70432-0

70432-0

No. 70432-0-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KING COUNTY,

Respondent/Cross-Appellant,

v.

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

Appellants/Cross-Respondents.

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

BRIEF OF APPELLANTS TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, LIBERTY MUTUAL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, AND ZURICH AMERICAN INSURANCE COMPANY

OLES MORRISON RINKER & BAKER, LLP

By: Peter N. Ralston
WSBA No. 8545
Thomas R. Krider
WSBA No. 29490

701 Pike Street, Suite 1700
Seattle, WA 98101
(206) 623-3427

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Howard M. Goodfriend
WSBA No. 14355

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Appellants Travelers Casualty And Surety Company Of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity And Deposit Company Of Maryland, and Zurich American Insurance Company

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I. INTRODUCTION

King County hired Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV (VPFK) to construct the two middle sections (BT-2 and BT-3) of a four-section, 13-mile tunnel running from the Brightwater wastewater treatment plant to Puget Sound. Appellants Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company (collectively, the Sureties) issued the performance bond required by RCW 39.08.010 for the project. Neither the bond nor the construction contract, both of which the County alone drafted, contained a provision allowing a prevailing party to obtain attorney fees.

The ground conditions proved to be different from those indicated by the construction contract, making the work more difficult, costly, and time-consuming. The County declared VPFK in default but did not terminate VPFK or demand that the Sureties remedy the supposed default. Instead, after two mediations, the County and VPFK reached agreements under which VPFK completed all of the remaining project work except the excavation of the second half of the BT-3 tunnel, for which the County hired

another contractor. The County then filed this breach of contract action against VPFK and the Sureties, and VPFK filed counterclaims against the County.

The jury awarded the County more than $155 million in damages against VPFK, but made no findings on the Sureties' liability under the performance bond. The trial court nevertheless entered a final Judgment holding the Sureties jointly and severally liable for all the damages awarded against VPFK. The trial court also awarded the County judgment against the Sureties alone for $14,720,387.19, all of the attorney fees and costs the County incurred in its contract dispute with VPFK. The trial court relied on *Olympic Steamship, Inc. v. Centennial Insurance Co.,* 117 Wn.2d 37, 811 P.2d 673 (1991), and *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007), in making its award. In *Olympic Steamship,* the Supreme Court applied equitable principles to justify a fee award to an insured that was forced to sue its insurer to obtain coverage for a loss covered by its insurance policy. In *Colorado Structures,* a slim majority of the Court expanded *Olympic Steamship* to justify a fee award in favor of a private contractor that was forced to sue the surety on a

subcontractor's performance bond on a private construction project.

The part of the Judgment holding the Sureties liable for the County's attorney fees and costs should be reversed because *Colorado Structures* does not support a fee award in favor of a public agency against a statutory surety on a public works project. In the Public Works Act, RCW 39.04.240, the Legislature directed that the provisions of RCW 4.84.250-.280 govern fee awards in cases arising out of public works contracts. The County did not qualify for an award under that scheme, and our courts will not apply equitable principles such as those underlying *Olympic Steamship* to alter rights expressly governed by statute. In any event, it would be inequitable to award fees in this case. The County chose not to include a fee provision in either the construction contract or the bond, both of which it alone drafted. Absent a contractual fee provision, the equitable principles governing *Olympic Steamship* do not justify a unilateral fee award in favor of a governmental entity against a statutory surety on a performance bond.

Even if the County was entitled to a fee award in some amount, it was not entitled to an award against the Sureties of *all*

the fees it incurred in this lengthy and complex dispute. The County incurred the vast bulk of its fees prosecuting its breach of contract claim against VPFK and defending against VPFK's counterclaims. Those fees are not recoverable under *Olympic Steamship* or *Colorado Structures* because they do not relate to a coverage determination under the bond, and the trial court erred in failing to require the County to segregate any recoverable fees.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by awarding attorney fees and costs to the County against the Sureties on April 19, 2013, and by entering a $14,720,387.19 Judgment against the Sureties for fees and costs. (CP 4490-91, 4537)

2. The trial court erred in entering Finding of Fact No. 8:

> This Court considered and ruled on numerous dispositive and pre-trial motions. King County's work on these motions was reasonable and the County is entitled to all fees and costs sought in connection with the dispositive and pre-trial motions.

(CP 4487)

3. The trial court erred in entering Finding of Fact No. 9:

> This Court presided over the trial of this matter. King County's work at trial was reasonable and necessary, given King County proved its default claim and responded to Defendants' wide-ranging claims and defenses, and King County is entitled to

> full recovery of all fees and costs sought for work performed during the course of trial. The defendants do not dispute the reasonableness of the amounts requested.

(CP 4487)

4. The trial court erred in entering Finding of Fact No. 15:

> In order to fulfill the purpose of Olympic Steamship and make King County whole, the fee award includes reasonable amounts for outside counsel, in-house counsel, expert witness fees, and costs.

(CP 4488 (deleting cited authorities))

5. The trial court erred in entering Finding of Fact No. 16:

> The amount of the fee award has been calculated using the lodestar method, multiplying a reasonable hourly rate by the reasonable number of hours spent on the lawsuit and does not include hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. . . . The defendants did not dispute the amount of the fees requested, just legal issues as to whether the plaintiff is entitled to fees at all, the date from which the fees should run and whether plaintiff is entitled.

(CP 4488 (deleting cited authority))

6. The trial court erred in entering Finding of Fact No. 19:

> King County's claim of default against VPFK and the Sureties involved a common core of facts. Since the Sureties denied coverage and adopted all of VPFK's defenses, the claims could not and were not required to be segregated.

(CP 4489)

7. The trial court erred in entering Finding of Fact No. 20:

> The Sureties adopted all of VPFK's defenses in this case, including claims for various differing site condition (DSC) claims, which, if proved in their entirety, would defeat King County's claim of default. The work King County did prosecuting its default claim against VPFK was also directly attributable to the Sureties, and the fee award cannot reasonably be segregated as between VPFK and the Sureties.

(CP 4489 (deleting cited authority))

8. The trial court erred in entering Finding of Fact No. 21:

> The jury found for RCO 65 and 66 (the two largest awards to VPFK) that VPFK was "not capable of segregating its damages . . . because of the overlapping and interconnected nature of the claims." Dkt. 621A (Verdict Form, Questions 9.f and 12.g). Where, as here, the claims are so related that "no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees."

