting one's own witnesses. Nor was Mr. Habashi's overview of concurrent claims a substitute for his testimony that VPFK's 18-month delay was entirely concurrent with delays on the BT-1 tunnel. If the court erred by excluding Mr. Habashi's testimony, the error plainly was prejudicial.

CROSS-RESPONDENT'S BRIEF

The Trial Court Correctly Denied The County's Motion For Judgment As A Matter Of Law On VPFK's Rim Bar Damage Claims.

1. Background to VPFK's rim bar damage claims.

In May and June 2009, VPFK discovered that the rim bar sections of the cutting head supporting the tools on both the BT-2 and BT-3 STBMs were damaged. (RP 754-55, 1624-25.) At the time, both STBMs were in locations where the pressure was greater than 75 psi, which the County's Contract had represented would be the maximum pressure for interventions. (RP 1749-50.) At those pressures, little work could be done because a worker could remain inside the STBM's cutting head for only 45 minutes, and then would require 4-5 hours to decompress. (RP 1749-50, 3602,;ex. 1597, at HK0000781.) The expert panel concluded that, in order to make the repairs, VPFK would have to reduce the pressure. (*See* RP 781-82; ex. 1830, at KC0133049.) VPFK worked from May 2009 until February 2010 to engineer a solution, dewater the BT-2 tunnel, reduce the pressure, create a safe haven, and repair the machine. (RP 1985-86.) At the same time, VPFK dewatered and created a safe haven in the BT-3 tunnel to repair the BT-3 machine. (RP 5131-32.) After the County hired JDC to complete

the BT-3 tunnel, it instructed VPFK not to complete the BT-3 repairs. (RP 3201-02, 5132; ex. 152, at KC0010115; ex. 161, at KC0010244.)

VPFK later submitted documentation supporting two change order requests (85 and 86) that sought to recoup \$23,946,605 in repair costs⁶ plus two time extensions: 254.1 calendar days on all milestones affected by the BT-2 delay, and 192.1 calendar days on all milestones affected by the BT-3 delay. (Ex. 1830, at KC0133055.) Part of the requests were based on VPFK's position that the costs of the repair work were substantially increased because of differing site conditions at the locations where it created safe havens to perform the repairs. (Ex. 1830, at KC0133043.) The County denied the requests and VPFK sought compensation for its costs in this litigation (CP 1327-28).

Based on its conclusion that Type I differing site conditions existed at the locations where the rim bars were repaired (CP 1327-28), the jury awarded VPFK damages totaling \$8,297,551. (*Id.*)

In its cross-appeal, the County argues that the trial court should have granted its JMOL motion on the rim bar damage claims because substantial evidence did not support the jury's conclusion that

⁶ Under change orders 13 and 15, the County conditionally had already paid \$20 million of these sums. (RP 1965, at KC_EM_0000500.)

differing site conditions existed at the repair locations, and did not support the jury's damages calculations. Neither argument has merit.

2. Substantial evidence supports the jury's findings on liability.

A JMOL motion can be granted “only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest.” [Citation.] ‘Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.’” *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250, 254 (2001).

The County argues that VPFK's differing site condition claims lack merit because the County's plans and specifications provided no information about soil conditions at the locations prepared for the rim bar repair, and VPFK therefore failed to demonstrate that the soil at those locations differed from the soil VPFK expected to find. VPFK in fact introduced evidence supporting three separate differing site conditions.

First, VPFK introduced evidence that, based on the GBR, GDR, and other contract documents, it should have been able to find a natural safe haven to repair the rim bar a short distance from where the BT-2 and BT-3 machines were damaged. (RB 3185-87, ex. 1830, at

KC0133043.) No natural safe havens were found and VPFK was forced to build *artificial* safe havens to perform the repairs. (RP 973; ex. 1699, at KC0091479, 1830, at 4, 10.) VPFK's inability to find safe havens in the expected locations was a Type I differing site condition. (Ex. 1830, at KC0133042; CP 9120 (a Type I differing site condition is a condition that differs materially from a condition indicated in the contract documents).)