(CP 4489 (deleting cited authorities))

9. The trial court erred in entering Finding of Fact No. 26:

> The amount of the fees, expert expenses, and costs awarded to King County as of [sic] is as follows:

King County's Fees and Costs	
Attorney Fees (Stoel Rives)	$ 7,991,010.72
In-House Counsel Fees	$ 874,276.36
Other Professional Services & Expert Fees and Costs	$ 5,980,020.03
Subtotal	$ 14,845,307.11
Deductions	(124,919.92)
TOTAL	**$14,720,387.19**

(CP 4490)

10. The trial court erred in instructing the jury that the Sureties were jointly and severally liable with VPFK. (CP 9112)

11. In the event of remand for new trial, the trial court should instruct the jury on the Sureties' independent defenses to liability. (*See* CP 7858)

12. The trial court erred in the respects set forth in the Assignments of Error in VPFK's opening brief, which the Sureties adopt by this reference as permitted by RAP 10.1(g).

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. May the County recover attorney fees from the Sureties under the equitable exception to the American Rule recognized in Olympic Steamship and Colorado Structures when (1) fee awards in actions arising out of a public works contract are governed by a

comprehensive statutory scheme under which the County did not qualify for fees, and (2) the County shielded itself from liability for fees by not including a fee provision in either the construction contract or the Sureties' bond, both of which the County alone drafted?

B. If the County was entitled to a fee award, was the County required to segregate the recoverable fees it incurred litigating any coverage dispute with the Sureties from the nonrecoverable fees the County incurred litigating its contract dispute with VPFK?

The Sureties also adopt by reference the Issues Related to Assignments of Error in VPFK's opening brief. RAP 10.1(g).

IV. STATEMENT OF THE CASE

A. The Sureties Issued A Performance Bond Under The Public Works Act. Neither The Bond Nor The Underlying Contract, Both Of Which The County Alone Drafted, Contained A Fee Provision.

The Sureties incorporate by reference the Statement of the Case in VPFK's opening brief. The following additional facts bear on the issues the Sureties raise in this appeal.

RCW 39.08.010 and the Central Contract between VPFK and the County required VPFK to provide a performance bond. (CP 5383; RP 4989; Ex. 6 at §§ 4.01(B), 4.02 [KC 000028-29]) VPFK

provided the required bond, on a form dictated and prepared by the County, jointly issued by the five Sureties who appeal here. The bond, Exhibit 3001 at trial, is Appendix A to this brief. Under the bond, VPFK was the principal and the County was the obligee. (Ex. 3001, at 1) The Sureties bound themselves "in the full sum of the Contract Price of . . . ($211,076,058.00), and including any and all adjustments to the Contract Amount, for the faithful performance" of the Central Contract. If VPFK were to "faithfully perform all provisions of such Agreement . . . then this obligation is void, otherwise to remain in full force and effect." The Sureties' obligation was: "whenever Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owner's obligations thereunder, the Surety, at the request of the Owner, shall promptly remedy the default in a manner acceptable to the Owner." (Ex. 3001)

B. Months After The County Declared A Default And Negotiated An Interim Agreement With VPFK, The County Demanded That The Sureties Remedy The Default On 8 Days Notice. The County Withdrew Its Demand When It Hired Another Contractor For A Specific Portion Of The Work.

After months of delays and difficulties stemming from differing site conditions and the County's requirement that VPFK use a slurry tunnel boring machine in its work (VPFK Br. at 11-25),

the County declared VPFK in default on October 28, 2009. (RP 2089, 2102-03; Ex. 142 at 3) The County did not directly notify the Sureties of the claimed default, and it did not demand that the Sureties perform under the bond. Over three months later, and after several days of mediation, the County and VPFK on February 15, 2010, entered into an Interim Agreement providing that the County would engage another contractor, JDC, to complete the excavation of the remaining half of the BT-3 tunnel, and would issue a change order deducting the remainder of the work on that tunnel from VPFK's contract ("deductive change order"). (Ex. 152) VPFK remained responsible for completion of all other project work, including completion of the BT-e tunnel after it was excavated. On February 25, 2010, VPFK and the County executed another agreement providing that VPFK would receive specified incentive payments if it completed the excavation of the BT-2 tunnel by specified milestone dates. (Ex. 155 at 1) The Sureties did not participate in the negotiations that culminated in these agreements and change orders. Nor had the Sureties consented to the County's plan to retain JDC. (RP 4958; Ex. 3019 at 2)

On February 26, 2010, the County sent a letter to VPFK's counsel, seeking assurances from the Sureties (1) that the

contemplated deductive change order would "not affect the validity of the bond, which will continue to cover the entire amount of the Central Contract (as adjusted in that change order)"; (2) that the County had "satisfied all notice requirements so as to preserve its positions that (a) VPFK is in default and consequently; (b) both VPFK and the surety are liable for the cost overrun of completing the BT-3 mining work"; and (3) that the County's engagement of JDC to complete the BT-3 excavation work on a "cost reimbursement basis is not a violation of any right the surety may have to complete the BT-3 work itself or to engage another contractor." (Ex. 3014 at 2)

In the first direct communication between the Sureties and the County, the Sureties responded on March 10, 2010. (Ex. 3015) The Sureties agreed that the deductive change order would not affect the bond's validity and that VPFK and the County had reserved their respective rights to dispute responsibility for the costs and expenses associated with retaining JDC. The Sureties reserved their "rights and defenses to dispute the alleged underlying default which gave rise to King[ ] County['s] retention of [JDC] including the reasonableness of any compensation paid by King County to [JDC] in connection with the BT-3 work," and noted

that the County had yet to make any claim or demand under the bond. (Ex. 3015)

In a March 18, 2010, letter to VPFK's counsel (Ex. 3016), the County responded that it could not retain JDC if the Sureties did not consent and if they reserved their rights to assert new defenses under the bond based on retention of JDC. For the first time, the County demanded that the Sureties perform their obligation under the bond to remedy VPFK's alleged default. (RP 4966; Ex. 3016 at 1-2) The County gave the Sureties eight days to agree, and threatened that if the Sureties did not respond by that deadline "the County may be forced to move forward and engage [JDC] on its own." (Ex. 3016 at 2; *see* RP 4985)

The Sureties promptly began to investigate whether VPFK was actually in default (Ex. 3019 at 3-4; Ex. 3024 at 1-3)—a condition precedent to the Sureties' obligations under the bond. (Ex. 3001; Ex. 3024 at 4) The Sureties and the County's counsel met for the first time on March 24, and again on March 30, 2010, to discuss VPFK's alleged default. (Ex. 3019 at 1; Ex. 3024 at 1)

The County insisted that VPFK's default was "clear," hence no investigation was needed. (Ex. 3019 at 3-4; RP 4986) On April 12, 2010, the County sent another letter to VPFK's counsel

confirming that, as contemplated in the Interim Agreement, the County intended to sign a contract with JDC to complete the excavation work on the BT-3 tunnel and then to issue the deductive change order to VPFK. (Ex. 3025) The County sought the Sureties' consent that this proposed course of action:

> will not give the Sureties grounds for any new defense to its obligation on the Bond that did not exist prior to the execution of this letter. By consenting to the course of action above, the Sureties are not consenting to the reasonableness or necessity of payments made to JDC or others. Moreover, the Sureties are not consenting to the appropriateness of any future conduct of the County or VPFK. The Sureties' consent is limited to the contractual procedure in which the County intends to complete BT-3. The Sureties hereby reserve all rights.

(Ex. 3025 at 2) The County further stated that, if the Sureties agreed to these terms, the County "hereby terminates any pending demand on the Sureties related to VPFK and the subject performance bond; provided the County reserves its right to claim that the Sureties are jointly and severally liable with VPFK (if it is shown that VPFK is in default)." (Ex. 3025 at 1)

On April 19, 2010, the Sureties agreed to the terms set forth in the County's April 12 letter (Ex. 3025 at 2; RP 4995-98) and stopped investigating VPFK's alleged default. (RP 5001) That same day, the County signed a contract, which JDC had executed on April

2, 2010, to complete the excavation work on BT-3. (CP 5409; Ex. 3022)

C. After The County Filed This Action, The Sureties Resumed Their Investigation And Ultimately Denied The County's Claim Under The Performance Bond.

Unbeknown to the Sureties, on April 19, 2010, the County also filed its complaint in this action, naming VPFK and lead surety Travelers as defendants. (CP 1) The County's operative second amended complaint, filed July 6, 2010, alleged a cause of action against Travelers for breach of contract, i.e., the bond. (CP 43-45) The County's prayer for relief did not include a request for attorney fees. (CP 45)

The Sureties treated the County's complaint as a reinstatement of its claim under the bond, and resumed their investigation. (RP 5009) Based on that investigation, the Sureties concluded that, "to the extent VPFK failed to comply with its contractual obligations, such failure was the result of defective specifications, [differing site conditions] and/or a cardinal change in the Contract. VPFK is not in default of its contract obligations and the County has not performed its obligations thereunder." (Ex. 3000 at 20-21) Accordingly, on August 4, 2010, the Sureties formally denied the County's claim on the bond. (Ex. 3000 at 21)

The next day, Travelers filed its answer to the County's second amended complaint. (CP 116) The four unnamed co-Sureties also intervened as defendants and filed their answer to the County's second amended complaint. (CP 138)

D. After The Court Denied The Sureties' Motion For Summary Judgment, The Jury Found VPFK Was In Default But Made No Finding Against The Sureties.

In June 2012, the Sureties filed a motion for summary judgment contending they should be exonerated from liability under the bond because (1) the County failed to satisfy the conditions precedent to the Sureties' obligations under the bond, including the requirement in the Central Contract that the County terminate VPFK before calling on the Sureties to perform obligations under the bond, and (2) the County materially altered the Contract when it entered into the Interim Agreement and hired JDC to complete the BT-3 excavation. (CP 4953-57, 4960-64)

On August 7, 2012, the trial court denied the Sureties' motion for summary judgment on the grounds that "Factual issues remain as to whether a portion of the contract was in fact terminated, whether the contractor was in default, and whether the Surety was provided with sufficient time to respond to King County's request that it remedy the default. . . ." (CP 1083)

Less than a month later, the case against the Sureties was tried together with the County's case against VPFK. But the County did not pursue any claim that the Sureties breached the bond by failing to remedy VPFK's default. (RP 6132 (County's counsel: "[W]e're not proceeding under that last paragraph of the bond.")) Rather, the County contended that under the bond and the Central Contract, the Sureties were "equally liable for" any default damages assessed against VPFK. (RP 6124)

Although in its summary judgment ruling the trial court had identified factual issues whether the Sureties had been given sufficient time to investigate and respond to the County's demands, the trial court now instructed the jury that "[I]f you find that VPFK is liable for damages, the Sureties will be jointly and severally liable for those damages." (RP 6817; CP 9112) The court refused to ask the jury to decide the factual issues the court had identified in denying summary judgment: whether the Sureties were denied a reasonable opportunity to investigate the alleged default, and whether the County's retention of JDC to complete the excavation work on the BT-3 tunnel with a different boring machine on a time-and-materials basis constituted a material alteration to the Central

Contract that exonerated the bond. (RP 5651-54, 5738, 6114-15, 6128-31; CP 7858)

The jury returned a verdict that VPFK had been in default and awarding the County $155,831,471.00 on its breach of contract claim. The jury also awarded VPFK $26,252,949.00 on certain of its claims, resulting in a net verdict for the County of $129,578,522.00. (CP 4537) The jury was not asked to decide—and did not decide—whether the Sureties had breached any obligation under the bond. None of the questions posed to the jury on the verdict form mentioned the Sureties or required the jury to determine the Sureties' liability. (CP 1316-29)

E. The Court Entered Judgment Against The Sureties Jointly And Severally For All The County's Damages And Severally For All The County's Fees. The Sureties Appeal.

Without explanation, the trial court denied the Sureties' motion for entry of judgment based on the jury's failure to find liability or award damages against the Sureties. (CP 1635, 4493-94) Instead, the court granted the County's post-trial motion for an award of fees against the Sureties, holding that the Sureties were liable for all the attorney fees, expert fees and costs the County incurred in its contract dispute with VPFK, totaling $14,720,387.19. (CP 4485-92)

On May 7, 2013, the court entered final Judgment against the Sureties as Judgment debtors, jointly and severally liable with VPFK for the County's net damages. (CP 4537) The Judgment also held the Sureties severally liable for the County's $14.7 million fee and cost award. (CP 4537-38)

On May 31, 2013, VPFK and the Sureties filed a timely notice of appeal from the May 7 Judgment. (CP 4533)

V. ARGUMENT

A. There Is No Statutory, Contractual, Or Equitable Basis For The Trial Court's Award Of Fees To The County.

1. Standard of review: This court reviews de novo whether the County is entitled to fees.

"Whether a party is entitled to attorney fees is an issue of law, which is reviewed de novo." *North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 643, ¶ 10, 151 P.3d 211 (2007). "The process of determining the applicable law and applying it" to the facts of a particular case also is a question of law reviewed de novo. *Erwin v. Cotter Health Centers, Inc.*, 161 Wn.2d 676, 687, ¶ 18, 167 P.3d 1112 (2007). "Statutory interpretation is a question of law, subject to de novo review." *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298, ¶ 13, 149 P.3d 666 (2006).