VPFK also introduced evidence that the pressure at the locations where the artificial safe havens were built exceeded 75 psi, above the maximum pressure the County's plans and specifications said VPFK would encounter for interventions. (*See* ex. 141, at KC0091636 (letter in support of RCO 86); ex. 1597, at HK0000780; ex. 1699, at KC0091479; RP 2690 (pressure above 5.3 bar, which exceeds 75 psi).) The higher pressure VPFK encountered also constitutes a Type I differing site condition. (*See* ex. 1596, at KC0091026.)

Additionally, two aquifers not shown on the County's GBR were found above and below the location where the BT-2 STBM was to be repaired, which greatly complicated the dewatering effort. (RP 5101.) An undisclosed sand deposit was found where the BT-3 safe haven was

being built, which also interfered with dewatering. (RP 5130.) These too were differing site conditions. (RP 2691.)

Each of these facts supports the jury's conclusion that VPFK encountered differing site conditions at the location where it worked on the rim bar repairs.

3. Substantial evidence supports the jury's damage award.

The County argues that VPFK suffered little financial harm as a result of differing site conditions. Trying to recast the facts, it claims that the *only* problem VPFK faced was that full-face teal was unable to provide the anticipated 24 hours of stand-up support. "There was no evidence at trial that VPFK's repair costs would have been any different if the soils at the STBM repair locations had stood up for 24 hours and then become unstable." (RB 87-88.)

As explained above, VPFK's rim bar damage claim was based on numerous differing site conditions. It was based on the fact that, contrary to the Contract indications, VPFK was unable to find a natural safe haven in the locations where the rim bar damage first occurred; the need to dewater the repair locations in order to create *artificial* safe havens; and unexpected conditions that interfered with VPFK's ability to create artificial safe havens, including pressure that

exceeded 75 psi, and the presence of aquifers and ground conditions not shown on the GBR, which greatly complicated the dewatering process.

Each of these factors increased the time and expense of the repair work. To create safe havens, VPFK had to pump water from the ground and find a way to dispose of it. (RP 781, 1357, 5123-24.) Drilling from the surface and installing surface pumps required that VPFK obtain permits from landowners so it could install the equipment and pumps. (Ex. 142, at VPFK EM 00171389; RP 1984.) Because of the unexpected presence of aquifers, VPFK had to install additional pumps from the surface as well as from within the BT-2 tunnel. (RP 1357, 1985, 5125.) Even with the extra pumps, VPFK was unable to remove enough water to achieve atmospheric pressure. (RP 991, 5125.) Because of the presence of nonglacial sand where VPFK was creating the BT-3 safe haven, the dewatering wells had to be redesigned and rebuilt. (RP 5131.)

To support change order requests 85 and 86, VPFK documented these and numerous other steps it took to repair the rim bars. (Ex. 1830, at KC0133049-54; *see also* ex. 1721, at 12-13.) The direct costs it incurred performing this work totaled \$20,917,067. (RP 5454-56; *see* demonstrative ex. 4072, at 1.) It incurred delay costs

as well: 254.1 calendar days on all milestones affected by the BT-2 delay, and 192.1 calendar days on all milestones affected by the BT-3 delay. (Ex. 1830, at KC0133055.) The fact that VPFK was required to take these steps and spend this time and incur such costs supports the jury's conclusion that VPFK encountered differing site conditions that materially increased the cost of repairing the rim bars.

The County's position that VPFK's damages claim arose solely because full-faced teal did not provide 24 hours of stand-up time is based on a description of VPFK's rim bar repair claim in the court's jury instructions. (RB 87 (citing CP 9098 ("VPFK claims the location of the rim bar repairs for both TBMs was in full face teal but atmospheric conditions could not be achieved . . . VPFK believes this is a Type I differing site condition")).) This description is part of Instruction 9, which stated at the outset that the court was providing a "*summary* of claims of the parties provided to help you understand the issues in the case." (CP 9091 (emphasis added).) Instruction 9 did not describe the parties' claims in full or identify all of the evidence supporting the claims. The jury properly considered *all* of the evidence VPFK introduced to support its claim, and that evidence fully supports the verdict on that claim.

III. CONCLUSION

For all of the foregoing reasons, the judgment should be reversed and VPFK should be granted a new trial. As to the cross-appeal, the denial of the County's JMOL motion should be affirmed.

DATED this 7th day of July 2014.

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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 July 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:

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DATED at Encino, California, this 7th day of July 2014.



 Jo-Anne Novik