2. The equitable exception to the American Rule recognized in *Colorado Structures* does not apply to cases arising out of public works contracts, in which fee awards are governed by statute.

Under the "American Rule," a court cannot award attorney fees as costs or damages unless a contract, statute, or recognized ground of equity permits the award. *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997); *Cosmopolitan Eng'g Group,* 159 Wn.2d at 296-97, ¶ 18. In its motion for attorney fees against the Sureties, the County did not contend the Central Contract, the bond, or any statute permitted a fee award. (CP 1410-31) The County relied solely on the equitable grounds recognized in *Olympic Steamship, Inc. v. Centennial Insurance Co.,* 117 Wn.2d 37, 811 P.2d 673 (1991), and *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007). (CP 1412-13) The trial court committed legal error by granting the County's motion, saddling the Sureties with liability for all the attorney fees and costs the County incurred in its dispute with VPFK—more than $14.7 million. (CP 4485-92) Neither *Olympic Steamship* nor *Colorado Structures* supports the fee award.

In *Olympic Steamship*, the Supreme Court crafted a narrow exception to the American Rule: an insured who prevails in an

action against an insurer to recover benefits due under an insurance contract may also recover attorney fees. *Olympic Steamship*, 117 Wn.2d at 52-53. The Court reasoned that insurance contracts are "substantially different from other commercial contracts" because of the "disparity of bargaining power between an insurance company and its policyholder." *Olympic Steamship*, 117 Wn.2d at 52; *see also McCready*, 131 Wn.2d at 275, n. 6. When an insurer fails "to honor its commitment" and the insured consequently must incur attorney fees to recover the benefits of the policy, equity requires that the insurer bear the fees so that the insured is made whole. *Olympic Steamship*, 117 Wn.2d at 52-53; *see Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 149, 930 P.2d 288 (1997).

In *Colorado Structures*, a bare majority of the Supreme Court extended the *Olympic Steamship* exception to a general contractor's action against a subcontractor's surety for payment under a performance bond issued on a private construction project. The majority reasoned that the performance bond surety was akin to an insurer and thus subject to liability for attorney fees under *Olympic Steamship* for its wrongful denial of a claim for benefits under the bond. *Colorado Structures*, 161 Wn.2d at 605, ¶ 24, 638,

¶ 93 (opinion of Chambers, J., for four justices; Sanders, J., concurring on the point).

But *Colorado Structures* involved a performance bond issued to secure a subcontractor's performance of a *private* construction contract, for the benefit of a general contractor. This case, in contrast, involves a performance bond issued to secure performance of a *public works* contract for the benefit of a public agency as project owner. No court has awarded attorney fees to a public works agency under *Colorado Structures*—and for good reason. Fee awards in cases arising out of public works contracts are governed by a comprehensive statutory scheme.

3. The Public Works Act does not authorize a fee award because the County did not recover more than an amount offered in settlement.

The public works contract fee statute, RCW 39.04.240, provides that "[t]he provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 [$10,000] shall not apply . . . ." RCW 39.04.240 thus effectively modifies RCW 4.84.250 to require that in all actions arising out of a public works contract in which a

public body is a party, the "prevailing party as hereinafter defined" is entitled to recover reasonable attorney fees. RCW 4.84.250.

RCW 4.84.260 defines the plaintiff as the "prevailing party" when its recovery equals or exceeds its pretrial settlement offer: "The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than *the amount offered in settlement by the plaintiff, or party seeking relief*, as set forth in RCW 4.84.280." RCW 4.84.260 (emphasis added).

An action seeking damages for breach of a public works contract is an action "arising out of" that contract within the meaning of RCW 39.04.240. *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 846, 917 P.2d 1086 (1995). The statutorily-required performance bond is part of the Central Contract. *Levinson v. Linderman*, 51 Wn.2d 855, 859, 322 P.2d 863 (1958). Here, the County alleged that VPFK breached a public works contract, the Central Contract, to construct the BT-2 and BT-3 tunnels. Then the County claimed from the Sureties all the fees it incurred litigating that dispute. Yet the County never made, much less bettered, a settlement offer to VPFK or the Sureties.

Consequently, the County never qualified as the "prevailing party" entitled to claim fees under RCW 4.84.260.

When rights are defined by statute, the courts will not invoke equitable principles to permit a party to escape the provisions of the statute. *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 699, 790 P.2d 149 (1990) (courts "will not give relief on equitable grounds in contravention of a statutory requirement"); *Williams v. Duke*, 125 Wash. 250, 254, 215 P. 372 (1923) ("'[W]herever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation . . .'") (*quoting Magniac v. Thomson*, 56 U. S. (15 How) 281, 14 L. Ed. 696 (1853)); *see Kingery v. Dep't of Labor & Indus.*, 80 Wn. App. 704, 710, 910 P.2d 1325 (1996) ("Equitable principles cannot be asserted to establish equitable relief in derogation of statutory mandates."), *aff'd,* 132 Wn.2d 162, 937 P.2d 565 (1997). The Public Works Act does not authorize a fee award because the County did not "better" a settlement offer.

4. *Olympic Steamship* and *Colorado Structures* do not justify a fee award on a public works performance bond dictated by the County.

The holdings in *Olympic Steamship* and *Colorado Structures* rest entirely on equitable principles. The Court

grounded its decision on "*equitable notions* regarding the disparity in bargaining power between insureds and insurers, and attorney fees as damages." *McCready*, 131 Wn.2d at 275, n.6, (emphasis added); *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 899, 16 P.3d 617 (2001) (*Olympic Steamship* "is an equitable exception to the American Rule on attorney fees."); *Leingang*, 131 Wn.2d at 149 (*Olympic Steamship* fees recoverable "as a matter of equity.").

There was no disparity of bargaining power here. The County alone drafted both the form of the bond and the terms of the underlying Contract. Indeed, the terms of a public works project cannot be negotiated; "a negotiated contract for a project which must be competitively bid is invalid . . . because of the strong public policy favoring competitive bidding in this state." *Hanson Excavating Co., Inc. v. Cowlitz County,* 28 Wn. App. 123, 126, 622 P.2d 1285 (1981), *discussing Platt Elec. Supply, Inc. v. City of Seattle,* 16 Wn. App. 265, 274, 555 P.2d 421 (1976), *rev. denied*, 89 Wn.2d 1004 (1977). The County had the sole and absolute power to dictate and control the terms of both the Central Contract and the bond. Hence an equitable justification for fees, premised on an insured's inability to bargain for a better agreement, simply has no application here.

The trial court erred by allowing the County to invoke the equitable principles underlying *Olympic Steamship* and *Colorado Structures* to circumvent the positive statutory rules governing the County's right to fees in this case. The Court in those two cases had no reason to discuss, and did not discuss, the statutory rules because neither case involved a public works contract. To extend the narrow exception to the American Rule recognized in *Colorado Structures* to this dispute "arising out of a public works contract," RCW 39.04.240, would defeat the statutory scheme of the Public Works Act. Nothing in *Colorado Structures* requires or supports such a result.

5. The equitable exception to the American Rule recognized in *Colorado Structures* should not apply where, as here, a fee award would be inequitable.

Equity should refrain from enforcing an *equitable* principle where, under the circumstances, enforcement would work an *inequity*. "It is a contradiction of terms to adhere to a rule which requires a court of equity to act oppressively or inequitably and by rote rather than through reason." *Arnold v. Melani*, 75 Wn.2d 143, 153, 449 P.2d 800 (1968). In this case, an award of *Olympic Steamship* fees would work an inequity for at least two reasons.

First, the County itself decided *not* to include an attorney fee provision in either the Central Contract or the bond, both of which it alone drafted. Having thus protected itself from potential liability for *defendants'* fees, the County cannot, consistent with equity, recover its own fees. To allow the County to recover under these circumstances would be tantamount to enforcing a unilateral fee provision, i.e., a fee provision the terms of which allow only one party to a contract to recover fees. Unilateral fee provisions are fundamentally unfair, and Washington public policy forbids them. *Mahler v. Szucs*, 135 Wn.2d 398, 426 n.17, 957 P.2d 632, 966 P.2d 305 (1998) (*citing* RCW 4.84.330).

Second, the County's decision not to include an attorney fee provision in the Central Contract or the bond alters the equities here in another important way that distinguishes this case from *Colorado Structures*. The contract at issue in that case included a fee provision. *See Colorado Structures*, 161 Wn.2d at 597, ¶ 11 ("The trial court declined to award *Olympic Steamship* attorney fees but did award attorney fees *under the contract*.") (emphasis added). Thus, the contract placed both the principal and the surety on notice that the obligee might claim attorney fees if it prevailed in an action on the contract. Here, because neither the Central

Contract nor the bond included a fee provision, neither document afforded VPFK or the Sureties notice that they could be liable for the County's fees. Indeed, the County did not make a claim for fees in its complaint when it asserted the Sureties had breached their contract. (CP 45)

Nor did the governing statutes place VPFK or the Sureties on notice that they could be liable for fees. In this action arising from a public works contract, in which any fee award would be authorized by RCW 39.04.240, the County never made a settlement offer under RCW 4.84.280, and thus never satisfied the condition precedent to an award under RCW 4.84.250 and RCW 4.84.260.

To allow the County to recover fees from the Sureties would be a harsh and inequitable result—not only for the Sureties, but also for VPFK. The burden of the fee award will ultimately fall on VPFK, which must reimburse the Sureties for payments to the County. *Colorado Structures*, 161 Wn.2d at 629-30, ¶ 77 (Madsen, J., conc. in dissent) ("[T]he surety has an implied (and usually, as here, an express) contractual right to indemnification for any costs it incurs as a result of the principal's default." Stearns, [*The Law of Suretyship*] § 280 [(4th ed. 1934)] (a surety has an implied contractual right to indemnification from the principal for any

payment made to the creditor)"). (RP 4951: if Sureties pay any money under the bond, VPFK "has to pay us back for that.")

VPFK will ultimately bear responsibility for paying any fee award to the County, even though (1) the Contract it signed with the County contained no fee provision, (2) VPFK had no notice it could be liable for fees, (3) the County never offered to settle under the Public Works Act, and (4) VPFK consequently had no opportunity to plan its litigation strategy to minimize that potential multi-million-dollar exposure. The Court should not allow the equitable rule of *Olympic Steamship* to produce this harsh and inequitable result.

B. If The County Was Entitled To A Fee Award, The Trial Court Abused Its Discretion By Not Requiring The County To Segregate Its Fees.

1. Standard of review.

A trial court's decision not to require a party seeking attorney fees to segregate recoverable and nonrecoverable fees is reviewed for abuse of discretion. *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N)*, 119 Wn. App. 665, 690, 82 P.3d 1199, *rev. denied*, 152 Wn.2d 1023 (2004). A trial court abuses its discretion when segregation is possible but the court awards fees without making a record showing the segregation. *See*,

e.g., *Loeffelholz*, 119 Wn. App. at 692-93 (where record showed that "segregation clearly was possible" and that claims were not "so interrelated as to excuse segregation," trial court abused its discretion by awarding a portion of claimed fees without making a record demonstrating segregation of recoverable and nonrecoverable fees); *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) (discretion must be "exercised on articulable grounds").

2. The County must segregate the fees it incurred to litigate the coverage issue from the fees it incurred to litigate the many issues unrelated to coverage.

"If . . . an attorney fees recovery is authorized for only some of the claims, the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues." *Hume v. American Disposal Co.*, 124 Wn.2d 656, 672, 880 P.2d 988 (1994), *cert. denied*, 513 U.S. 1112 (1995). Segregation is required even if claims are overlapping or interrelated, *Loeffelholz*, 119 Wn. App. at 690, unless the claims "are so related that no reasonable segregation of successful and unsuccessful claims can be made," *Hume,* 124 Wn.2d at 673.

The majority in *Colorado Structures* held that attorney fees incurred to litigate a *coverage* dispute against a surety may be recovered under *Olympic Steamship*. *Colorado Structures*, 161 Wn.2d at 606-07, ¶ 36. A *coverage* dispute is one that turns on "whether there is a contractual duty to pay, who is insured, the type of risk insured against, or whether an insurance contract exists at all." *Solnicka v. Safeco Ins. Co. of Ill.*, 93 Wn. App. 531, 534, 969 P.2d 124 (1999).

"*Olympic Steamship* applies when an insurer contests the meaning of a contract, but not when it contests other questions . . . ." *Condon v. Condon*, 177 Wn.2d 150, 167, ¶ 29, 298 P.3d 86 (2013). Fees therefore cannot be recovered under *Olympic Steamship* when the parties litigate a *claim* dispute or other dispute not involving coverage, such as a dispute over "factual questions of liability, injuries, and damages . . . ." *Solnicka*, 93 Wn. App. at 534 (affirming denial of fees); *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 658, ¶ 26, 272 P.3d 802 (2012) ("An insured cannot claim attorney fees where the dispute is over the extent of the insured's damages or factual questions of liability."); *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994) (vacating fee award) ("[D]ispute[s] over the value of the claim

presented under the policy . . . are not properly governed by the rule in *Olympic Steamship*."). With respect to claim disputes and other disputes not involving coverage, Washington continues to follow the American Rule, under which each party must bear its own attorney fees. *Dayton*, 124 Wn.2d at 280.

When a single action combines both coverage and noncoverage disputes, the successful claimant may recover reasonable *Olympic Steamship* fees for litigating only the part of the action that resolved the coverage dispute. *See, e.g.*, *Leingang*, 131 Wn.2d at 148 (in case involving both coverage and noncoverage disputes with insurer, *Olympic Steamship* fees were properly awarded for trial and appellate litigation of the portion of the case that involved the coverage dispute).

Here, the County sued VPFK and the Sureties in a single action that combined multiple disputes – few of which involved coverage under the bond. For example, in seeking summary judgment against VPFK and resisting VPFK's summary judgment motion on liquidated damages, the County was litigating a dispute over VPFK's liability and the County's damages, not a dispute over coverage under the bond. The fees the County incurred in those

efforts would have been incurred even if the Sureties were not parties to this action.

Similarly, there is no evidence that the Sureties played any significant role in the lengthy trial. The County's efforts at trial were almost exclusively devoted to proving VPFK's liability, quantifying the County's damages, and defeating VPFK's counterclaims or minimizing its recovery. Those were the disputes the jury was charged with resolving. The County abandoned any attempt to resolve issues relating to the Sureties' liability and defenses under the bond (*see* RP 5730, 6132), and consequently the jury did not consider those issues. The jury was not even asked to find if the Sureties were liable under the bond. (CP 1316-29) None of the fees the County incurred litigating the disputes with VPFK were incurred to obtain a determination of coverage under the bond, hence none can be recovered under *Olympic Steamship*.

Certainly, fees the County incurred *defending* against VPFK's counterclaims had nothing to do with obtaining a coverage determination. As counterclaim defendant, the County could not obtain any affirmative relief. The County would have incurred the same fees defending itself against VPFK's counterclaims had the Sureties conceded coverage from day one or had there been no

bond. Since none of those fees were incurred to obtain a coverage determination, none are recoverable under *Olympic Steamship*.

The purpose of awarding *Olympic Steamship* fees is to make an insured whole when it must incur fees to overcome an insurer's coverage position. *Leingang*, 131 Wn.2d at 149; *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 40, 904 P.2d 731 (1995). To allow the County to recover *all* the fees it incurred in this action, including the fees it incurred litigating its contract disputes with VPFK, would make the County *more* than whole and place the County in a position superior to that of any other litigant who incurs fees to prove a breach of contract claim or any other claim that does not result in a coverage determination.

3. The trial court's rationale for not requiring the County to segregate its fees had no basis in law, fact or logic.

The trial court offered the following explanation for its decision to award the County all the fees it incurred in this case, without segregation:

> 20. The Sureties adopted all of VPFK's defenses in this case, including claims for various differing site condition (DSC) claims [sic], which, if proved in their entirety, would defeat King County's claim of default. The work King County did prosecuting its default claim against VPFK was also directly attributable to the Sureties, and the fee award cannot reasonably be segregated as between VPFK and the Sureties.

> 21. The jury found for RCO 65 and 66 (the two largest awards to VPFK) that VPFK was "not capable of segregating its damages . . . because of the overlapping and interconnected nature of the claims." Dkt 621A (Verdict Form, Questions 9f and 12g) Where, as here, the claims are so related that "no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees."

(CP 4489 (*quoting Loeffelholz*, 119 Wn. App. at 691) (additional citations omitted)) The trial court's reasoning was legally flawed, factually unsupported and illogical.

As a legal matter, "[t]he work King County did prosecuting its default claim against VPFK" was not "attributable to the Sureties." (CP 4489) It was attributable to the fact that the County sued VPFK for breach of contract and, to prevail on that claim, the County had to prove breach and damages and defeat VPFK's defenses. The County would have had to prove its case and defeat VPFK's defenses even if the Sureties had not been parties or had not disputed coverage, so the fees the County incurred to prove its case against VPFK cannot fairly be "attributable to the Sureties."

The trial court deemed it significant that "[t]he Sureties adopted all of VPFK's defenses in this case, including claims for various differing site condition (DSC) claims [sic], which, if proved in their entirety, would defeat King County's claim of default." (CP

4489) Why the court considered that fact to be significant is unclear. Perhaps the court believed that because VPFK and the Sureties had congruent interests in defeating the County's breach of contract claim, the County's case against VPFK was therefore a "coverage" dispute. But that is not so. VPFK's defenses did not pertain to coverage under the bond; they pertained to VPFK's liability for breach of contract. In overcoming those defenses, the County was not litigating a coverage dispute, it was litigating a claim for breach of contract.

A performance bond is not a contract of liability insurance. Nonetheless, under the trial court's reasoning, every tort action against an insured defendant would become a "coverage" dispute, authorizing an award of fees to the plaintiff because the insurer shares the defendant's interest in successfully defending the case: when the defense prevails, the defendant avoids liability in tort and the insurer avoids liability under its policy. No authority supports the notion that such a shared interest is sufficient to create a coverage dispute, making *Olympic Steamship* fees available in every case where a plaintiff prevails on a claim covered by the defendant's insurance policy.

Finally, no facts support the trial court's conclusion that the County could not feasibly segregate its fees. (FF 19-21, CP 4489) The court cited the jury's finding that *VPFK's damages* could not be segregated because its *counterclaims* were interconnected with its defenses to the County's contract claims. (FF 21, CP 4489) But that finding is irrelevant to the fee issue. The question before the court was whether it was feasible to segregate the County's *fees* (not VPFK's damages) incurred in pursuing the County's *claims* (not VPFK's counterclaims) from those incurred in establishing coverage under the bond. The County's coverage dispute with the Sureties was not so intertwined with the County's breach of contract claim against VPFK that no reasonable segregation of attorney fees was feasible. The court's finding that VPFK's counterclaims—which had nothing to do with coverage—were intertwined cannot support its refusal to segregate recoverable (coverage) from nonrecoverable (claim) fees.

In short, the court articulated no sound reason for relieving the County of its obligation to segregate recoverable and nonrecoverable fees. And no sound reason exists. The record shows that "segregation clearly was possible." *Loeffelholz*, 119 Wn. App. at 692. Though the *County* bore the burden of showing that

segregation was *not* reasonably possible, *Loeffelholz*, 119 Wn. App. at 690—a burden it did not come close to meeting—the Sureties affirmatively identified many examples of fees the County incurred for discrete activities unrelated to coverage that easily could have been segregated. (*See* CP 4334-41) Here are some of those examples:

- The County claimed fees charged by outside counsel to draft and respond to VPFK's change order requests during construction of the tunnels; to seek clarification of VPFK's affirmative claims; to participate with VPFK in a proceeding before a dispute resolution board, which the Sureties did not attend and which the County has acknowledged concerned only VPFK's counterclaims "without regard to King County's own claims" (CP 1426); to address issues related to the County's Owner Controlled Insurance Program; to negotiate with JDC over the replacement contract for the excavation of BT-3 tunnel; to communicate with elected officials; to respond to County oversight and audit requests; to mediate and litigate disputes over construction problems on the BT-1 tunnel; and to depose witnesses concerning VPFK's claims. (CP 1418-19, 1434, 1443, 4334, 4357)

- The County claimed fees it incurred to administer the Central Contract; to participate in the dispute resolution proceeding; and to negotiate the JDC replacement contract. (CP 1434, 1443, 1792-93, 4334)

- The County claimed fees it paid to an expert, Ron Maus, who provided a report and testimony on VPFK's and the County's damage claims, which had nothing to do with coverage under the bond. (CP 1444, 1616, 4355)

- The County claimed fees it paid to other experts and consultants, many of whom did not testify, and who, like Maus, performed no work involving coverage. (CP 1444, 1614-17, 4335-36)

The only fees the County incurred that might be allocable to coverage issues were the fees incurred to negotiate and meet with the Sureties, long after the County declared VPFK in default; the fees incurred to depose the Sureties' witnesses; and the fees incurred in connection with the Sureties' motion for summary judgment. If the County incurred any other fees fairly allocable to coverage issues, it bore the burden of demonstrating that in a proper fee application. The trial court abused its discretion by

relieving the County of that burden without factual or legal justification.

C. The Sureties Adopt VPFK's Arguments For Reversal And Preserve Their Own Defenses For Litigation If Necessary After Remand.

If this Court reverses the Judgment against VPFK, then the Sureties will also be entitled to reversal of the Judgment holding them jointly and severally liable with VPFK for the County's damages. The Sureties adopt by this reference the Arguments advanced in VPFK's opening brief, as permitted by RAP 10.1(g).

In the event this court reverses and remands for further proceedings, the trial court should allow the Sureties to present to a jury their independent defenses to liability under the bond. The trial court erred in instructing the jury that the Sureties would be jointly and severally liable for all of the County's damages. (CP 9112) On any remand the Sureties are entitled to a resolution of their independent defenses to liability on the bond, and to a determination of their liability on the bond independent of any liability of VPFK to the County.

"[A] surety has the right to stand strictly on the expressed terms of its contract of suretyship and to insist that it be not held responsible for any liability or obligation not directly expressed

within the contract." *Grand Lodge of Scandinavian Fraternity of America, Dist. No. 7 v. U.S. Fidelity & Guar. Co.*, 2 Wn.2d 561, 570, 98 P.2d 971 (1940). When a bond is drafted by the obligee (as the County did here), the court "need not adopt a rule of construction weighted against" the surety, and it is "reasonable to ascribe to the surety an intent to assume the least burdensome obligation consistent" with the terms of the bond drafted by the County:

> Where . . . the language of the surety's promise is selected by the obligee, another view is permissible. For example, where an accommodation surety signs a bond, its language is generally selected by others before it is presented to him for signature and doubts should be resolved in his favor. The same is true where the guaranty merely refers to the contract between the principal debtor and the creditor. Under such circumstances, it may be reasonable to ascribe to the surety an intent to assume the least burdensome obligation consistent with his words if such meaning could be understood by an ordinary person under the same or similar circumstances.

Nat'l Bank of Washington v. Equity Investors, 86 Wn.2d 545, 555, 546 P.2d 440 (1976), *quoting* L. Simpson, *Law of Suretyship* 94 (1950).

The bond here, drafted by the County alone, contained no language committing the Sureties to compensate the County for all consequential damages flowing from VPFK's claimed breach of contract. Nor does it make the Sureties liable on a "joint and

several" basis with the VPFK. Under the bond, the Sureties committed only to "promptly remedy the default in a manner acceptable to the [County]." (Ex. 3001) Courts have construed this language to require the surety either to make arrangements to complete the project itself or to pay the owner the reasonable costs of completing the project. *See, e.g., American Home Assur. Co. v. Larkin General Hosp., Ltd.*, 593 So.2d 195, 198 (Fla. 1992).

But the County here expressly abandoned any claim that it was looking to the Sureties to remedy VPFK's default. (RP 5730, 6132) And nothing in the bond suggests that the Sureties committed to pay all consequential damages assessed against VPFK for breach of contract, including the County's claimed delay damages. Because delay damages do not represent the cost of completing the project, an owner cannot recover them from the performance bond surety. *Downingtown Area School Dist. v. International Fidelity Ins. Co.*, 769 A.2d 560, 565-66 (Pa. Commw. Ct. 2001) (performance bond surety not responsible for delay damages), *app. denied*, 567 Pa. 731 (2001); *Mycon Const. Corp. v. Board of Regents of State*, 755 So. 2d 154, 155 (Fla. App. 2000)

("Because the performance bond contains no provision for damages for delay, the surety cannot be held liable for such damages").[1]

The County asserted that the Sureties' liability was co-extensive with VPFK because the bond incorporated the Central Contract. But under the terms of the Contract, which the County also exclusively drafted, the County's "option" to "[c]all upon the surety to perform its obligations under the performance and payment bonds, if applicable," were triggered only "[u]pon termination" of VPFK by the County. (Ex. 6, Art. 8.0A.3.c)) Even if the County had the "right to terminate" its contract with VPFK, it indisputably never did so. (*See* Ex. 6, Art. 8.0A.2)

A surety also has the right to perform an independent investigation of any claimed default once the obligee makes a claim under the bond, and material changes in the scope of the contractor's obligation to the owner can exonerate or limit the surety's obligation under the bond. *See Kenney v. Read*, 100 Wn.

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[1] Nor does the Public Works Act under which the Sureties supplied the bond support the argument that the Sureties agreed to compensate the County for delay damages. The statute requires only that the surety condition its liability on the contractor "[f]aithfully perform[ing] all the provisions of such contract." RCW 39.08.010(1)(a)(i). The *time* of performance—and consequently, delay in performance—are not covered by the bond, or the statute.

App. 467, 474, 997 P.2d 455, 4 P.3d 862 (2000) ("[A]ny material change in a surety's obligation without the surety's consent will discharge the surety's obligation.") (internal notation omitted). The trial court initially recognized that there were "[f]actual issues" "whether a portion of the contract was in fact terminated, whether the contractor was in default, and whether the Surety was provided with sufficient time to respond" to the County's demands (CP 1083), yet the court refused to instruct the jury on these independent defenses to the Sureties' liability. (*See* CP 7858; RP 5650-54, 5738, 6114-15, 6128-31)

These errors will be of practical consequence only if this court remands for further proceedings on VPFK's appeal. The Sureties reserve their right to raise these issues on any remand, and on any further review, as contemplated by RAP 2.5(c)(2).

VI. CONCLUSION

For the reasons set forth in VPFK's opening brief, the Court should reverse the Judgment against both VPFK and the Sureties. Regardless of the result in the VPFK appeal, the Court should reverse the Judgment to the extent it holds the Sureties liable for the County's attorney fees and costs. Alternatively, the Court

should reverse and remand, directing the trial court to segregate recoverable from nonrecoverable fees.

DATED this 7th day of January, 2014.

OLES MORRISON RINKER & BAKER, LLP

By: _____
Peter N. Ralston
WSBA No. 8545
Thomas R. Krider
WSBA No. 29490

SMITH GOODFRIEND, P.S.

By: _____
Catherine W. Smith
WSBA No. 9542
Howard M. Goodfriend
WSBA No. 14355

Attorneys for Appellants Travelers Casualty And Surety Company Of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity And Deposit Company Of Maryland, and Zurich American Insurance Company

DECLARATION OF SERVICE

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

That on January 7, 2014, I arranged for service of the foregoing Brief of Appellants Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ✓ U.S. Mail ___ E-Mail
Thomas R. Krider Peter Ralston Oles Morrison Rinker & Baker LLP 701 Pike St., Ste 1700 Seattle, WA 98101-3930	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Fredric D. Cohen Mitchell C. Tilner 157 Ventura Blvd. 18th Floor Encino, CA 91436	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
David R. Goodnight Karl E. Oles Leonard Feldman Hunter Ferguson Stoel Rives LLP 600 University St., Ste 3600 Seattle, WA 98101-4109	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail

Mary DeVuono Englund 900 King County Administration Bldg. 500 Fourth Avenue Seattle, WA 98104	___ Facsimile ___ Messenger _✓_ U.S. Mail _✓_ E-Mail

DATED at Seattle, Washington this 7th day of January, 2014.

V. Vigoren

Victoria K. Vigoren

EXECUTED IN FOUR (4) COUNTERPARTS.

SECTION 00420
PERFORMANCE AND PAYMENT BOND

104768459, 049002364,4409024, 08837361, 82037516
Bond Numbers

VCGP / Parsons RCI / Frontier-Kemper, JV
Contractor

KNOW ALL BY THESE PRESENTS: That we, VCGP / Parsons RCI / Frontier-Kemper, JV, as Principal, and Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Fidelity and Deposit Company of Maryland, Zurich American Insurance Company and Federal Insurance Company, as Surety, all corporations legally doing business in the State of Washington, are held and firmly bound and obligated unto the State of Washington and King County, pursuant to Chapter 39.08 RCW, in the full sum of the Contract Price of Two Hundred Eleven Million Seventy Six Thousand Fifty Eight and No/100 Dollars ($211,076,058.00), and including any and all adjustments to the Contract Amount, for the faithful performance of the Agreement referenced below, and for the payment of which sum we do bind ourselves, and each of our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, THE CONDITIONS OF THIS OBLIGATION ARE SUCH THAT the Principal entered into a certain Agreement with **KING COUNTY**, for **Brightwater Conveyance System - Central Contract, Brightwater Tunnel, Sections 2 and 3 Contract C00005C06** incorporating herein by this reference all of the Contract Documents, as now and as hereinafter amended and modified.

NOW, THEREFORE, if the Principal shall faithfully perform all provisions of such Agreement and pay all laborers, mechanics and subcontractors and materialmen, and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, then this obligation is void, otherwise to remain in full force and effect.

Provided, however, that the conditions of this obligation shall not apply to any money loaned or advanced to the Principal or to any subcontractor or other person in the performance of any such work.

IT IS FURTHER DECLARED AND AGREED that whenever Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owner's obligations thereunder, the Surety, at the request of the Owner, shall promptly remedy the default in a manner acceptable to the Owner.

SIGNED this 28th day of June, 2006.

Principal:	VCGP / Parsons RCI / Frontier-Kemper, JV	Surety:	Travelers Casualty and Surety Company of America
By:		By:	
Title:	Thierry Portafaix Attorney-in-Fact	Title:	Michael R. Mayberry, Attorney-in-Fact
Address:	1216 140th Avenue Ct. E	Address:	90 Market St., Mail Code 2S2B
City/Zip:	Sumner WA 98390	City/Zip:	Hartford CT 06183
Telephone:	253-863-5200	Telephone:	860-277-1503

Surety:	Liberty Mutual Insurance Company	Surety:	Fidelity and Deposit Company of Maryland
By:		By:	
Title:	Michael R. Mayberry, Attorney-in-Fact	Title:	Michael Mayberry, Attorney-in-Fact
Address:	450 Plymouth Road, Suite 400	Address:	3910 Keswick Road
City/Zip:	Plymouth Meeting PA 19462	City/Zip:	Baltimore MD 21211
Telephone:	610-832-8216	Telephone:	410-261-7968

Surety:	Zurich American Insurance Company	Surety:	Federal Insurance Company
By:		By:	
Title:	Michael Mayberry, Attorney-in-Fact	Title:	M.R. Mayberry, Attorney-in-Fact
Address:	3910 Keswick Road	Address:	3 Mountain View Road
City/Zip:	Baltimore MD 21211	City/Zip:	Warren NJ 07061
Telephone:	410-261-7968	Telephone:	908-903-4673

Note: A power of attorney must be provided which appoints the Surety's true and lawful attorney-in-fact to make, execute, seal and deliver this Performance and Payment Bond.

END OF SECTION